SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 5, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Moskowitz, Acosta, JJ.

8838N Maria Silverio, Index 306762/09
Plaintiff-Respondent,

-against-

Ronny M. Arvelo, et al.,
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for appellants.

Andrew L. Weitz & Associates, P.C., New York (Andrew L. Weitz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered April 15, 2011, which, inter alia, granted plaintiff's motion to strike the answer of defendant Ronny M. Arvelo, unanimously affirmed, without costs.

Plaintiff established that Arvelo's repeated failure to appear for a deposition was willful and contumacious. Since defendants failed to meet their burden of demonstrating a reasonable excuse for the nonappearance, the court did not abuse its discretion in striking the pleading (*see Touray v Munoz*, 96

AD3d 623 [1st Dept 2012]). Defendants' investigator had discovered that Arvelo was in school in the Dominican Republic and had no intent to return to New York. "The fact that defendant has disappeared or made himself unavailable provides no basis for denying a motion to strike his answer, particularly in the face of continued defaults in appearance for examination before trial" (*Foti v Suero*, 97 AD2d 748, 748 [2d Dept 1983]; *see Reidel v Ryder TRS, Inc.*, 13 AD3d 170 [1st Dept 2004]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Freedman, Abdus-Salaam, JJ.

7256-
7257 Index 150063/10

In re East 51st Street Crane Collapse Litigation

- - - - -

East 51st Street Development Company, LLC, et al.,
Plaintiffs-Respondents-Appellants,

-against-

Lincoln General Insurance Company,
Defendant-Respondent-Appellant,

AXIS Surplus Insurance Company, et al.,
Defendants-Appellants-Respondents,

Everest National Insurance Company,
Defendant.

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Hurwitz & Fine, P.C., Buffalo (Dan D. Kohane of counsel), for AXIS Surplus Insurance Company, appellant-respondent.

Chalos, O'Conner & Duffy, LLP, Port Washington (Alfred C. Constants, III of counsel), for Interstate Fire and Casualty Company, appellant-respondent.

Clyde & Co US LLP, New York (Sarah H. Mitchell of counsel), for East 51st Street Development Company, LLC, and Illinois Union Insurance Company, respondents-appellants.

Schoenfeld Moreland, P.C., New York (Edward F. Rubbery of the Illinois Bar, admitted pro hac vice, of counsel), for Lincoln General Insurance Company, respondent-appellant.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered March 4, 2011, which granted plaintiffs' motion for summary judgment declaring that defendant Lincoln General

Insurance Company has a duty to defend East 51st Street Development Company, LLC and to reimburse Illinois Union Insurance Company for past defense costs in the underlying crane collapse litigation from the date of the crane collapse (March 15, 2008) to the date that Lincoln General exhausted its policy limits, and so declared; granted plaintiffs' motion for summary judgment declaring that defendant AXIS Surplus Insurance Company has a duty to defend East 51st Street and to reimburse Illinois Union for past defense costs and to pay all future defense costs in the crane-collapse litigation, and so declared; granted Lincoln General's motion for summary judgment declaring that its policy is excess to the AXIS policy and that AXIS owes a primary duty to pay all or a portion of East 51st Street's defense costs, and so declared; granted Lincoln General's motion for summary judgment declaring that defendant Interstate Fire and Casualty Company is obligated to provide primary coverage to East 51st Street and so declared; denied AXIS's motion for summary judgment declaring that it has no duty to defend; and denied Interstate's motion for summary judgment dismissing the complaint and Lincoln General's cross claims against it, unanimously modified, on the law, to deny Lincoln General's motions for summary judgment declaring that its policy is excess to the AXIS and Interstate

policies, to vacate those declarations, and to declare that Lincoln General is obligated to provide primary coverage to East 51st Street, and that Interstate has no duty to defend or provide coverage in the litigation, and otherwise affirmed, without costs.

On March 15, 2008, a crane collapsed at a construction site on East 51st Street in Manhattan, causing the deaths of six construction workers and a pedestrian, injury to several other individuals, and extensive damage to property. Multiple claims for bodily injury and property damage were brought against plaintiff East 51st Street, the owner of the property on which the accident occurred, Reliance Construction Ltd., the construction manager on the project, and Joy Contractors, Inc., the superstructure subcontractor, whose employee was operating the crane at the time of the accident.

As is undisputed, the insurance policies issued by AXIS and Interstate to Reliance and the policy issued by Lincoln General to Joy were primary to the policy issued by Illinois Union to East 51st Street. AXIS, Interstate and Lincoln General therefore are obligated to reimburse Illinois Union for defense costs. Although Illinois Union had already taken up East 51st Street's defense, its intent to seek contractual indemnification from

Reliance and Joy created a potential conflict between East 51st Street and Lincoln General, giving East 51st Street the right to obtain independent counsel (*see 69th St. & 2nd Ave. Garage Assoc. v Ticor Tit. Guar. Co.*, 207 AD2d 225, 227 [1st Dept 1995], *lv denied* 87 NY2d 802 [1995]).

The "Supplementary Payments" provision of the AXIS policy issued to Reliance states that "[w]e will pay, with respect to any claim we investigate or settle, or any 'suit' against an insured we defend[] ... [a]ll expenses we incur," and that "[t]hese payments will reduce the limits of insurance." However, the amended Insuring Agreement of the policy provides that AXIS's "duty to defend ends when [AXIS has] used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B [i.e., damages]." The ambiguity as to whether "expenses" includes defense costs that result from these conflicting provisions must be construed against AXIS (*see 242-44 E. 77th St., LLC v Greater N.Y. Mut. Ins. Co.*, 31 AD3d 100, 105 [1st Dept 2006]). We therefore conclude that the policy does not provide for defense within limits, which undermines AXIS's argument that the policy limits had been eroded, and that AXIS is obligated to share in the costs of the defense of East 51st Street, an "additional insured" on the policy (*see Pecker Iron*

Works of N.Y. v Traveler's Ins. Co., 99 NY2d 391, 393 [2003]).

Interstate's contention that East 51st Street is not listed on the additional insured endorsement or the declarations page of the policy issued to Reliance does not avail it since it admitted in its answer that East 51st Street was an additional insured under that policy. Contrary to Interstate's further contention, since East 51st Street never filed any claims against Interstate in the related federal action brought by Reliance's excess liability carrier, and filed all its claims against Interstate in this state action, it did not engage in "claims splitting" (*see Emery Roth & Sons v National Kinney Corp.*, 44 NY2d 912 [1978]; *67-25 Dartmouth St. Corp. v Syllman*, 29 AD3d 888 [2d Dept 2006]).

However, Interstate has demonstrated that its policy was exhausted upon its July 2009 settlement with Reliance of the declaratory judgment action commenced in federal court which sought defense and indemnity for several lawsuits relating to the crane accident. The settlement agreement clearly states that Interstate's payment of $1 million to Reliance was in settlement of all of Interstate's indemnification and defense obligations under the policy and that the settlement "exhausts all potentially applicable Interstate Policy limits and all coverages. . ." The motion court found no indication that the

settlement had been entered into as a means to inappropriately exhaust the policy and there is no basis, given the express terms of the settlement agreement, for the motion court's conclusion that the $1 million constitutes reimbursement to Reliance of "Supplementary Payments" under the Supplementary Payments provision.

As we have concluded that Interstate's policy was exhausted by the $1 million settlement, we need not reach the motion court's determination that any failure by Reliance to comply with the conditional coverage endorsement affects Reliance, triggering the liability limitation of $200,000, but does not necessarily affect East 51st Street. Were we to reach this, we would find that the policy clearly provides that failure by the named insured to comply with conditions of that endorsement will reduce the limits of coverage for "all insureds" and, accordingly, any failure of Reliance to comply with the contractors' conditional endorsement would reduce the coverage for Reliance as well as its additional insureds (*see Robert Pitt Realty, LLC v 19-27 Orchard St., LLC*, ___ AD3d ___ [1st Dept 2012], 2012 NY Slip Op 8243 [whether additional insured "is entitled to coverage will generally turn on whether [the named insured] is entitled to coverage"]; *see also DRK, LLC v Burlington Ins. Co.*, 74 AD3d 693,

694 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011] [separation of insureds provision "does not negate bargained-for exclusions, or otherwise expand, or limit, coverage"]).

We find that, pursuant to the "Other Insurance" provision in the AXIS, Lincoln General and Interstate policies, the insurance provided to East 51st Street, an additional insured on those policies, is primary (*see Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 18 [1st Dept 2009]). Our conclusion is not altered by the "Additional Insured" endorsement in the AXIS policy, which provides that "such insurance as is afforded by this policy for the benefit of [East 51st Street] shall be primary insurance as respects any claim, loss or liability arising out of [Reliance's] operations, and any other insurance maintained by [East 51st Street] shall be excess and non-contributory with the insurance provided hereunder." A reasonable business person would understand the term "insurance maintained by" to refer to insurance actually procured by East 51st Street (the Illinois Union policy), rather than afforded it as an additional insured.

Although, as Interstate points out, a low premium suggests that a policy may not be primary, it is not conclusive (*see State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 376 [1985]). The

language of the Interstate policy does not establish the policy as a pure excess policy (*compare Tishman Constr. Corp. v Great Am. Ins. Co.*, 53 AD3d 416, 420 [1st Dept 2008]).

The Decision and Order of this Court entered herein on April 3, 2012 is hereby recalled and vacated (see M-2226 and 2230, decided simultaneously herewith).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Sweeny, J.P., Acosta, Saxe, Freedman, Román, JJ.

7691 In re Ariel Berlin, Index 113670/10
Petitioner-Respondent,

-against-

Andrea Evans, Chief Executive Officer,
State Division of Parole,
Respondent-Appellant.

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Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Robert C. Newman of counsel), for respondent.

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Appeal from judgment, Supreme Court, New York County (Anil C. Singh, J.), entered April 13, 2011, unanimously dismissed, without costs and without disbursements, on the ground that the proceeding is abated by reason of petitioner's death.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Sweeny, J.P., Acosta, Freedman, Clark, JJ.

7985 The People of the State of New York, Respondent, Ind. 5892/06 3323/07

-against-

Kareem McCutheon, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Alexandra Keeling of counsel), and Debevoise & Plimpton LLP, New York (John C. Dockery of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered May 28, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of three years, unanimously reversed, on the law, the judgment vacated, and the indictment dismissed.

This Court previously held this appeal in abeyance pending a new suppression hearing (96 AD3d 580 [1st Dept 2012]). Supreme

Court conducted the hearing and granted defendant's motion to suppress the pistol that defendant is charged with possessing. There being no basis for disturbing that determination, we vacate the conviction and dismiss the indictment.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, Renwick, JJ.

7994 In re New York Times Company, et al., Petitioners-Appellants-Respondents, Index 116449/10

-against-

The City of New York Police Department, Respondent-Respondent-Appellant.

_____

New York Times Company Legal Department, New York (David E. McCraw of counsel), for appellants-respondents.

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

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Order and judgment (one paper), Supreme Court, New York County (Jane S. Solomon, J.), entered November 1, 2011, granting the petition to the extent it sought an order directing respondent, under the Freedom of Information Law (Public Officers Law § 84 *et seq.*) (FOIL), to provide an electronic copy of a database, as redacted, of names and addresses of New York City residents who have been granted handgun licenses, and a database, to be redacted, of hate crimes reported to respondent from January 1, 2005 to the present, and denying the petition to the extent it sought an order directing respondent to provide an electronic copy of its crime incident database, a declaration that respondent's practices in responding to FOIL requests

violate the statute, and an order directing respondent to cease these practices, unanimously modified, on the law, to deny the petition as to the databases of handgun licensees and hate crimes and to reinstate the petition with respect to the demand for the crime incident database, insofar as it seeks production of the electronic crime incident database produced in *Floyd v City of New York* (08 Civ 01034 [SAS] [US Dist Ct, SD NY]) (the *Floyd* database), and the matter remitted to Supreme Court for a determination of whether production of the *Floyd* database should be ordered, and, if so, to what extent and under what conditions, and otherwise affirmed, without costs.

The court correctly declined to declare that respondent's responses to FOIL requests and rulings on administrative appeals are as a matter of practice untimely and to order respondent to cease this practice. The FOIL requester's statutory remedy for an untimely response or ruling is to deem the response a denial and commence a CPLR article 78 proceeding "for review of such denial" (Public Officers Law § 89[4][a],[b]; *Matter of Miller v New York State Dept. of Transp.*, 58 AD3d 981, 983 [3d Dept 2009], *lv denied* 12 NY3d 712 [2009]). Review of a FOIL determination does not provide for mandamus relief (*see Matter of Harvey v Hynes*, 174 Misc 2d 174, 177 [Sup Ct, Kings County 1997]).

We note that, contrary to the court's interpretation, Public Officers Law § 89(3) does not require either a grant or a denial of a FOIL request within 20 days of the 5-day "acknowledgment" notice. The 20-day period is triggered only when "[the] agency determines to grant a request in whole or in part, and [when] circumstances prevent disclosure ... within twenty business days from the date of the acknowledgment of the receipt of the request" (*id.*). Indeed, Public Officers Law § 89(3) mandates no time period for denying or granting a FOIL request, and rules and regulations purporting to establish an absolute time period have been held invalid on the ground that they were inconsistent with the statute (*see e.g. Matter of Legal Aid Socy. v New York City Police Dept.*, 274 AD2d 207, 215 [1st Dept 2000], *lv dismissed in part, denied in part* 95 NY2d 956 [2000]).

Petitioners' reliance on CPLR 3001 is similarly unavailing. If, as petitioners assert, "[n]othing about the declaratory and mandamus relief sought by [them] touches on the sole relief that the Petition sought in respect to the four individual [FOIL] requests," then there is no "justiciable controversy" within the meaning of CPLR 3001. Moreover, to the extent petitioners seek hybrid FOIL and declaratory relief, they were required to serve a summons in addition to the notice of petition, and a combined

petition/complaint (*see Matter of Newton v Town of Middletown*, 31 AD3d 1004, 1005 [3d Dept 2006]).

The court erred in ordering respondent to release the home addresses of handgun licensees in electronic form. The fact that Penal Law § 400.00(5) makes the name and address of a handgun license holder "a public record" is not dispositive of whether respondent can assert the privacy and safety exemptions to FOIL disclosure, especially when petitioners seek the names and addresses in electronic form (*see Matter of New York State Rifle & Pistol Assn., Inc. v Kelly*, 55 AD3d 222, 226 [1st Dept 2008]). In addition, "[d]isclosing a person's home address implicates a heightened privacy concern" (*Matter of New York State United Teachers v Brighter Choice Charter School*, 64 AD3d 1130, 1132 [3d Dept 2009], citing, inter alia, Public Officers Law § 89[7], *revd on other grounds* 15 NY3d 560 [2010]).

Furthermore, respondent submitted a deputy inspector's affidavit, which petitioners failed to controvert, detailing its privacy and safety concerns implicated by disclosure of the addresses in electronic form. At a minimum, the affidavit demonstrated "a possibility of endanger[ment]" sufficient to invoke the exemption set forth in Public Officers Law § 87(2)(f) (*see Matter of Ruberti, Girvin & Ferlazzo v New York State Div.*

of State Police, 218 AD2d 494, 499 [3d Dept 1996] [internal quotation marks omitted]).

Nor, since the zip codes of the license holders were disclosed, would the additional disclosure of their exact street addresses appear "to further the policies of FOIL, which are to assist the public in formulating intelligent, informed choices with respect to both the direction and scope of governmental activities" (*New York State United Teachers*, 15 NY3d at 564-565 [2010] [internal quotation marks omitted]).

Similarly, FOIL does not require disclosure of the home addresses of hate crime victims, even redacted as the court instructed (*see* Public Officers Law § 87[2][b]). Even the partial disclosure of an address can reveal the identity of a victim, if, for example, he or she resides in a single family house or is the only member of a particular minority group who resides in a small apartment building. Moreover, respondent's expert's testimony regarding the sensitivity of hate crime victims and their frequent desire to remain private about the incidents was not controverted.

The court erred when it declined to order respondent to produce to petitioners the on the grounds that petitioners had not exhausted their administrative remedies with respect to those

records and that the futility exception to the exhaustion of administrative remedies doctrine did not apply to FOIL.

Petitioners' administrative remedies were exhausted when respondent constructively denied their timely internal appeal of the denial of their request for the crime incident database by failing to respond to the appeal within the statutorily mandated 10-day period (Public Officers Law § 89[4][a]; *see also Council of Regulated Adult Liq. Licensees v City of NY Police Dept.*, 300 AD2d 17, 18-19 [1st Dept 2002]). Petitioners then exercised their statutory remedy by bringing this proceeding for review of the denial under CPLR article 78, and, after learning of its existence, narrowed their request to the *Floyd* database, which contained 12 of the 16 data fields petitioners had originally requested (*see Matter of Williams v Erie County Dist. Attorney*, 255 AD2d 863, 864 [4th Dept 1998]).

Even if the request for the *Floyd* database is deemed a new request, certain exceptions exist by which a petitioner can bypass the available administrative remedies, such as where the administrative remedies would either be futile or cause irreparable injury (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). Here, respondent made clear that it would not grant petitioners' request for the *Floyd* database and any

further attempt at internal administrative review would be futile (*see Matter of Counties of Warren & Washington, Indus. Dev. Agency v Village of Hudson Falls Bd. of Health*, 168 AD2d 847, 848 [3d Dept 1990]; *Fileccia v City of New York*,2011 NY Slip Op 32156[U] [Sup Ct, NY County 2011]); *Wasserman, Grubin & Rogers, LLP v New York City Dept. of Educ.*, 2009 NY Slip Op 31797[U][Sup Ct, New York County 2009]).

Citing *Bankers Trust Corp. v New York City Dept. of Fin.* (1 NY3d 315 [2003]), the court incorrectly held that the futility exception to the exhaustion of administrative remedies doctrine does not apply because FOIL establishes an exclusive remedy (Public Officers Law § 89[4][b]). In *Bankers Trust*, the plaintiff sought a declaratory judgment that it was entitled to a tax refund. The applicable statute was Administrative Code of City of NY § 11-681(2), which provides:

> "2. Judicial review exclusive remedy. The review of a decision of the tax appeals tribunal provided by this section shall be the exclusive remedy available to any taxpayer for the judicial determination of the liability of the taxpayer for the taxes imposed by the named subchapters."

The Court of Appeals held that because review of a decision of the Tax Appeals Tribunal was plaintiff's statutory exclusive remedy, the courts did not have jurisdiction to hear the bank's

declaratory judgment action. Unlike the tax statute at issue in *Bankers Trust*, FOIL does not contain an express provision that judicial review of a final administrative determination is a party's "exclusive remedy" for an allegedly erroneous administrative rejection of a request for information under the statute. Accordingly, in the context of FOIL, a futility exception exists to "the judicially-created rule that administrative remedies must be exhausted" (*Bankers Trust*, 1 NY3d at 322) before judicial review may be obtained. Since, as previously discussed, petitioners have established that exhaustion of administrative remedies concerning their request for the *Floyd* database would be futile, petitioners' failure to exhaust administrative remedies does not bar the petition to require production of the *Floyd* database pursuant to FOIL.

However, the *Floyd* database was produced in an unrelated federal action, governed by very different standards from those that govern public access to records under FOIL (*see Svaigsen v City of New York*, 203 AD2d 32 [1st Dept 1994]). Further, the database was produced pursuant to strict confidentiality requirements, which indicates that disclosure to the general

public would, at a minimum, raise serious confidentiality and privacy concerns. Accordingly, we remand to Supreme Court to determine whether the *Floyd* database should be released, and if so, under what conditions.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

8368 & Ind. 5768/08
M-5529 In re New York State Commission
on Judicial Conduct,
Petitioner-Respondent,

-against-

Seth Rubenstein,
Respondent-Appellant.

- - - - -

The People of the State of New York,

-against-

[Redacted], et al.,
Defendants.

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Greenfield Stein & Senior, LLP, New York (Gary B. Freidman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Won S. Shin of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Fern A. Fisher, J.), entered on or about May 25, 2012, which denied respondent Seth Rubenstein's motion to, among other things, vacate a prior order releasing certain records and papers to petitioner New York State Commission on Judicial Conduct, unanimously dismissed, without costs, as moot.

Respondent appeals an order releasing to the Commission records and papers, including transcripts, of a criminal matter

in which he was acquitted on all counts after a jury trial. He contends that the order violated CPL 160.50(1), which provides for sealing of records in a criminal proceeding following termination in favor of the person accused. The trial court ordered the release based on Judiciary Law § 42(3), authorizing the Commission to request and receive data or information from any public authority that would enable it to carry out its function. Mr. Rubenstein was tried jointly with a judge, and the Commission sought the records in connection with its investigation of the judge.

The Commission now moves to dismiss the appeal, as the Commission no longer has any use for the records because, the judge has agreed to a penalty, and thus any further proceeding by this Court would be purely academic. In other words, this appeal has been rendered moot. Mr. Rubenstein opposes dismissal as moot, in part because the Commission has published some documents which have been released and are on the Commission's website, and because "of the importance of the questions involved, the possibility of recurrence, and the fact that orders of this nature . . . typically evade review."

We find that the matter has been rendered moot and decline to pass on whether the release order was justified. However, we

direct that all documents contained in the previously sealed records that were furnished to the Commission be returned forthwith to the court and be resealed for all purposes.

M-5529 - *NYS Comm on Judicial Conduct v Rubenstein*

Motion to dismiss appeal granted.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Tom, J.P., Mazzarelli, Abdus-Salaam, Feinman, JJ.

8762N New York Physicians LLP, Index 653134/11
Plaintiff-Appellant,

-against-

Ironwood Realty Corporation,
Defendant-Respondent.

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Akerman Senterfitt LLP, New York (Scott M. Kessler of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered December 21, 2011, which ordered plaintiff, pending arbitration, to pay the base rent that had been in effect during the first renewal term, plus escalation and real estate taxes, unanimously affirmed, with costs.

The parties' lease states that the fair market rent for the second renewal term shall be determined by arbitration if the parties cannot agree. The parties could not agree on fair market rent, and plaintiff tenant commenced this action seeking, inter alia, *a Yellowstone* injunction and a declaration that it is not in default of the lease. Upon staying the action pending arbitration, the motion court appropriately ordered plaintiff to pay the base rent that was in effect during the previous lease

term plus escalation and real estate taxes (*see Andejo Corp. v South St. Seaport Ltd. Partnership.*, 35 AD3d 174 [1st Dept 2006]). Should plaintiff prevail in the arbitration, defendant shall be required to refund or offset any overcharge.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Mazzarelli, J.P., Renwick, Richter, Gische, Clark, JJ.

9095 Barbara K. Nixon-Tinkelman, Index 113339/07
Plaintiff-Appellant,

-against-

New York City Department of Health
and Mental Hygiene,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about August 4, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 11, 2013,

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9156- Ind. 5388/09
9157- 3779/10
9157A The People of the State of New York,
Appellant,

-against-

Harold Jones,
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for respondent.

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about March 2, 2011, which, inter alia, reduced a count charging criminal possession of a weapon in the second degree to criminal possession of a weapon in the third degree, unanimously reversed, on the law, and the charge of second degree weapon possession is reinstated. Appeal from order, same court and Justice, entered on or about June 15, 2011, which effectively granted reargument and, upon reargument, adhered to its March 2, 2011 order, unanimously dismissed as academic. Appeal from order, same court and Justice, entered on or about March 10, 2011, unanimously dismissed as nonappealable.

The court erred in reducing the charge to third-degree

weapon possession on the basis of the "home or place of business" exception (Penal Law § 265.03[3]). The indictment properly charged defendant with second-degree possession, since Penal Law § 265.03(3), by referencing Penal Law § 265.02(1), criminalizes the possession of a loaded firearm, even in the home, where a defendant has previously been convicted of any crime (*see People v Hughes*, 83 AD3d 960 [2d Dept 2011], *lv granted* 19 NY3d 961 [2012]). The People properly charged the prior conviction by way of a special information (*see* CPL 200.60), and defendant's arguments to the contrary are without merit.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9158 In re John Martin, Index 111402/03
Petitioner-Appellant-Respondent,

-against-

The City of New York,
Respondent-Respondent-Appellant.

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Law Office of Stuart A. Klein, New York (Christopher M. Slowik of counsel), for appellant-respondent.

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

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Order and judgment (one paper), Supreme Court, New York County (Eileen Bransten, J.), entered November 4, 2011, which, to the extent appealed from as limited by the briefs, granted petitioner's motion to renew his petition challenging respondent's denial of his application for a master plumber's license, and, upon renewal, directed petitioner to submit to respondent, within 30 days, additional proof in support of his application, and adjudged that petitioner's failure to do so "will deem the application denied," unanimously affirmed, without costs.

Although this Court's decision in *Matter of Kreitzer v New York City Dept. of Bldgs.* (24 AD3d 374 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]) did not change the law, it undermined the

primary basis on which respondent had denied petitioner's application for a master plumber's license, i.e., that petitioner did not show that he had been directly employed by a master plumber. Thus, Supreme Court properly granted petitioner's motion to renew (CPLR 2221[e][2]; *see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]).

Petitioner is correct that our review of respondent's determination is limited to the grounds invoked by respondent (*see Matter of Parkmed Assoc. v New York State Tax Commn.*, 60 NY2d 935 [1983]). However, it is not clear from the record that petitioner's failure to show he had been directly employed by a master plumber was the sole basis for respondent's determination. In any event, petitioner would not be entitled to the judgment he seeks directing respondent to grant his application, since, as Supreme Court correctly found, he failed to show the requisite

qualifying experience (*see Matter of Reingold v Koch*, 111 AD2d 688 [1st Dept 1985], *affd for the reasons stated* 66 NY2d 994 [1985]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, JJ.

9159 In re Trayvon J.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Leslie Cooper Mahaffey of counsel), and Davis Polk & Wardwell LLP, New York (Jacob Gardener of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about December 2, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the first degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. Since the interrogating detective made a good faith effort to comply with Family Court Act § 305.2 and did not willfully or negligently disregard any of its requirements, we find no basis for suppression of appellant's statements (*see Matter of Emilio*

M., 37 NY2d 173, 177 [1975]).

The police notified both appellant's mother and his stepfather that appellant was being taken into custody, and both parents accompanied the officers and their son to the Manhattan Child Abuse Unit. However, the detective only permitted one parent to enter the interview room. As a result, the mother was present for the interview, but the stepfather remained outside.

Family Court Act § 305.2(3) provides that when a police officer takes a child into custody, the officer "shall immediately notify the parent or other person legally responsible for the child's care, or if such legally responsible person is unavailable the person with whom the child resides, that the child has been taken into custody." Family Court Act § 305.2(7) provides that "[a] child shall not be questioned pursuant to this section unless he and a person required to be notified pursuant to subdivision three if present, have been advised [of the *Miranda* rights]."

It is plain that subsection 3 is satisfied when the officer notifies one "parent or other person legally responsible" that their child has been taken into custody. Here the presence of appellant's mother provided the core protection intended by the statute.

We reject appellant's other claims of noncompliance with Family Court Act § 305.2. A child arrestee must be taken to court "unless the officer determines that it is necessary to question the child" (Family Ct Act § 305.2[4][b]). Contrary to appellant's argument, interrogation is not limited to exigent circumstances, and the record fails to support appellant's claim that he was too tired to be questioned. Finally, while the questioning did not occur in a "designated juvenile room" (*see* Family Ct Act § 305.2[4][b]), the setting of the interview satisfied the requirement that the location be "substantially similar" to such a designated room (*see Matter of Daniel H.*, 67 AD3d 527, 528 [1st Dept 2009], *appeal dismissed*, 15 NY3d 883 [2010]; *Matter of Luis M.*, 112 AD2d 86, 88 [1st Dept 1985]).

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

Since we conclude that any error in excluding evidence of the victim's allegedly bad reputation for truthfulness was harmless under the circumstances of the case (*see People v*

Crimmins, 36 NY2d 230 [1975]), we find it unnecessary to decide whether a group of only four or five relatives can constitute a relevant community under *People v Fernandez* (17 NY3d 70 [2011]) for purposes of introducing reputation evidence.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9160 The People of the State of New York, Ind. 5996/03
Respondent,

-against-

Edwin Reynoso, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about September 13, 2010, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9161 Pedro J. Rivas, Index 13185/07
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

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

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

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Judgment, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered June 21, 2011, after a jury trial, to the extent appealed from, apportioning fault 70% to defendants and 30% to plaintiff, unanimously reversed, on the law, without costs, and the matter remanded for a new trial on the issue of apportionment of fault.

The jury poll revealed that four out of the six jurors claimed that they did not vote for the apportionment percentages stated in the verdict sheet (*see Duffy v Vogel*, 12 NY3d 169, 174 [2009], citing *Warner v New York Cent. R.R. Co.*, 52 NY 437, 442 [1873]). Thereafter, the trial court discharged the jury prior to resolving the contradiction between the verdict sheet read into the record and the results of the jury poll (*see National*

Equip. Corp. v Ruiz, 19 AD3d 5, 12-13 [1st Dept 2005]). Accordingly, a new trial is required on the issue of apportionment of fault.

The trial court did not err in permitting the jury to hear evidence suggesting that the bus driver may have violated Transit Authority rules by not sounding his horn to alert plaintiff, a bicyclist, of the presence of the bus. This evidence is admissible since the subject rules do not impose a standard of care transcending that imposed by common law or the applicable provisions of the Vehicle and Traffic Law (*see Lopez v New York City Tr. Auth.*, 60 AD3d 529, 531 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]; *see also* Vehicle and Traffic Law § 1146[a]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9163 Nicole Moore, Index 301129/10
Plaintiff-Appellant,

-against-

Francisco Almanzar, et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Jillian Rosen of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 17, 2012, which, to the extent appealed from, granted defendants' motion for summary judgment dismissing the claims of serious injury under the permanent and significant limitation categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie that the injuries that plaintiff allegedly sustained to her cervical and lumbar spine, shoulders, and knees were not caused by the motor vehicle accident. They submitted evidence that plaintiff suffered neck and lower back injuries in an earlier accident, and reports by a radiologist and an orthopedist opining that the MRI films of the allegedly injured body parts revealed a chronic preexisting

condition and no radiographic evidence of trauma or causally related injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]).

Plaintiff failed to raise an issue of fact in opposition. The limitations found by her expert regarding plaintiff's left shoulder were too minor to be deemed "significant" within the meaning of Insurance Law § 5102(d) (*see Phillips v Tolnep Limo Inc.*, 99 AD3d 534 [1st Dept 2012]). Plaintiff's orthopedic expert noted that defendants' expert found degeneration in her right shoulder on the MRI, which plaintiff's radiologist confirmed, but failed to address these findings. Plaintiff submitted no recent quantifications of range-of-motion restrictions in her spine or knees (*see Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]), and failed to address the evidence that her neck, back and knee injuries were preexisting conditions.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9164 The People of the State of New York, Ind. 917/10
Respondent, 3794/10

-against-

Nelson Lopez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Roger S. Hayes, J.), rendered on or about November 18, 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: FEBRUARY 5, 2013

CLERK

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

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9170-
9170A & In re Vivian Vulpone,
M-128 Petitioner-Appellant,

-against-

Howard Anthony Rose,
Respondent-Respondent.

_____

Vivian Vulpone, appellant pro se.

Cohen Rabin Stine Schumann LLP, New York (Gretchen Beall Schumann of counsel), for respondent.

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Order, Family Court, New York County (Mary E. Bednar, J.), entered on or about April 6, 2011, which granted in part petitioner mother's objections to an order, same court (Ann Marie Loughlin, Support Magistrate), entered on or about October 8, 2010, to the extent of remanding to the Support Magistrate to increase the award of basic child support from $1,842 to $3,000 per month, and to order that the subject child be removed from New York State's "Child Health Plus" health care program and placed on respondent father's private health insurance plan, unanimously modified, on the law, to vacate the Support Magistrate's order requiring respondent to make a provision in his testamentary estate for the child in the event he is unable to obtain a life insurance policy for the child's benefit, and

direct that respondent name the child as a beneficiary and petitioner as the child's trustee on a term life insurance policy in his name in the amount of the monthly order of support multiplied by the number of years the child has until she turns 21 years of age, without any exceptions, and otherwise affirmed, without costs. Order, same court and Judge, entered on or about September 7, 2011, which, upon renewal and reargument, adhered to the original determination requiring respondent to place the child on his health insurance plan, unanimously affirmed, without costs.

In determining the basic child support obligation and respondent's share of the obligation, the Support Magistrate properly imputed $109,210.31 in adjusted gross income to petitioner and $616,000.09 in adjusted gross income to respondent. The Support Magistrate also applied the correct statutory formula (*see* Family Ct Act § 413[1]) and properly determined that, upon consideration of the factors set forth in Family Court Act § 413(1)(f), it would be "unjust or inappropriate" to apply the statutory "child support percentage" to all of the combined parental income in excess of $130,000 (§ 413[1][c][3],[f]). However, the Family Court properly determined that the Support Magistrate's award of child support

in the amount of $1,842 per month was insufficient and that an award of $3,000 per month would satisfy the child's "actual needs" and afford him an "appropriate lifestyle" (*Matter of Brim v Combs*, 25 AD3d 691, 693 [2d Dept 2006], *lv denied* 6 NY3d 713 [2006]; *see also Matter of Erin C. v Peter H.*, 66 AD3d 451, 451-452 [1st Dept 2009], *lv dismissed and denied* 14 NY3d 855 [2010], *lv denied* 15 NY3d 704 [2010]).

The Support Magistrate properly required respondent to pay 85% of child care expenses and unreimbursed medical expenses (*see* Family Ct Act § 413[1][c][4], [5][c]), and properly declined to award petitioner child care expenses incurred on overseas trips with her mother and the child. The Support Magistrate also properly declined to award petitioner prospective private school expenses for the then-toddler (*see* Family Ct Act § 413[1][c][7]).

Although the Support Magistrate properly ordered respondent to obtain life insurance for himself naming the subject child as the beneficiary and petitioner as the child's trustee, it erred in directing respondent to make a provision in his testamentary estate for the child if life insurance is "unavailable" to respondent. The record shows that respondent has more than two life insurance policies. Accordingly, if respondent is unable to obtain another life insurance policy for the subject child's

benefit, he should be able to add the child as a beneficiary of one of his existing policies. Accordingly, the matter is remanded to the Support Magistrate to order respondent to name the child as the beneficiary and petitioner as the trustee on a term life insurance policy in his name in the amount indicated above, without any exceptions (*see Hughes v Hughes*, 79 AD3d 473, 476-477 [1st Dept 2010]).

The Family Court properly required respondent to place the child on his health insurance plan. The State's child health insurance plan should not be used where, as here, one of the parents has health insurance benefits that may be extended to cover the child (*see* Family Ct Act § 416[c], [e][2][iii]). Respondent has not given sufficient reasons for excluding the child from his plan.

The Family Court properly declined to direct respondent to make child support payments through the Support Collection Unit. The record shows that, from the time of the temporary order of child support until the final order of support, respondent made the required child support payments directly to petitioner on a timely basis. Petitioner has not provided any reason to change the manner of payment.

We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

M-128 - *Vulpone v Rose*

Motion for sanctions denied.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9171-
9171A Zachary Lipsky,
Plaintiff-Respondent,

-against-

Manhattan Plaza, Inc., et al.,
Defendants-Appellants,

Starbucks Corporation,
Defendant.

Index 112702/08

_____

McGaw, Alventosa & Zajac, Jericho (Ross P. Masler of counsel), for appellants.

Kirsch, Gartenberg Howard LLP, New York (Peter D. Valenzano of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 29, 2012 which, upon reargument, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously reversed on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered February 10, 2012, which denied the aforementioned motion for summary judgment in the first instance, unanimously dismissed, without costs, as academic.

Here, the court denied the initial motion, without addressing the merits, because it was filed under an incorrect

index number; however, upon subsequently purporting to deny reargument, the court proceeded to address the merits of the motion and adhered to its original determination. The order is thus appealable to this Court as of right (*see Foley v City of New York*, 43 AD3d 702, 703 [1st Dept 2007]; CPLR 5701[a][2][viii]).

On the merits, the photographs identified by plaintiff as depicting the location of the accident on the date of the accident show a trivial defect, which is not a trap or snare. The plaza pavers in the photographs are not broken or uneven, and the slight incline or slope of the surface by the drain is shallow and gently graded. Plaintiff testified that the lighting of the areas was adequate. Accordingly, summary judgment was appropriate (*see Leon v Alcor Assoc., L.P.*, 96 AD3d 635 [1st Dept 2012]; *Menendez v Dobra*, 301 AD2d 453 [1st Dept 2003]).

Plaintiff's expert's opinion was insufficient to raise a triable issue of fact because it did not cite violations of any relevant Building Code provisions, and the expert did not inspect

the scene until more than four years after the accident, during which time the condition of the area may have changed (*see Alston v Zabar's & Co., Inc.*, 92 AD3d 553 [1st Dept 2012]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9172 David R. Hogin, et al., Index 116990/06
Plaintiffs-Appellants, 590452/07

-against-

The City of New York,
Defendant-Respondent,

Consolidated Edison Company
of New York, et al.,
Defendants.

[And a Third-Party Action]

_____

Downing & Peck, P.C., New York (John M. Downing, of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered November 9, 2011, which granted defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, and denied plaintiffs' cross motion to strike the City's answer, unanimously affirmed, without costs.

The documentation of various complaints made to the Department of Environmental Protection and repairs made by the Department of Transportation do not constitute "written acknowledgment" of the alleged sinkhole condition that caused

plaintiff David Hogin's fall (Administrative Code of City of NY § 7-210[c][2]; *see Bruni v City of New York*, 2 NY3d 319 [2004]). Only one of the documents refers to a sinkhole, but that document does not demonstrate that the City "had knowledge of the condition and the danger it presented" (*Bruni* at 326-327). Indeed, it states that the inspectors found no such condition. Moreover, the record is devoid of evidence that the City caused or created the condition by an affirmative act of negligence (*see Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *Rosenblum v City of New York*, 89 AD3d 439 [1st Dept 2011]).

Supreme Court also properly denied plaintiffs' cross motion. Although the City was recalcitrant or tardy with respect to complying with certain discovery directives, striking its answer would have been too severe a sanction under the circumstances (*see e.g. Frye v City of New York*, 228 AD2d 182, 182-183 [1st Dept 1996]). Moreover, the documents and testimony plaintiffs sought would not overcome their inability to demonstrate prior written notice or acknowledgment, nor would it show that the City

caused or created the condition (*see Flores ex rel. Hernandez v Cathedral Props. LLC* 2012 N.Y. Slip Op 08407 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9173 The People of the State of New York, Ind. 3109/07
Respondent,

-against-

Will Dunbar,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Cheryl P. Williams of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy 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 (Steven W. Paynter, J.), rendered on or about December 22, 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: FEBRUARY 5, 2013

CLERK

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

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9175 Ethel J. Griffin, as Public Administrator of the New York County Estate of Gary Lebow, etc., Plaintiff-Respondent, Index 104084/03

-against-

Franco P. Cerabona, M.D., Defendant-Appellant,

Andrew Merola, M.D., et al., Defendants.

_____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Law Offices of Joseph M. Lichtenstein, P.C., Mineola (Joseph L. Ciaccio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan B. Carey, J.), entered December 21, 2009, which, insofar as appealed from, denied the motion of defendant Franco P. Cerabona, M.D. for summary judgment dismissing the cause of action alleging medical malpractice as against him, unanimously affirmed, without costs.

The record presents triable issues of fact as to whether defendant physician committed malpractice by performing spinal surgery on plaintiff's decedent. In response to the evidence submitted by defendant showing that the surgery was appropriately performed, plaintiff submitted an affidavit from an expert

stating that defendant departed from good and accepted medical practice by performing the spinal fusion surgery that was contraindicated for the decedent and that such departure was a proximate cause of the decedent's injuries. Plaintiff's expert reviewed the decedent's medical records and films and detected no evidence of spinal instability. The expert further noted the numerous risk factors involved with the decedent undergoing the surgery and concluded that it was likely to fail. Such conflicting evidence warranted the denial of summary judgment in defendant's favor since "[r]esolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury" (*Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9176 The People of the State of New York, Ind. 1664/09
Respondent,

-against-

Dewayne Robinson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Cassandra Mullen, J. at hearing; Dominick Massaro, J. at jury trial and sentencing), rendered October 6, 2010, convicting defendant of criminal possession of a weapon in the second degree, resisting arrest and unlawful possession of marijuana, and sentencing him to an aggregate term of 3½ years and a $25 fine, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's suppression motion in all respects. There is no basis for disturbing the court's credibility determinations. Initially, we note that there is no merit to defendant's suggestion that he is entitled to suppression of a loaded pistol simply because some portions of

the oral decision that the court rendered immediately after the hearing may have been inartfully worded.

Defendant did not preserve the challenge to the initial stop. Moreover, the police lawfully stopped the car defendant was driving after they observed that its windows appeared to be excessively tinted, in violation of the Vehicle and Traffic Law. When the police asked defendant to roll down the windows, they detected an odor of marijuana. This was sufficient, by itself, to provide probable cause to arrest defendant and search the car (*see e.g. People v Smith*, 66 AD3d 514 [1st Dept 2009], *lv denied* 13 NY3d 942 [2010]).

The People met their burden of establishing that defendant's statements were made voluntarily (*see People v Witherspoon*, 66 NY2d 973, 973-974 [1985] *People v Ferro*, 63 NY2d 316, 322; *People v Curry*, 287 AD2d 252, 253). When defendant denied knowledge of the pistol recovered from the glove compartment of the car he was driving, there was nothing coercive about advising defendant that the police would need to speak to his grandmother, who was the registered owner of the car. This was the next logical investigatory step. The record fails to support defendant's assertion that, viewed in context, this was a threat to arrest

defendant's grandmother if defendant refused to admit possession of the weapon. We have considered and rejected defendant's remaining arguments concerning the admissibility of his statements.

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

ENTERED: FEBRUARY 5, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9177N In re Daval-Ogden, LLC, Index 301725/11
Plaintiff-Appellant-Respondent,

-against-

Highbridge House Ogden, LLC,
Defendant-Respondent-Appellant.

_____

Leonard Zack & Associates, New York (Leonard Zack of counsel), for appellant-respondent.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered February 3, 2012, which denied plaintiff's motion to vacate a default judgment, and denied sub silentio defendant's request for attorneys' fees and sanctions, unanimously modified, on the law, plaintiff's motion granted, and the matter remanded to the motion court for disposition of the underlying motion on the merits, and otherwise affirmed, without costs.

Under the circumstances of this case the motion court erred in finding that there was no excusable default based upon law office failure (*see* CPLR 2005; *compare Perez v New York City Hous. Auth.*, 47 AD3d 505, 505-506 [1st Dept 2008]).

Plaintiff also demonstrated a meritorious cause of action. Although the subject lease does have a disclaimer of defendant

landlord's ability to deliver possession of the premises on the commencement date, that provision may reasonably be read to be limited to instances of a holdover, construction problems or regulatory failures, outside defendant's control (*cf. Northgate Elec. Corp. v Barr & Barr, Inc.*, 61 AD3d 467 [1st Dept 2009]). Indeed, to read the clause to excuse failure to deliver possession for any reason, including intentional acts of defendant landlord to breach the lease, would render the contract illusory (*see Souveran Fabrics Corp. v Virginia Fibre Corp.*, 37 AD2d 925 [1st Dept 1975]; *compare Pacific Coast Silks, LLC v 247 Realty, LLC*, 76 AD3d 167 [1st Dept 2010]).

Moreover, plaintiff's claim that the failure to return its first month's rent and security deposit constitutes unjust enrichment is not barred by the voluntary payment doctrine, which requires that plaintiff make the payment at issue without any alleged fraud or mistake (*see Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc.*, 34 AD3d 244, 246 [1st Dept 2006]). Here, however, plaintiff alleges that it made the payment not knowing that another tenant had a conflicting lease allowing it to continue in the premises.

Defendant is correct that plaintiff is barred from seeking lost profits, because it never took possession of the premises

(*see Dodds v Hakes*, 114 NY 260, 265 [1889]). However, this does not warrant the conclusion that plaintiff does not have a meritorious cause of action.

In view of the foregoing, defendant is not entitled at this stage of the proceedings to an award of attorney's fees under the lease, or to sanctions under 22 NYCRR 130.1-1.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9179 In re Michael M.,

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

Michael M., Sr.,
Respondent-Appellant,

St. Dominic's Home,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 28, 2011, which, insofar as appealed from, determined that respondent father's consent was not required for the adoption of the subject child, unanimously affirmed, without costs.

The mother and the caseworker testified that the father did not provide any financial support for the child, although he was receiving Supplemental Security Income, and that he did not contact or communicate with the child at any time *(see* Domestic Relations Law § 111[1][d]; *Matter of Phajja Jada S. [Toenor Ann*

S.], 86 AD3d 438 [1st Dept 2011], *lv denied* 17 NY3d 716 [2011]). There exists no basis to disturb the court's rejection of the father's unsubstantiated accounts of the financial support he provided to the child's caretakers *(see Matter of Irene O.*, 38 NY2d 776 [1975]), and, even by the father's own account, his contact with the child over a number of years was substantially nonexistent.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9180 Alicia Rutledge, Index 101196/05
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellant.

Daniel E. Rausher, Brooklyn, for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered August 19, 2011, upon a jury verdict awarding plaintiff, inter alia, the principal amount of $400,000 for future pain and suffering over 20 years, unanimously affirmed, without costs.

Plaintiff was injured when, while attempting to board defendant's bus, the doors closed on her and the bus started to drive away before coming to an abrupt stop. As a result, plaintiff suffered a herniation to her lumbar spine and two

bulging discs to her cervical spine, resulting in radiculopathy, for which surgery was recommenced. Compensation for plaintiff's injuries did not deviate materially from what is reasonable compensation.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9183 The People of the State of New York, Ind. 4493/11
Respondent,

-against-

Joshua Golston,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (John B.F. Martin of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about January 3, 2012,

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

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

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

9184 In re Fayona C., also known as Fayona J.,
Petitioner-Respondent,

-against-

Christopher T.,
Respondent-Appellant.

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Goetz L. Vilsaint, Bronx, for appellant.

Steven N. Feinman, White Plains, for respondent.

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

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about June 17, 2011, which, to the extent appealed from as limited by the briefs, after a fact-finding determination of aggravating circumstances, granted petitioner mother a final five-year order of protection, and modified a prior order of custody and visitation to award her sole legal custody of the subject child and visitation on the third weekend of every month, unanimously affirmed, without costs.

Contrary to appellant father's contention, the Family Court properly determined, in the combined family offense and custody modification order appealed, that a further evidentiary hearing was not necessary because the Court possessed sufficient

information to render an informed decision based on its extensive history with the parties and because the father made no further offer of proof that would have affected the outcome (*see Matter of James M. v Kevin M.*, 99 AD3d 911, 913 [2d Dept 2012]; *Rodman v Friedman*, 33 AD3d 400, 401 [1st Dept 2006], *lv dismissed* 8 NY3d 895 [2007]).

Moreover, where domestic violence is alleged, "the court must consider the effect of such domestic violence upon the best interests of the child" (Domestic Relations Law § 240[1]). Upon weighing the appropriate factors, the Family Court correctly determined that the best interests of the child here would be served by granting the mother custody (*see Matter of Gant v Higgins*, 203 AD2d 23, 24 [1st Dept 1994]; *Matter of Rosiana C. v Pierre S.*, 191 AD2d 432 [2d Dept 1993]). Although appellant denied during the fact-finding hearing on the family offense petition that he had committed acts of domestic violence and/or verbal abuse that were directed at the mother in front of the child, the Family Court resolved the conflicting testimony in favor of the mother, and on this record, there is no basis to

disturb the court's credibility determinations (*see Matter of Lisa S. v William V.*, 95 AD3d 666 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9186 The People of the State of New York, Ind. 4806/08
Respondent,

-against-

James Watley,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Rishi Zutshi of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered June 23, 2009, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the officer's ability to observe a drug transaction.

To the extent the observing officer, who also testified as

an expert witness, gave testimony in his expert capacity that improperly went to the ultimate issue of whether there was a drug transaction, the court provided a suitable remedy. The court's careful instructions were sufficient to prevent that limited testimony from causing any prejudice.

We have considered defendant's remaining challenges to the officer's testimony, as well as defendant's challenges to the prosecutor's summation, and we find no basis for reversal.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9188-	The People of the State of New York,	Ind. 239/02
9188A-	Respondent,	SCI 9834/98
9188B-		9835/98
9188C	-against-	6734/00

Iraida Solano,
Defendant-Appellant.

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

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Judgments, Supreme Court, New York County (Michael R. Sonberg, J.), rendered on or about February 22, 2010, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9189 Panasia Estate, Inc., Index 104355/09
Plaintiff,

-against-

Daniel R. Broche, etc.,
Defendant-Respondent,

Property 51 LLC, et al.,
Defendants-Appellants.

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Thomas F. Farley P.C., White Plains (Thomas F. Farley of counsel), for appellants.

Watson, Farley & Williams LLP, New York (Neil A. Quartaro of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about December 22, 2011, which, inter alia, resettled an order, same court and Justice, entered on or about June 30, 2011, inter alia, declaring void ab initio contracts of sale for the properties at 51 and 53 West 19th Street between defendant Daniel R. Broche, as Ancillary Executor of the Estate of Agnes M. Broche, and defendants Property 51 LLC and Property 215 LLC, unanimously dismissed, without costs, as untimely.

Defendants Property 51 LLC and Property 215 LLC are aggrieved not by the December 22, 2011 order from which they

purport to appeal but from the earlier June 30, 2011 order. Contrary to their contention, there is no material difference between the two. Thus, defendants' time to appeal must be measured from the June 30 order (*see Kitchen v Port Auth. of N.Y. & N.J.*, 221 AD2d 195 [1st Dept 1995]). Defendants failed to include the notice of entry and affidavit of service of the June order in the record, but they do not dispute that their deadline to file a notice of appeal was August 29, 2011, which they exceeded by almost five months.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9190 In re Jeffrey Chandler, Index 400071/11
Petitioner-Respondent,

-against-

John Rhea, etc., et al.,
Respondents-Appellants.

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Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for appellants.

Steven Banks, The Legal Aid Society, Bronx (Russell Crane of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered October 11, 2011, granting the petition to annul respondents' determination, dated September 28, 2010, which terminated petitioner's tenancy on the grounds of non-desirability and breach of rules and regulations, to the extent of remanding the matter to respondents for reconsideration of the penalty, taking into account petitioner's conduct since the administrative hearing and the feasibility of a probationary period, unanimously reversed, on the law, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

Notwithstanding the evidence adduced at the hearing of petitioner's progress towards rehabilitation, his three

convictions for drug-related crimes in 2008 and 2009, including two convictions for felony drug sale, one of which was determined to have arisen from a sale on Housing Authority grounds, where he resides, constitute grounds for termination of his tenancy (*see Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630 [1st Dept 2011]; *Matter of Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]).

Supreme Court erred in remanding the matter for consideration of petitioner's conduct since the administrative hearing in August 2010, i.e., in effect, for further development of the record. "Judicial review of administrative determinations is confined to the facts and record adduced before the agency" (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000] [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9191 The People of the State of New York, Ind. 3502/08
Respondent,

-against-

Elliott Harris,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered September 13, 2010, as amended October 6, 2010, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree and sentencing him, as a second felony drug offender, to a term of 6 years, with 3 years' postrelease supervision, unanimously affirmed.

Defendant has not preserved his claim that the court failed to advise him of the length of the postrelease supervision component of the sentence he would receive in the event that he violated the terms of his guilty plea. Defendant was on notice, well before sentence was imposed, that if he absconded from a drug program he would receive a sentence that would include at least three years of PRS. Therefore, he was required to preserve

this issue by moving to withdraw his plea (*People v Murray*, 15 NY3d 725, 726-727 [2010]).

We decline to review this unpreserved claim in the interest of justice, and as an alternative holding we reject it on the merits. When the plea colloquy is read as a whole, it clearly establishes that the court itself, with the assistance of the prosecutor, warned defendant that the applicable PRS term was at least three years, and possibly five years. While there appears to have been some momentary confusion between the court and the prosecutor about whether the appropriate PRS term was three or five years, that discrepancy did not prejudice defendant, as he was actually sentenced to the lower PRS term (*see People v Carter*, 67 AD3d 603, 604 [2009], *lv denied* 14 NY3d 886 [2010]). Thus, the court gave defendant all the information he needed to "knowingly, voluntarily and intelligently choose among alternative courses of action" (*People v Catu*, 4 NY3d 242, 245

[2005]). Furthermore, any confusion as to whether the PRS term was three or five years was resolved by a written plea agreement, which defendant subsequently executed in open court.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 5, 2013

CLERK

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

9193 Robert O'Brien, Index 300336/09
Plaintiff-Respondent,

-against-

Prestige Bay Plaza
Development Corp., et al.,
Defendants-Respondents,

P.C. Richard & Son, LLC, et al.,
Defendants-Appellants.

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Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for appellants.

Gregory P. Haegele, PLLC, Coram (Gregory P. Haegele of counsel), for Robert O'Brien, respondent.

Callan, Koster, Brady & Brennan LLP, New York (James A. Gazis of counsel), for Prestige Bay Plaza Development Corp., Bartow Properties Corp., Bartow Properties, LLC, Bay Plaza Community Corp., Bay Plaza Community Center, City Bay Plaza, LLC and City Lease Bay Plaza, LLC, respondents.

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Order, Supreme Court, Bronx County (Sharon A. M. Aarons, J.), entered June 27, 2012, which, to the extent appealed from as limited by the briefs, denied defendants P.C. Richard & Son, LLC and A.J. Richard & Sons, Inc.'s (PC Richard) motion for summary judgment dismissing the complaint and cross claims against them and for an award of reasonable attorneys' fees and costs against defendant City Bay Plaza, LLC, unanimously modified, on the law, the motion granted to the extent of dismissing the complaint and

all cross claims against PC Richard, and otherwise affirmed, without costs. The Clerk is directed to enter judgment accordingly.

In this action for personal injuries, plaintiff alleges that he tripped and fell over a piece of metal on the edge of a curb cut adjacent to a sidewalk in front of a shopping plaza, where PC Richard is a tenant. As a tenant of the shopping center, not an abutting landowner, PC Richard has no statutory obligation to maintain the public sidewalk adjacent to its store (Administrative Code of the City of New York § 7-210; *see Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431 [2008]). Further, under the terms of the 1998 lease between PC Richard and defendant landlord City Bay Plaza, LLC, PC Richard has no obligation to maintain the sidewalk (*see Collado v Cruz*, 81 AD3d 542 [1st Dept 2011]).

Even if it were shown that PC Richard constructed the subject sidewalk after entering into the lease, there is no evidence that the construction was negligently performed, or that the defect that allegedly caused plaintiff's accident 8 to 10 years later, resulted from such construction, rather than the effects of the passage of time (*see Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011]). Nor is PC Richard liable under a

special use theory, since it made no special use of the public sidewalk, and there is no evidence that the alleged defect was caused by its use of the sidewalk (*see Balsam v Delma Engineering Corp.*, 139 AD2d 292 [1st Dept 1988], *appeal dismissed in part, denied in part* 73 NY2d 783 [1988]).

PC Richard is not, however, entitled to recover reasonable attorneys' fees and costs from the landlord, since the lease provision it relies upon applies when legal fees and costs are incurred to "enforce or protect its rights under [the] lease," not in defense of a personal injury action (*see Cier Indus. Co. v Hessen*, 136 AD2d 145, 148 [1st Dept 1988]).

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

ENTERED: FEBRUARY 5, 2013

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