SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 21, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Friedman, Renwick, Freedman, JJ.

8471 Chang Zhang Zou, Index 101309/09
Plaintiff-Appellant,

-against-

122 Development, LLC,
Defendant,

Matrix Construction Services, Inc.,
Defendant-Respondent.

_____

Morelli Ratner PC, New York (Adam E. Deutsch of counsel), for appellant.

Faust Goetz Schenker & Blee LLP, New York (Peter Kreymer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 8, 2011, which, to the extent appealed from as limited by the briefs, granted the motion of defendant Matrix Construction Services, Inc. (Matrix) for summary judgment dismissing the Labor Law § 240(1) and § 241(6) claims as against it, unanimously affirmed, without costs.

The evidence establishes that Matrix was not a general contractor with supervisory authority and control over

plaintiff's work. Accordingly, it cannot be held liable for plaintiff's injuries under Labor Law § 240(1) or § 241(6) (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Aversano v JWH Contr., LLC*, 37 AD3d 745 [2d Dept 2007]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Richter, JJ.

8530 The Stop & Shop Supermarket Company, Index 105819/03
Plaintiff-Appellant,

-against-

Vornado Realty Trust, et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bernard Fried, J.), entered on or about December 16, 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 February 7, 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It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.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 21, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8948 In re Sade B., And Others,

Children Under the Age of
Eighteen Years, etc.,

Scott M.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Susan Jacobs, The Center for Family Representation, New York (Emily S. Wall of counsel), for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the Children.

_____

Order of fact-finding, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about September 14, 2011, which determined, after a fact-finding hearing, that respondent-appellant had abused Ashanti C., a child for whom he was legally responsible, and derivatively neglected Sade B. and Sapphire B., his biological children, unanimously affirmed, without costs.

The findings that respondent abused Ashanti, which were the only findings challenged, were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Tammie*

Z., 66 NY2d 1, 3 [1985]). The court properly found that Ashanti's out-of-court statements were sufficiently corroborated by both her sister's out-of-court statements to the caseworker and her mother's testimony (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 119 [1987]). There is no reason to disturb the court's evaluation of the evidence, including its credibility determinations, as the findings were clearly supported by the record (*see Matter of Ilene M.*, 19 AD3d 106, 106 [1st Dept 2005]).

As the preponderance of the evidence supported the findings, the court's improper admission of largely irrelevant evidence relating to respondent's character, and improper denial of respondent's motion to obtain Ashanti's school records, constitutes harmless error.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9063 In re Jorge Esteban Aguirre, Index 109314/11
Petitioner-Appellant,

-against-

City of New York, et al.,
Respondents-Respondents.

_____

Jonathan Bobrow Altschuler P.C., New York (Jonathan B. Altschuler of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered March 19, 2012, denying the petition to annul the determination of the New York City Department of Mental Health and Hygiene (DOHMH) that denied petitioner's application to transfer his deceased mother's mobile food vending permit to his name, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DOHMH's determination, that petitioner was not a "dependent" child under section 17-314.1(d)(1) of the Administrative Code of the City of New York and therefore was not entitled to his deceased mother's permit under that section, has a rational basis (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d

222, 231 [1974]). DOHMH was not required to conduct a formal hearing (*see Matter of Rasole v Department of Citywide Admin. Servs.*, 83 AD3d 509 [1st Dept 2011]). Nor was it required to conduct an independent medical examination of petitioner. In any event, the record shows that petitioner was afforded "a full and fair opportunity to be heard" (*id.* [internal quotation marks omitted]). Moreover, DOHMH did not challenge petitioner's medical evidence, but rather concluded that the evidence did not demonstrate that he was a dependent child. There is no basis to disturb DOHMH's determination.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9069 In re The State of New York, Index 251812/08
Petitioner-Respondent,

-against-

William W.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Namita Gupta of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Michael A. Gross, J.), entered on or about April 12, 2011, which, upon a jury verdict that respondent suffers from a mental abnormality, determined that respondent is a dangerous sex offender requiring confinement, unanimously affirmed, without costs.

The jury's verdict that respondent suffers from a mental abnormality (*see* Mental Hygiene Law § 10.03[i]) was not against the weight of the evidence. The expert testimony offered by the State constituted clear and convincing evidence that at the time of trial, respondent suffered from a disorder called frotteurism, which resulted in his having serious difficulty controlling his conduct. The expert's conclusion was properly based not only on respondent's convictions of three counts of sexual abuse in 1986

and one count of sexual assault in the first degree in 2003, but also on documents, reports, evaluations and other information spanning the years from his first offense through his incarceration. The absence of proof that he was accused or convicted of similar crimes between the time of his 1986 offenses and the time of his 2003 offense, or in the years between the 2003 offense and the trial, need not be treated as negating or disproving the diagnosis.

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

ENTERED: FEBRUARY 21, 2013

CLERK

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

9085 Dessa Lansen, Index 112719/09
Plaintiff-Respondent,

-against-

SL Green Realty Corp.,
Defendant-Appellant,

Outback Steakhouse - NYC Ltd.,
Defendant.

_____

Wechsler & Cohen, LLP, New York (Mitchell S. Cohen of counsel), for appellant.

Law Office of Bryan J. Swerling, New York (Bryan J. Swerling of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered March 21, 2012, which granted plaintiff's motion for leave to amend the complaint to add two new defendants and denied defendant SL Green Realty Corp.'s cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion denied and the cross motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff Dessa Lansen commenced this negligence action against defendant SL Green Realty Corp. (SL Green) after she slipped on the sidewalk abutting property owned by defendant.

Plaintiff asserts that the sidewalk was uneven where a section of the sidewalk cement buttressed up against a paving stone. She alleges that the cement was higher than the paving stone, so that when the heel of her shoe struck the edge of the cement section, she fell, injuring her ankle. Plaintiff also asserts that ice and snow that had accumulated between the paving stones and the cement contributed to her fall.

Plaintiff moved to amend her complaint to add two defendants. Defendant SL Green cross-moved for summary judgment dismissing the complaint. The motion court granted plaintiff's motion to amend and denied defendant's motion to dismiss. The question of "whether a dangerous or defective condition exists on the property of another so as to create liability . . . 'is generally a question of fact for the jury'" (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997], quoting *Guerrieri v Summa*, 193 AD2d 647, 647 [2nd Dept 1993]). However, when the trivial nature of the defect outweighs other factors, the case need not be submitted to a jury (*Trincere*, 90 NY2d at 977).

Here, we find that any defect that existed in the sidewalk was trivial. The pictures of the sidewalk presented by plaintiff did not show any significant height differential or significant defect. Moreover, some of the pictures were taken after repairs

were done on the sidewalk and it is impossible to ascertain from the photographs what the sidewalk looked like at the time of plaintiff's fall. The conclusory statements of plaintiff's expert witness fail to raise a triable issue of fact (*Di Sanza v City of New York*, 11 NY3d 766, 767 [2008]). Plaintiff's expert claims that the photographs taken prior to the repairs show a difference in elevation, but our review of the photograph leads us to conclude otherwise (*see Leon v Alcor Assoc., L.P.*, 96 AD3d 635 [1st Dept 2012]). The expert provides no explanation for exactly how he determined the size of the gap at the time of plaintiff's fall based on photographs taken several years after the accident. Without an evidentiary basis for his assessment, the conclusions of plaintiff's expert fail to raise an issue of fact *(Matos v Challenger Equip. Corp.*, 50 AD3d 502 [1st Dept 2008]).

In view of the foregoing finding of a trivial defect, plaintiff's motion to add the new defendants is academic.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9305 The People of the State of New York, Ind. 3143/09
Respondent,

-against-

Carlos Rodriguez,
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 (Philip Morrow of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about August 12, 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 21, 2013

CLERK

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

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9306 149 Madison LLC, Index 570321/11
Petitioner-Appellant,

-against-

Paul J. Bosco,
Respondent-Respondent.

_____

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for appellant.

Murray Shactman, New York, for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about August 31, 2011, which affirmed an order of the Civil Court, New York County (Manuel J. Mendez, J.), entered on or about September 23, 2010, denying petitioner landlord's motion for leave to renew and/or reargue an order of the same court and Judge, entered on or about May 26, 2010, which, in turn, had denied petitioner landlord's motion for summary judgment on its claim for electrical charges in a commercial nonpayment summary proceeding, unanimously reversed, on the law, with costs, and petitioner's motion for summary judgment on the claim for electrical charges granted.

There is no ambiguity in the relevant clauses of the parties' lease agreement which, in accordance with their plain

meaning, require respondent tenant to pay monthly electric charges in addition to the basic rent (*see W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Beginning with Article 44, which provides for a "rent free" month, it is clear that electric charges are separate and apart from basic rent. Indeed, during the "rent free" month respondent was required to pay the electric charges.

Article 45 sets forth a schedule of the annual rental rate for each year. For example, for the period September 1, 2008 through August 31, 2009, the annual rental rate was $100,000, payable in equal monthly installments of $8,333.33. Article 46 sets forth the electrical charges, providing that the annual electric charges are $9,534, payable monthly at $794.50. The first sentence of Article 46 clearly states that basic rent "exclusive of additional rents and charges" is based on the schedule set forth in paragraph 45. Thus, basic rent was unambiguously intended to exclude additional rent and charges, including electricity, as well as the real estate taxes and cost of living adjustment provided for in Article 49.

The second section of Article 46 does not require a different conclusion. The pertinent portion of that section provides, "Tenant hereby covenants, undertakes and agrees that

during the term of this lease *Tenant will pay annual rent inclusive of electrical usage charges in monthly installments as hereinbefore provided*" (emphasis added). This language does not intend that the basic annual rent is inclusive of electrical charges. Rather, the language, properly read, means that tenant agrees to pay basic annual rent and the electrical usage charges in monthly installments as provided in the prior portion of Article 46.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9307 Philip Wollruch, Index 117553/09
Plaintiff-Appellant,

Esther Wollruch,
Plaintiff,

-against-

Robert Jaekel,
Defendant-Respondent,

Empire Skate Club of New York, Inc.,
Defendant.

_____

The Saftler Law Firm, New York (James W. Bacher of counsel), for appellant.

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

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about March 28, 2012, which, insofar as appealed from, denied plaintiff Philip Wollruch's (plaintiff) motion for summary judgment and granted defendant Robert Jaekel's cross motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Dismissal of the complaint as against defendant Jaekel was appropriate in this action where plaintiff was injured while participating in a sponsored in-line skating event, when Jaekel lost his balance and collided with him, after another participant

veered into Jaekel's path. Although Vehicle and Traffic Law § 1231 makes the provisions of that statute applicable to in-line skaters on a roadway, plaintiff failed to raise a triable issue regarding whether Jaekel violated an applicable provision of the Vehicle and Traffic Law.

Moreover, plaintiff, a participant in a sponsored sporting event, assumed the risk of injury from a fall or collision with another skater, since falling is an inherent part of the sport (*see e.g. Anand v Kapoor*, 15 NY3d 946, 947-948 [2010]; *compare Custodi v Town of Amherst*, 20 NY3d 83 [2012]). Indeed, plaintiff testified that falling was "[j]ust part of skating," and he failed to present evidence that Jaekel's conduct was reckless or intentional.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9308-
9308A In re Justin Javonte R., etc., and Another,

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

Leticia W., etc.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the children.

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Orders, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about February 3, 2012, which, insofar as appealed from, upon a finding of mental illness, terminated respondent mother's parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence, including the expert testimony from a court-appointed psychologist, who examined the

mother on two occasions and reviewed all of her available medical records, supported the determination that she is presently and for the foreseeable future unable, by reason of mental illness, to provide proper and adequate care for her children (*see* Social Services Law § 384-b[4][c]; 6[a]; *Matter of Faith D.A. [Natasha A.]*, 99 AD3d 641 [1st Dept 2012]). The psychologist testified that the mother suffered from schizophrenia and her prognosis was "very poor." She had periods of noncompliance with her medications and exhibited symptoms regularly, whether or not she was compliant with treatment.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9309 Anna Ortiz, Index 14485/07
Plaintiff-Appellant,

-against-

Rose Nederlander Associates, Inc., et al.,
Defendants-Respondents.

_____

Gottlieb Siegel & Schwartz, LLP, Bronx (Michael Gottlieb of counsel), for appellant.

Nicoletti Gonson Spinner & Owen LLP, New York (Kevin Michael Ryan of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 6, 2011, which, in this personal injury action arising from a slip and fall, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff fell on a backstage staircase that she had been sent to clean off accumulated debris. Although plaintiff testified that there was "poor lighting" on the backstage staircase where she fell, she testified that she fell because the step was uneven or pitched forward. Thus, plaintiff failed to submit sufficient evidence to raise an issue of fact as to whether the alleged poor lighting was a proximate cause of her fall (*see Batista v New York City Tr. Auth.*, 66 AD3d 433, 434

[1st Dept 2009]; *Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [1st Dept 2004]).

Moreover, plaintiff's expert's opinion that the stairs violated Administrative Code of the City of New York former §§ 27-127 and 27-128, is unavailing. Those sections "merely require that the owner of a building maintain and be responsible for its safe condition," and liability will not be imposed in the absence of a breach of some specific safety provision (*Hinton v City of New York*, 73 AD3d 407, 408 [1st Dept 2010] [internal quotation marks omitted], *lv denied* 15 NY3d 715 [2010]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9310 Mary Briggs, Index 303524/08
Plaintiff-Appellant,

-against-

Pick Quick Foods, Inc.,
Defendant-Respondent.

_____

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for appellant.

Hammill, O'Brien, Croutier, Dempsey, Pender & Koehler, P.C., Syosset (Anton Piotroski of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered November 15, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Upon such showing, the burden shifts to the party opposing the motion "to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518, 519 [1st Dept

2010]).

Plaintiff failed to rebut defendant's prima facie showing that it did not cause or create the defective condition. Her claim on appeal that the store's employees created the allegedly dangerous condition by spraying water on produce prior to her accident is speculative, as she testified that she did not know where the water came from and that did not she see any of defendant's employees prior to her accident (*see Goldman v Waldbaum, Inc.*, 248 AD2d 436, 436-437 [2d Dept 1998], *lv denied* 92 NY2d 805 [1998]; *cf. Granera v 32nd St. 99¢ Corp.*, 46 AD3d 750, 751 [2d Dept 2007]).

Nor has plaintiff rebutted defendant's prima facie showing that it had no actual or constructive notice of the alleged defective condition (*see Kershner v Pathmark Stores*, 280 AD2d 583, 584 [2d Dept 2001]; *Stoerzinger v Big V Supermarkets*, 188 AD2d 790 [3d Dept 1992]; *cf. Brockman v Cipriani Wall St.*, 96 AD3d 576, 577 [1st Dept 2012]). The record establishes that defendant did not receive any complaints about the allegedly defective condition before the accident (*see Kerson v Waldbaums Supermarket*, 284 AD2d 376, 377 [2d Dept 2001]). To constitute constructive notice, "a defect must be visible and apparent and it must exist for a sufficient length of time prior to the

accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Here, plaintiff testified that she did not see water on the floor prior to her fall and did not know how long it was there.

Plaintiff's affidavit was insufficient to raise a triable issue of fact as to the exact site of the accident, because it conflicts with her deposition testimony that the photo at issue depicted only the general, but not the specific accident location (*see Smith v Costco Wholesale Corp.*, 50 AD3d at 501]).

Lastly, plaintiff's claim that, in making its prima facie showing, defendant relied upon inadmissable hearsay was not raised before the motion court, and accordingly, will not be considered on appeal (*see e.g. Honique Accessories, Ltd. v S.J. Stile Assoc., Ltd.*, 67 AD3d 481, 482 [2008]). Were we to review

plaintiff's hearsay argument, we would find it unavailing.

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

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9311 Clara Collazo, Index 310055/08
Plaintiff-Appellant,

-against-

Alyssa Anderson, et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered June 11, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, the motion denied to the extent it sought dismissal of plaintiff's claim that she suffered "permanent consequential" and "significant limitation" injuries to her knees and lumbar spine, and otherwise affirmed, without costs.

Plaintiff alleges that she sustained serious injuries when, while she was sitting in a restaurant, a car owned and driven by defendants crashed through a window and hit her. The record shows that defendants established prima facie absence of a serious injury to either knee by submitting the affirmed reports of their orthopedist who found full range of motion in both

knees, and of their radiologist who found degeneration and absence of acute traumatic injuries (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]*; Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]).

In opposition, plaintiff raised a triable issue of fact as to whether she sustained a "significant" or "permanent consequential limitation of use" of her knees. Plaintiff's evidence shows that she began treatment shortly after the accident and, when months of physical therapy did not help, she opted for surgery, which revealed meniscal tears in both knees. In her most recent examination, her surgeon found 15- to 20-degree limitations in active and passive range of motion testing in the knees with spasms and patellofemoral crepitus, and concluded that there was a "high likelihood" of the need for further treatment, including the possibility of knee replacement surgery (*see Perez v Vasquez*, 71 AD3d 531 [1st Dept 2010]).

Defendants failed to meet their prima facie burden of showing the absence of a serious injury to plaintiff's lumbar spine. Defendants' orthopedist did not adequately explain his finding of a significant limitation in forward flexion (*see Jackson v Leung*, 99 AD3d 489 [1st Dept 2012]), and their neurologist's conclusion, that the significant restriction

plaintiff exhibited while performing a straight-leg raising test in a standing position was voluntary, was not supported by an objective medical explanation (*see Hi Ock Park-Lee v Voleriaperia*, 67 AD3d 734 [2d Dept 2009]). Furthermore, the conclusion of defendants' radiologist that the lumbar disc herniations reflected in plaintiff's MRI films were "unlikely" related to acute traumatic injury since such findings are "common" in the asymptomatic population is insufficient to establish absence of causation as a matter of law. Because defendants did not meet their prima facie burden as to the lumbar spine, we need not consider plaintiff's opposition as to this part of the body (*see Feaster v Boulabat*, 77 AD3d 440, 441 [1st Dept 2010]).

Defendants established entitlement to dismissal of plaintiff's 90/180-day injury claim by submitting the portion of plaintiff's deposition testimony that she was confined to bed and home for three to four weeks immediately after the accident (*see Bonilla v Abdullah*, 90 AD3d 466, 468 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]). The report of one of plaintiff's orthopedists also indicated that plaintiff returned to work

within 90 days of the accident. Plaintiff's assertion that she could not perform her usual and customary daily activities during the requisite period is unsupported by objective medical evidence (*see Mitchell v Calle*, 90 AD3d 584, 585 [1st Dept 2011]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9312 Addison Thompson, Index 104819/11
Plaintiff-Appellant,

-against-

The Andy Warhol Foundation for
the Visual Arts, Inc., et al.,
Defendants-Respondents,

The Andy Warhol Museum, et al.,
Defendants.

_____

Steptoe & Johnson LLP, New York (Michael D. Rips of counsel), for appellant.

Boies Schiller & Flexner LLP, Albany (Luke Nikas of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 14, 2011, which, insofar as appealed from as limited by the briefs, granted the motion of defendants The Andy Warhol Foundation for the Visual Arts, Inc. and The Andy Warhol Authentication Board, Inc. to dismiss the complaint as against them, unanimously affirmed, without costs.

The covenants not to sue in the letter agreements that plaintiff signed bar his claims for breach of contract and gross or ordinary negligence, to the extent such a cause of action can be gleaned from the pro se pleadings (*see e.g. Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993]).

Plaintiff's claims must be dismissed, as defendants' only duty to plaintiff was that undertaken by the letter agreements. There was no special relationship between the parties that would give rise to a tort claim (*see Mandarin Trading v Wildenstein*, 16 NY3d 173 [2011]), and as this court previously observed, the market place is the appropriate place to resolve authentication disputes (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88 [2009], *lv denied* 15 NY3d 703 [2010]).

Contrary to the parties' arguments, neither side has engaged in conduct that warrants the imposition of sanctions.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9313-
9314 Eugene Washington, et al.,
Plaintiffs-Respondents,

-against-

Fausto Atenco, et al.,
Defendants-Appellants.

Index 300713/07

_____

Foster & Mazzie, LLC, New York (Mario A. Batelli of counsel), for appellants.

Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered August 16, 2011, upon a jury verdict, in plaintiffs' favor, unanimously affirmed, without costs. Order, same court and Justice, entered January 10, 2012, which denied defendants' motion to set aside the verdict or order a new trial, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Although the court should have given a proximate cause charge, defendants failed to preserve their argument that the trial court erred in declining to charge the jury on proximate cause and to include a jury interrogatory whether the accident was a substantial factor in causing plaintiffs' injuries, since

they neither raised a contemporaneous objection to the court's denial of their requests therefor nor articulated a cognizable objection after the charge was given (*see* CPLR 4110-b; *Kroupova v Hill*, 242 AD2d 218, 220 [1st Dept 1997], *lv dismissed in part, denied in part* 92 NY2d 1013 [1998]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9315 Patricia Leighton, Index 115379/08
Plaintiff-Appellant,

-against-

Marc Lowenberg, D.D.S., et al.,
Defendants-Respondents,

NBC Universal, Inc.,
Defendant.

_____

Andrew Molbert, New York, for appellant.

Martin Clearwater & Bell, LLP, New York (Stewart G. Milch of counsel), for respondents.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered on or about July 5, 2011, which, in this dental malpractice action, to the extent appealed from as limited by the briefs, denied plaintiff's motion to amend the complaint to add a cause of action for lack of informed consent, granted the dentist defendants' (defendants) motion for partial summary judgment dismissing plaintiff's gross negligence and breach of implied warranty claims and her demand for punitive damages, and denied plaintiff's cross motion for leave to amend the complaint to add a claim for breach of contract and to further particularize facts concerning her claims for lack of informed consent, gross negligence, and breach of contract, unanimously affirmed, without

costs.

The court providently exercised its discretion in denying plaintiff's request for leave to amend the complaint to add lack of informed consent claims. Plaintiff failed to submit an expert affirmation stating with certainty that the information defendants allegedly provided to plaintiff before the dental procedures at issue departed from what a reasonable practitioner would have disclosed (*see Orphan v Pilnik*, 15 NY3d 907, 908 [2010]). Further, the numerous unauthenticated audio recordings upon which plaintiff heavily relies are insufficient to independently establish the merit of her proposed amendment.

Plaintiff's allegations that defendants negligently placed a veneer on one of her teeth, intentionally misled her to believe that she would receive the "picket fence" dental treatment, and gave her precision dentures despite a lack of experience in this area, do not rise to the level of gross negligence, as the alleged conduct does not "smack" of intentional wrongdoing (*see Apple Bank for Sav. v PricewaterhouseCoopers LLP*, 70 AD3d 438 [1st Dept 2010] [internal quotation marks omitted]). Plaintiff's allegations do not sufficiently state anything other than dental malpractice claims. The alleged conduct also "falls short of showing the high degree of moral turpitude, wanton dishonesty and

utter malice necessary to an award of punitive damages" (*Board of Mgrs. of the Waterford Assn., Inc. v Samii*, 68 AD3d 585, 586 [1st Dept 2009] [internal quotations marks omitted]).

Plaintiff's proposed breach of contract claim is "legally redundant" of the dental malpractice claim, and plaintiff has failed to show that, within the context of her dental treatment, defendants expressed a specific promise to accomplish some definite result (*Scalisi v New York Univ. Med. Ctr.*, 24 AD3d 145, 147 [1st Dept 2005]). Defendants' alleged promises to make plaintiff look "gorgeous" are insufficient.

Plaintiff has not shown that there had been a sale within the meaning of the Uniform Commercial Code (UCC) so as to give rise to any implied warranties under § 2-315 of the UCC. Indeed, the dental items plaintiff identified in her complaint are not "goods" within the meaning of § 2-315. Rather, they are items

that were "incidental part[s] of the services rendered" by defendants in the course of plaintiff's dental treatment (*see Osborn v Kelley*, 61 AD2d 367, 369 [3d Dept 1978]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9316 The People of the State of New York, Ind. 2528/09
Respondent,

-against-

William Rosenberg,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered December 22, 2009, as amended January 19, 2010, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of three years, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court properly exercised its discretion when it precluded inquiry into one of defendant's convictions and permitted inquiry into the underlying facts of a theft-related crime. The underlying theft-related crime was probative of defendant's credibility, and it was not so similar to the present charges as to be unduly prejudicial.

An isolated phrase in the prosecutor's summation that briefly mentioned defendant's right to call witnesses was inappropriate, but it does not warrant reversal. The court's instructions on the burden of proof were sufficient to prevent any prejudice.

Defendant's contention that the victim's identification of defendant was improperly bolstered by an officer's testimony about the identification is unpreserved, and we decline to review in the interest of justice. As an alternative holding, we find that it was defense counsel, not the prosecutor, who elicited the testimony and that the testimony was admissible in any event as background evidence, completing the narrative (*see People v Morgan*, 193 AD2d 467 [1st Dept 1993], *lv denied* 81 NY2d 1077 [1993]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9317- Index 652408/10
9317A Yehuda Keller, et al.,
Plaintiffs-Appellants,

-against-

Merchant Capital Portfolios, LLC, et al.,
Defendants,

The Comvest Group, et al.,
Defendants-Respondents.

_____

Poltorak PC, Brooklyn (Elie C. Poltorak of counsel), for appellants.

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

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered on or about January 26, 2011, which, to the extent appealed from as limited by the briefs, granted the motion of defendants The Comvest Group, Comvest Investment Partners, Cynergy Holdings LLC, Cynergy Data, LLC, and Cynergy Prosperity Plus, LLC, (collectively, Comvest) to dismiss the complaint as against them pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs. Order, same court and Justice, entered May 22, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiffs' cross motion to enforce a conditional order, same court and Justice, entered April 22, 2011, inter

alia, granting plaintiffs' motion for sanctions pursuant to CPLR 3126 to the extent of ordering that if defendants Merchant Capital Portfolios, LLC and Merchant Processing Services Corp. (collectively, Merchant) failed to produce certain materials within 45 days of the issuance of the order, and plaintiffs moved on notice with an accompanying affirmation detailing Merchants default, then an order striking Merchant's answer in its entirety would be entered, denied plaintiffs' cross motion for a default judgment pursuant to CPLR 3215, and denied plaintiffs' cross motion for sanctions pursuant to 22 NYCRR 130-1.1, unanimously modified, on the law, to enforce the conditional order and strike Merchant's answer in its entirety, and otherwise affirmed, without costs.

Although Comvest did not serve its cross motion to dismiss within the time frame provided by CPLR 2215, such failure may be excused where, as here, plaintiffs have not shown prejudice resulting from the delay (*see Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340 [1st Dept 2004]), and plaintiffs had sufficient opportunity to respond to Comvest's arguments (*Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 408 [1st Dept 2007]).

Plaintiffs' cross motion for a default judgment against

Merchant pursuant to CPLR 3215 was appropriately denied, since the court had previously addressed Merchant's untimely service and directed plaintiffs to accept the late answer, and plaintiffs did not take an appeal from such order.

However, the court erred, as a matter of law, in denying plaintiffs' cross motion to enforce the conditional order striking Merchant's answer since Merchant did not produce the specified materials within the identified time period, and did not establish both a reasonable excuse for its failure to timely produce the specified materials and the existence of a meritorious claim or defense (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]). In this context, where a conditional order had previously been entered based on the court's findings that a party had caused delay and failed to comply with the court's discovery orders, the court was not required to find that Merchant's conduct in failing to comply with the conditional order was "willful" (*id.* at 82-83).

Alternatively, Merchant's failure to timely comply with three court orders directing it to produce certain materials - one of which was a conditional order striking its answer if Merchant did not comply within 45 days - warrants an inference of willful noncompliance (*see Perez v City of New York*, 95 AD3d 675,

677 [1st Dept 2012], citing *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 375 [1990]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9318 Eugene Matarese, Index 100885/10
Plaintiff-Respondent,

-against-

John Robinson,
Defendant-Appellant.

_____

Jacobs & Jacobs, Stamford (Michael A. Jacobs of counsel), for appellant.

Theodore Bohn, New York, for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered May 21, 2012, which granted so much of plaintiff's motion as sought summary judgment on the issue of defendant's liability and ordered a trial on damages, unanimously affirmed, with costs.

In this action for the return of funds paid to defendant for the sale of land and construction of a new home, the motion court correctly determined that defendant was barred from relitigating the issue of whether he misappropriated plaintiff's funds. At defendant's administrative proceeding before the New York Department of State's Division of Licensing Services, defendant admitted to violating article 37 of the General Business Law by commingling and failing to deposit the funds into an escrow account. Since this action involves the same issues raised in

the administrative proceeding and defendant had a full and fair opportunity to litigate the matter at that proceeding, defendant's admissions were properly given preclusive effect under the doctrine of collateral estoppel (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 499-501 [1984]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9319 In re Estate of Fred Ziess, File 1366/02
Deceased.
- - - - -
Gerald P. Halpern,
Petitioner-Respondent,

Alan Ziess,
Objectant-Appellant.

_____

Gaines, Gruner, Ponzini & Novick, LLP, White Plains (Joseph H. Gruner of counsel), for appellant.

Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Thomas J. McGowan of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about October 28, 2011, which, among other things, granted petitioner's motion for partial summary judgment approving a portion of his accounting as co-executor of the deceased's estate, unanimously affirmed, without costs.

The Surrogate correctly determined that in calculating the commission due a fiduciary other than a trustee under SCPA 2307 (1) and (2), for receiving and paying money, the rents to be included in the definition of money received are gross rents

(*Matter of Schinasi*, 277 NY 252 [1938]; *Matter of Amato*, 265 AD2d 548, 550 [2d Dept 1999]; *see* SCPA 2307 [6]).

We have considered objectant-appellant's remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9320 Deewan Singh, et al., Index 301829/11
Plaintiffs-Appellants,

-against-

Data Palette Information Services, LLC,
Defendant-Respondent.

_____

Joseph A. Altman, Bronx, for appellants.

Davis Shapiro Lewit & Hayes LLP, New York (Gary P. Adelman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about October 26, 2011, which denied plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

Plaintiffs failed to establish their entitlement to judgment as a matter of law by showing that they either performed under the contract or were excused from doing so (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425 [1st Dept 2010]). Moreover, the record presents triable issues of fact as to whether defendant

breached the Operating Agreement (*see Boston Concessions Group v Criterion Ctr. Corp.*, 200 AD2d 543 [1st Dept 1994]).

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 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9322 Thomas Buckner, Index 106856/10
Plaintiff-Appellant,

-against-

St. Luke's Roosevelt Hospital Center,
Defendant-Respondent.

_____

Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Judy C. Selmeci of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Joan B. Lobis, J.), entered July 6, 2012, which granted defendant's motion for summary judgment dismissing the complaint, deemed an appeal from judgment, same court and Justice, entered August 14, 2012, dismissing the complaint, and, so considered, said judgment unanimously affirmed, without costs.

Defendant mad a prima facie showing of entitlement to summary judgment dismissing the complaint by submitting the affidavit of a medical expert opining, with a reasoned and fact-based explanation, that the treatment defendant's physician provided to plaintiff for his fractured ankle comported with good and accepted medical practice. In opposition, plaintiff's expert simply asserted that defendant's physician, instead of putting

the ankle in a splint, should have performed a surgical open reduction and internal fixation of the fracture. Plaintiff's expert, however, neither set forth an explanation of the reasoning supporting his conclusion nor identified any facts in the record indicating his preferred course of treatment. Nor did plaintiff's expert opine whether plaintiff's outcome would have been materially better had he been treated with surgery. Because the opinion of plaintiff's expert was thus offered "in [a] conclusory fashion without specific analysis" (*Feliz v Beth Israel Med. Ctr.*, 38 AD3d 396, 397 [1st Dept 2007]), the motion court correctly determined that plaintiff failed to raise a triable issue of fact in the face of the well-supported opinion of defendant's expert that the record facts showed that defendant's physician treated plaintiff appropriately under the governing standard of care.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9323 Gettinger Associates, LLC, et al., Index 111166/06
Plaintiffs-Respondents,

-against-

Abraham Kamber & Company LLC,
Defendant-Appellant.

_____

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Akerman Senterfitt, LLP, New York (Donald N. David of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Debra A. James, J.), entered May 30, 2012, following a trial, declaring that plaintiffs were not in default under the sublease, dismissing defendants' affirmative defenses and counterclaims, and permanently enjoining defendant from taking any action to cancel or terminate the sublease and from otherwise interfering with plaintiffs' possession and beneficial use and enjoyment of the building based on the default and cure notices, unanimously modified, on the law, the first and third affirmative defenses and the first and fourth counterclaims reinstated, and it is declared that plaintiffs defaulted under Article 7 of the sublease based on two 2007 renovations and under Article 6 by assigning the sublease while in default, and otherwise affirmed,

without costs, and the matter is remanded for further proceedings to determine a remedy, other than forfeiture, for the defaults.

Contrary to the trial court's finding, the evidence does not show a course of conduct by defendant that clearly manifested an intent to abandon or relinquish its right to enforce the noticed defaults under Article 7 of the sublease, i.e., plaintiffs' expenditures in excess of $50,000 for repair work to the building's facade without providing plans or a performance bond (*see DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563 [1st Dept 2011]). However, defendant's unreasonable delay in seeking to enforce those defaults resulted in a specific waiver of its right to enforce – with two exceptions. The notices of default as to the 2007 interior renovation of Harry's Deli on the first floor of the building and the 2007 remodeling of a tenant space on the 10th floor were not unreasonably delayed. Although the defaults were breaches of a "substantial obligation of the tenancy" (*see Haberman v Hawkins*, 170 AD2d 377, 377-378 [1st Dept 1991]), they were not material breaches that would justify terminating the sublease (*see e.g. Metropolitan Transp. Auth. v Kura Riv. Mgt.*, 292 AD2d 230 [1st Dept 2002]).

The notice of default under Article 6, which prohibits the tenant from assigning the sublease without the landlord's

approval while in default of other provisions of the sublease, identified eight violations of Article 7. Although defendant waived its right to enforce the Article 7 defaults by its unreasonable delay in seeking to do so, the defaults existed at the time of the assignment. However, forfeiture of the sublease based on the improper assignment is unwarranted under the circumstances, especially because plaintiffs have asserted their willingness and ability to cure the default (*see Zona, Inc. v Soho Centrale*, 270 AD2d 12, 14 [1st Dept 2000]).

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

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

ENTERED: FEBRUARY 21, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, Freedman, Román, JJ.

9324N Roger Martinez, Index 305453/09
Plaintiff-Appellant,

-against-

Robert Bauer,
Defendant,

Yitzcho Abowitz, et al.,
Defendants-Respondents.

_____

Lisa M. Comeau, Garden City, for appellant.

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered March 12, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel a physical inspection of a desk and hutch in the Abowitz defendants' apartment, unanimously affirmed, without costs.

The trial court providently exercised its broad discretion in determining that plaintiff had not shown that the requested physical inspection in a private home was "material and

necessary" within the meaning of CPLR 3101(a) (*see Auerbach v Klein*, 30 AD3d 451, 452 [2d Dept 2006]; *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9325 The People of the State of New York, Ind. 5076/08
Respondent,

-against-

Bennie Jamison,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered June 3, 2009, as amended June 25, 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, to a term of two years, unanimously affirmed.

The court properly permitted the undercover officers to give background testimony, based on their experiences, regarding the roles of participants in street level drug sales (*see People v Brown*, 97 NY2d 500, 505-507 [2002]). Accessorial liability was the principal issue in the case. The challenged testimony was relevant to refute defendant's claim that, rather than acting as a steerer and/or lookout, he was a mere bystander to the

transaction (*see People v Henderson*, 22 AD3d 311 [2005], *lv denied* 6 NY3d 813 [2006]; *People v Broadhurst*, 306 AD2d 15, 16 [2003], *lv denied* 100 NY2d 641 [2003]). The jurors might not have been aware that defendant's behavior before and during the sale was typical of a steerer/lookout. Furthermore, this testimony tended to explain why all the buy money was recovered from a codefendant who had exchanged the drugs for cash. The jurors might not have understood why a steerer/lookout would not receive a share of the proceeds immediately after the sale.

While it may be preferable for testimony of this nature to come from a source other than a fact witness (*see Brown*, 97 NY2d at 505), there is no legal impediment to a fact witness testifying in a dual capacity (*People v Hansen*, 37 AD3d 318, 319 [1st Dept 2007]). The People's unsuccessful request for permission to bring in an additional witness, when viewed in context, does not constitute a waiver of this argument.

Defendant's remaining challenges to this testimony do not warrant reversal. Any error in permitting the officers to provide statistical information (*see People v Kelsey*, 194 AD2d 248, 253 [1st Dept 1994]) was harmless. To the extent any of the testimony could be viewed as going to the ultimate issue of accessorial liability, that testimony was elicited solely by

defense counsel. Finally, defendant did not preserve his claim that the court should have provided limiting instructions, and we decline to review it in the interest of justice. As an alternative holding, we find that defendant was not prejudiced by the absence of such instructions.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court only permitted inquiry into defendant's two most recent convictions, constituting a small portion of his very extensive criminal record. The probative value of these convictions, and their underlying facts, on the issue of credibility outweighed any prejudicial effect.

Defendant's argument regarding the lack of CPL 710.30(1)(b) notice is without merit because the identification at issue was confirmatory (*see People v Wharton*, 74 NY2d 921 [1989]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9326 In re Miguel Rodriguez, Index 402217/11
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Miguel Rodriguez, appellant pro se.

Kelly D. MacNeal, New York (Melissa R. Renwick of counsel), for respondent.

_____

Determination of respondent, dated April 13, 2011, which denied petitioner's remaining family member grievance, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Alice Schlesinger, J.], entered January 23, 2012), dismissed, without costs.

Substantial evidence supports the determination that petitioner did not qualify as a remaining family member. The record shows that petitioner never obtained respondent's written permission to return to reside in his brother's apartment, nor did he occupy the apartment for one year prior to his brother's death (*see Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580 [1st Dept 2011]). That petitioner cared for his brother

in the months leading up to his death, does not provide a basis to annul the determination (*see Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9327 Jason Brand, et al., Index 105392/09
Plaintiffs-Appellants,

-against-

Kevin Evangelista,
Defendant-Respondent.

_____

Frommer & Cerrato, LLP, Garden City (Stephen G. Frommer of counsel), for appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered December 14, 2011, which granted defendant's motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law dismissing plaintiff's claims pursuant to Insurance Law § 5102(d) by submitting, inter alia, affirmed reports of a neurologist and an orthopedist who opined that plaintiff had no residuals from his recent back surgery, and no deficits in his range-of-motion testing (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]). The experts' use of slightly different normal values in performing one diagnostic test was too

minor to be considered significant (*see Anderson v Zapata*, 88 AD3d 504 [1st Dept 2011]; *Feliz v Fragosa*, 85 AD3d 417, 418 [1st Dept 2011]). Moreover, the finding by one of defendant's physicians of a minor limitation in one plane of range of motion in plaintiff's lumbar spine was "'insignificant for purposes of Insurance Law § 5102(d)'" (*see Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012], quoting *Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463, 464 [1st Dept 2010]). Nor were defendant's physicians required to review plaintiff's medical records, since they detailed the specific tests they used in their personal examination of plaintiff, which revealed full range of motion (*see Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]; *Zhijian Yang v Alston*, 73 AD3d 562 [1st Dept 2010]).

In opposition, plaintiff failed to raise an issue of fact as to permanent limitations resulting from his claimed lumbar spine injury. His physicians did not tender any recent quantified range-of-motion measurements to demonstrate any limitations he may have had from his herniated discs, or following his second back surgery (*see Madera v Gressey*, 84 AD3d 460 [1st Dept 2011]), and failed to render a "qualitative assessment of plaintiff's limitations" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350, 353 [2002]). Plaintiff presented no recent reports on his

medical condition to refute the defense experts' findings that he had recovered (*see Vega*, 96 AD3d at 507; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

Moreover, while plaintiff's physician concluded that his preexisting condition was aggravated by the subject motor vehicle accident, he failed to provide any basis for determining the extent of any exacerbation of plaintiff's prior injuries (see *Suarez v Abe*, 4 AD3d 288 [1st Dept 2004]; *and see Dorrian v Cantalicio*, 101 AD3d 578, [1st Dept 2012]).

The three-month period plaintiff alleged he lost from work was not substantiated by any documentation from his employer or medical documentation of his inability to perform his usual daily tasks. Therefore, plaintiff failed to satisfy the 90/180-day category (*see Winters v Cruz*, 90 AD3d 412, 413 [1st Dept 2011]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9328 In re 703 Lenox LLC, Index 258668/09
Petitioner-Appellant,

-against-

New York City Department of Finance, et al.,
Respondents-Respondents.

_____

Goldberg Weprin Finkel Goldstein, LLP, New York (Matthew Hearle of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Brooke Zacker of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered August 12, 2011, which, in this proceeding brought pursuant to article 7 of the Real Property Tax Law, denied petitioner's motion to correct the assessed value of its premises to reflect a tax exemption under the Industrial and Commercial Incentive Program (ICIP), and granted respondents' cross motion for partial summary judgment dismissing petitioner's tax exemption claim under the ICIP, unanimously affirmed, without costs.

Petitioner was not entitled to ICIP tax exemptions, as respondents established that the premises was not a hotel, eligible to receive such exemptions under the applicable version

of 19 RCNY chapter 14. The record reflects that occupants stayed at the premises for more than 31 consecutive days during a one-year period, and petitioner failed to offer any evidence to the contrary. Petitioner's argument that respondents' proof was based upon inadmissible hearsay is both unpreserved and unavailing. On the existing record, there were sufficient indicia of reliability to qualify the spreadsheets submitted in support of respondents' motion as business records (*see* CPLR 4518[a]; *see also Pencom Sys. v Shapiro*, 237 AD2d 144 [1st Dept 1997]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9330 Carlos Velasquez, Index 100548/09
Plaintiff-Respondent,

-against-

795 Columbus LLC, et al.,
Defendants-Appellants.

_____

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for appellants.

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 16, 2011, which granted plaintiff's motion for partial summary judgment on his Labor Law § 241(6) claim and on his Labor Law § 200 claim to the extent it is asserted against defendant Tishman Construction, and denied defendants' cross motion for summary judgment dismissing the Labor Law § 200 claim and the claim for lost wages, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he slipped and fell on "mud, rocks and water" at a construction site that, at the time, consisted of an open excavation. He claims that a muddy condition had formed on the concrete floor at the bottom of the site due to water from rain and a nearby water main break

that occurred a few days before the accident.

Although 12 NYCRR 23-1.7(e), which protects workers from *tripping* hazards, is inapplicable to the facts of this case, we find that 12 NYCRR 23-1.7(d), which protects workers against *slipping* hazards, is an applicable predicate for the Labor Law § 241(6) claim (*see e.g. Raffa v City of New York*, 100 AD3d 558, 559 [1st Dept 2012]; *Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 733 [1st Dept 2006], *lv denied* 8 NY3d 814 [2007]; *Militello v 45 W. 36th St. Realty Corp.*, 15 AD3d 158, 159-160 [1st Dept 2005]; *Greenfield v New York Tel. Co.*, 260 AD2d 303, 304 [1st Dept 1999], *lv denied* 94 NY2d 755 [1999]). Plaintiff did not raise the applicability of 12 NYCRR 23-1.7(d) in his summary judgment motion (although he asserted it in his complaint and verified bill of particulars), but we reach the issue because it is a legal issue that is apparent on the record, and the determination could not have been avoided if the issue had been brought to defendants' attention on the motion (*see Rajkumar v Budd Contr. Corp.*, 77 AD3d 595 [1st Dept 2010], citing *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

Plaintiff was working on a "floor" within the meaning of 12 NYCRR 23-1.7(d) (*see Temes v Columbus Ctr. LLC*, 48 AD3d 281 [1st

Dept 2008]); the floor became covered with mud and water due to a water main break and rain. As the mud was not part of the floor and not an integral part of plaintiff's work, it constituted a "foreign substance" that caused slippery footing (*see Conklin v Triborough Bridge & Tunnel Auth.*, 49 AD3d 320 [1st Dept 2008]; *Cottone v Dormitory Auth. of State of N.Y.*, 225 AD2d 1032 [4th Dept 1996]). Further, plaintiff's testimony that his foreman instructed him to work on the day of the accident, despite the presence of a muddy and wet condition, established negligence for which defendants may be held vicariously liable (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]), and defendants failed to raise a triable issue of fact in opposition. The deposition testimony of Tishman Construction's general superintendent that there was no hazardous slippery condition is conclusory. Nor did defendants submit any evidence that plaintiff was contributorily negligent (*see id.; Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502 n 4 [1993]).

As to the Labor Law § 200 claim, defendants failed, as discussed, to rebut plaintiff's prima facie showing of a hazardous condition, and the evidence shows that Tishman – but not 795 Columbus – had notice of the water main break and the muddy condition (*see Hernandez v Columbus Ctr., LLC*, 50 AD3d 597,

598 [1st Dept 2008]; *Roppolo v Mitsubishi Motor Sales of Am.*, 278 AD2d 149, 150 [1st Dept 2000]).

The motion court correctly held that plaintiff's lost wages claim is an issue of damages to be addressed at trial.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9332 Abdul Yousef, Index 20233/06
Plaintiff-Respondent,

-against-

Kyong Jae Lee, et al.,
Defendants,

The City of New York,
Defendant-Appellant.

_____

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

Jesse Barab, White Plains (Jeremy S. Ribakove of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 30, 2011, which denied defendant City of New York's motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Triable issues of fact exist in this action where plaintiff testified that he tripped and fell in a hole on the "edge" of the sidewalk and identified on a photograph a condition located between the sidewalk and the curb as the cause of his accident. While the City may not be liable to plaintiff if he was injured as the result of a dangerous condition in the sidewalk abutting

the owners' property (*see* Administrative Code of City of NY § 7-210[c]), it may be liable if the accident resulted from a dangerous condition of the curb (*see Garris v City of New York*, 65 AD3d 953 [1st Dept 2009]; *see also Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]).

The City also failed to demonstrate an absence of prior written notice of the alleged defective condition of the curb (*see* Administrative Code § 7-201[c][2]). The Big Apple map submitted by the City includes symbols reflecting an "[e]xtended section of broken, misaligned, or uneven curb," and an "[e]xtended section of raised or uneven sidewalk" in the area where plaintiff allegedly fell, and the City did not submit any evidence explaining the symbols on the map. Factual disputes as to whether the map gave notice of the particular defect that caused the accident are for a jury (*see Puello v City of New York*, 90 AD3d 529 [1st Dept 2011]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9334 Mario Franco, Ind. 303796/10
Plaintiff-Appellant,

-against-

Rolling Frito-Lay Sales, Ltd., et al.,
Defendants-Respondents.

_____

Scott Baron & Associates, P.C., Howard Beach (John Burnett of counsel), for appellant.

Richard J. Davolio, Sayville, for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered January 9, 2012, which, in this personal injury action arising from a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The unsigned deposition transcripts submitted by defendants in support of their motion were admissible (*see* CPLR 3116[a]). Plaintiff's transcript was certified by the reporter and plaintiff does not challenge its accuracy (*Sass v TMT Restoration Consultants Ltd.*, 100 AD3d 443, 443 [1st Dept 2012]). Although the unsigned deposition transcript of defendant Jordain was not certified by a reporter, it "was submitted by the party deponent himself, and therefore, was adopted as accurate by the deponent"

(*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]).

Defendants, as the owner and operator of the stopped vehicle that was rear-ended by plaintiff, were entitled to summary judgment dismissing the complaint. Plaintiff failed to provide a nonnegligent explanation for the collision (*see Francisco v Schoepfer*, 30 AD3d 275, 275-276 [1st Dept 2006]). Plaintiff's assertion that defendants' vehicle had "stopped suddenly" is insufficient to rebut the presumption of his negligence (*id.* at 276).

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

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9335 In re Javelle M. McElhaney,
Petitioner-Respondent,

-against-

Raymond A. Okebiyi,
Respondent-Appellant.

_____

O'Keke & Associates, P.C., Brooklyn (Patrick O'Keke of counsel), for appellant.

Jones Day, New York (James A.A. Kirk of counsel), for respondent.

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 16, 2012, which denied respondent father's objections to the Support Magistrate's order directing him to pay $675.00 bi-weekly in child support, unanimously affirmed, without costs.

The Support Magistrate properly imputed income to respondent in calculating the support obligation and there exists no basis to disturb the Support Magistrate's credibility determinations particularly in light of the numerous omissions from respondent's tax returns and Financial Disclosure Affidavit discrepancies (*Matter of Bruce L. v Patricia C.*, 62 AD3d 566 [1st Dept 2009], *lv denied* 12 NY3d 715 [2009]). The evidence established that respondent, an accountant who worked for an entity where his

brother was the director, failed to include as income $110,000 in his bank account which respondent characterized as a loan from his brother but which was not reflected as a loan on his tax return, as well as money in a joint bank account with a board member of the entity where respondent works, and that his bank account activity was generally inconsistent with respondent's claimed income. The court thus properly imputed income based on the higher amount of wages listed in respondent's 2009 tax return rather than his 2010 tax return (*id.*, *see Matter of Mongelluzzo v Sondgeroth*, 95 AD3d 1332 [2d Dept 2012], *lv denied* 20 NY3d 854 [2012]). Contrary to respondent's assertions, this did not amount to a deviation from the statutory formula (*see* FCA § 413[1][b][5][iv] and [v]).

The Support Magistrate also properly considered respondent's education and the fact that he has an M.B.A. degree in questioning the veracity of his purported limited income in 2010 and onward (*see Matter of Collins v Collins*, 241 AD2d 725, 727 [3d Dept 1997], *appeal dismissed* 91 NY2d 829 [1997]). She also properly refused to acknowledge child support payments allegedly made for two non-subject children given the evidence in the record that respondent and the mother of the children live at the same address, the limited evidence that a valid order exists, and

respondent's failure to present any evidence that he is making such payments (*see Commissioner of Social Servs. of City of N.Y. v Nieves*, 229 AD2d 325 [1st Dept 1996]).

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9336 Mario Martinez, Index 305464/09
Plaintiff, 83823/10

-against-

Danny Benau, et al.,
Defendants.

- - - - -

Danny Benau, et al.,
Third-Party Plaintiffs-Appellants,

-against-

DTG Operations, Inc., et al.,
Third-Party Defendants-Respondents.

_____

Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellants.

Harris Beach PLLC, New York (James P. Nonkes of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered March 12, 2012, which granted third-party defendant DTG Operations, Inc.'s, formerly known as Dollar Rent A Car, Inc. (Dollar), motion for summary judgment dismissing the third-party complaint against it, unanimously affirmed, without costs.

Dollar, a commercial renter of automobiles, entered a storage agreement with defendants/third-party plaintiffs (collectively, Owners) to utilize space in the Owners' garage

facility to store its vehicles and maintain an office. Dollar's employee, the plaintiff herein, was injured when he took an elevator to retrieve a rental car, and the elevator door allegedly came out of its track and struck the plaintiff.

It is uncontested that the Owners had a non-delegable duty to maintain the premises, including its elevators, in a safe condition (*see* Multiple Dwelling Law § 78; *Mas v Two Bridges Assoc.*, 75 NY2d 680 [1990]; *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200 [1st Dept 1998]. The evidence also showed that the Owners and their elevator repair contractor maintained exclusive control over the two elevators on the premises. The plaintiff's injury was caused by an alleged defective elevator, and no argument was raised that "the operation of" Dollar's business had contributed in any way to the legal "cause" of plaintiff's injury.

The indemnification provision in the parties' storage agreement required the Owners to defend and indemnify Dollar with regard to any liability that arose out of the operation of the Owners' business on the premises, or from "any act or omission by [the Owners], its employees, agents and invitees" (*see generally Stern's Dept. Stores, Inc. v Little Neck Dental*, 11 AD3d 674 [2d Dept 2004]). Here, the Owners' failure to keep in good repair an

elevator, over which it had exclusive control and which it had a non-delegable duty to maintain in a safe condition, evidently contributed to the plaintiff's accident. The facts underlying the cause of plaintiff's injury, viewed together with the storage agreement's indemnification language, expose the Owners to liability. Further, contrary to the Owners' contention, the parties' indemnification provision did not "unmistakably" provide that the parties agreed to allocate all liability for any injury occurring on the premises to Dollar, even if only remotely connected to Dollar's use of the premises, and notwithstanding the absence of evidence that Dollar contributed to the cause of the liability (*see generally Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Putter v Sued*, 292 AD2d 222 [1st Dept 2002]; *Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904 [1st Dept 2011]). There is no language in the indemnification provision which clearly implied that the parties intended that Dollar indemnify the Owners for their own negligence. Based on the indemnification language, the facts established and the purposes of the storage agreement, there is no basis to infer that the parties had intended that Dollar remain liable to the Owners for full indemnification under any circumstances (*see generally Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777

[1987]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

We note that the storage agreement required both parties to maintain a $5 million general liability policy and to name one another as additional insureds on their respective policies (*see generally Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412 [2006]; *Port Parties, Ltd. v Merchandise Mart Props., Inc.*, __ AD3d __, 2013 Slip Op 277 [1st Dept 2013]). While the allocation of liability as to third persons (as between contracting parties) is premised upon the promisor's procurement of insurance to meet such obligation (*see id.*), here, the Owners would be covered under their own general liability policy.

It is clear from the indemnification and insurance provisions in the storage agreement that the parties did not intend to allocate all loss to Dollar for plaintiff's injury.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9339 The People of the State of New York, Ind. 4472/10
Respondent,

-against-

Eric Mays,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi 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 (Charles H. Solomon, J.), rendered on or about April 12, 2011,

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 21, 2013

CLERK

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

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9340-
9340A-
9340B

Index 110740/08

Zenon Klewinowski,
Plaintiff-Appellant,

Malgorzata Klewinowski,
Plaintiff,

-against-

City of New York, et al.,
Defendants,

Welsbach Electric Corp.,
Defendant-Respondent.

[And Third-Party Actions]

_____

Trief & Olk, New York (Barbara E. Olk of counsel), for appellant.

London Fischer, LLP, New York (James Walsh of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 3, 2012, dismissing the complaint as against defendant Welsbach Electric Corp. upon a jury verdict in its favor and bringing up for review an order, same court and Justice, entered May 17, 2012, which denied plaintiff Zenon Klewinowski's (plaintiff) motion to set aside the verdict, and an order, same court (Judith J. Gische, J.), entered September 15, 2011, which, to the extent appealed from as limited by the

briefs, granted Welsbach's motion for summary judgment, dismissing plaintiff's claims pursuant to Labor Law §§ 240(1), 241(6) and 200 against it, unanimously affirmed, without costs. Appeals from the foregoing orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff laborer commenced this action to recover for personal injuries he suffered when an excavating machine knocked into electrical cables and pulled down a light pole which fell on top of him. Contrary to plaintiff's assertions, the verdict in favor of defendant Welsbach, the subcontractor that installed the temporary light pole and overhead cables, was not inconsistent as a matter of law, since it can be reconciled with a reasonable view of the evidence *(see Martinez v New York City Transit Authority*, 41 AD3d 174 [1st Dept 2007]). Although plaintiff submitted evidence that the electrical cables were lower than the required 18 feet on the date of the accident, no evidence was adduced that the cables were improperly installed by Welsbach. To the contrary, the A&M inspector testified that he measured the cables after installation and found them to conform with the 18 foot requirement. Thus, the jury could have determined that Welsbach properly installed the cables at the proper height and that they dropped to a lower height in the five weeks that passed

between the installation and plaintiff's accident. Accordingly, the jury's finding in favor of Welsbach is not inconsistent with its finding that defendant Ammann & Whitney Consulting Engineers, P.C. (A&M), who was responsible for inspecting the site ensuring continued maintenance, was negligent and is based on a fair interpretation of the evidence (*see* CPLR 4404(a); *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]).

The motion court correctly dismissed plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) as Welsbach was not an owner as that term is defined by the Labor Law. Welsbach was responsible for installation of the pole and electrical cable but did not remain on site after its installation and had no continuing duty to maintain it (*see Morales v Spring Scaffolding*, 24 AD3d 42, 46-47 [1st Dept 2005]). To the extent Welsbach could be held liable under Labor Law § 200, based upon improper installation, said claim has been rendered academic by the jury's finding that it was not negligent.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9344 Olga Kapilevich, Index 104716/08
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

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

_____

Law Offices of William Pager, Brooklyn (William Pager of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about October 25, 2011, which, insofar as appealed from, granted the cross motion of defendant City of New York for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

The City established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she tripped and fell on a metal vault cover located within a crosswalk after it suddenly began to shake. The City submitted evidence showing that it did not have prior written notice of the condition that

caused plaintiff to fall (*see* Administrative Code of City of New York § 7-201[c][2]).

In opposition, plaintiff failed to raise a triable issue of fact. Neither the permits issued by the City for the location nor the notice of violation issued by the Department of Environmental Protection for an unspecified failure by nonparty Consolidated Edison to comply with the terms and conditions of a Department of Transportation (DOT) permit provided the City with prior written notice of the loose metal vault cover (*see Laing v City of New York*, 71 NY2d 912, 914 [1988]).

Moreover, although the motion court improperly resolved factual issues in determining that plaintiff could not rely on a DOT record of a noisy plate in the area, on appeal, the City relies on an argument that was not raised below, namely, that a citizen complaint made through its 311 system does not constitute prior written notice. This Court will consider the argument because the issue is one of law which appears on the face of the record and could not have been avoided by plaintiff had it been raised by the City at the proper juncture (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). Since a verbal or telephonic communication to a municipal body that is reduced to writing cannot satisfy the

prior written notice requirement, there is no issue of fact for a jury to resolve (*see Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009]; *Batts v City of New York*, 93 AD3d 425, 427 [1st Dept 2012]).

Contrary to plaintiff's argument that the City was required to support its cross motion with affidavits or deposition transcripts from individuals with actual knowledge of the DOT's record search, supporting proof placed before the court by way of an attorney's affidavit will not defeat a party's right to summary judgment (*see Olan v Farrell Lines*, 64 NY2d 1092, 1093 [1985]). The testimony of the City's witness as to the DOT search that was conducted by another DOT record searcher was sufficient, because his testimony indicated that the other employee had searched the agency's records and that no prior written notice of the complained-of condition was found (*see*

Campisi v Bronx Water & Sewer Serv., 1 AD3d 166 [1st Dept 2003]).

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

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9345N- Index 104317/07
9345NA Hope Hodson,
Plaintiff-Respondent,

-against-

Vinnie's Farm Market, et al.,
Defendants-Appellants.

_____

Edward J. Carroll, Kingston, for appellants.

Alan D. Gordon, New York, for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered May 13, 2011, which, in this personal injury action, denied defendants' motion to, inter alia, vacate an order, same court and Justice, entered April 30, 2009, on defendants' default, granting plaintiff's motion to strike defendants' answers, and a judgment, same court and Justice, entered July 31, 2009, in plaintiff's favor in the total amount of $201,498.61, following defendants' default at the inquest, and to dismiss the complaint as abandoned pursuant to CPLR 3215(c), unanimously affirmed, without costs. Appeal from aforesaid order, entered April 30, 2009, unanimously dismissed, without costs, as taken from a nonappealable paper.

No appeal lies from an order entered on default (*see Baez-*

Ferreira v Marte, 86 AD3d 434, 434-435 [1st Dept 2011]). Defendants' remedy was an application to vacate the order pursuant to CPLR 5015 (*id.*).

The court properly declined to dismiss plaintiff's complaint as "abandoned" under CPLR 3215(c). That subdivision does not apply where, as here, the defendants served answers, albeit unverified ones (*see Myers v Slutsky*, 139 AD2d 709, 710 [2d Dept 1988]).

Defendants failed to proffer a reasonable excuse in support of their motion to vacate their defaults (*see* CPLR 5015[a][1]; *LePatner & Assoc., LLP v Horowitz*, 81 AD3d 472 [1st Dept 2011]). The record belies defendants' claims that they believed the action was discontinued and that they were not served with various documents in this action, including notice of plaintiff's motion to strike their answers. Indeed, the record shows that defendants were served with and received notice of plaintiff's motion, and that they also failed to respond to approximately 39 letters, notices, demands, and correspondence regarding the action. In any event, defendants waived any objection to personal jurisdiction by not raising it in a pre-answer motion or in their answers (CPLR 3211[e]).

In view of defendants' lack of a reasonable excuse for their

defaults, it is unnecessary to consider whether they have demonstrated a meritorious defense (*see Aaron v Greenberg & Reicher, LLP*, 68 AD3d 533, 534 [1st Dept 2009]).

Defendants failed to preserve their challenge to the amount of the judgment awarded to plaintiff, since they never objected to the amount at the trial level (*see generally Griffin v Clinton Green S., LLC*, 98 AD3d 41, 47 [1st Dept 2012]). In any event, were we to review their argument, we would find that the amount awarded is not excessive.

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

ENTERED: FEBRUARY 21, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9346 In re Anthony Singleton Hall, Ind. 6154/11
[M-5884] Petitioner,

-against-

Hon. Lewis Bart Stone, etc., et al.,
Respondents.

_____

Anthony Singleton Hall, petitioner pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Remy Taborga of counsel), respondent pro se and Cyrus R. Vance, Jr., respondent.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: FEBRUARY 21, 2013

CLERK

Saxe, J.P., Freedman, Manzanet-Daniels, Gische, JJ.

9012 In re Jamal Morris, Ind. 4334/10
M-5107 Petitioner,

-against-

Hon. Leonard Livote, etc., et al.,
Respondents.

_____

The Bronx Defenders, Bronx (V. Marika Meis of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for Hon. Leonard Livote, respondent.

Robert T. Johnson, District Attorney, Bronx (Tammy M. Vadasz of counsel), for Robert T. Johnson, respondent.

_____

Application for a writ of prohibition granted, without costs and disbursements, respondents prohibited from prosecuting petitioner for any crimes arising out of the acts underlying Bronx County Indictment No. 4334/10, and the indictment dismissed.

Opinion by Freedman, J. All concur.

Order filed.