SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 26, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Renwick, DeGrasse, Román, JJ.

8577-
8577A Roy W. Lennox, Index 309930/11
Plaintiff-Appellant,

-against-

Joan E. Weberman,
Defendant-Respondent.

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Stein Riso Mantel, LLP, New York (Allan D. Mantel, Kevin M. Donough and Adam J. Turbowitz of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Charles Fox Miller of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 30, 2012, which, to the extent appealed from, upon reargument, and denial of renewal, adhered to a prior order, entered February 10, 2012, granting defendant's motion for pendente lite relief to the extent of awarding her tax-free maintenance in the amount of $38,000 per month, directing plaintiff to pay, inter alia, defendant's unreimbursed medical expenses up to $2,000 per month, interim counsel fees of $50,000, and expert fees of $35,000, and holding plaintiff's cross motion

for summary judgment and for counsel fees in abeyance, unanimously modified, on the facts, to provide that the aforesaid pendente lite relief shall be treated as an advance on the 50 percent of the parties' Joint Funds (as defined in the parties' prenuptial agreement) to which defendant is entitled pursuant to the prenuptial agreement, and otherwise affirmed, without costs. Appeal from the February 10, 2012 order, unanimously dismissed, without costs, as superseded by the appeal from the latter order.

We find that the court properly applied the formula set forth at Domestic Relations Law § 236 (B)(5-a)(c)(2)(a) (*see Khaira v Khaira*, 93 AD3d 194 [1st Dept 2012]) in calculating defendant's temporary spousal maintenance award. Specifically, the court listed all 19 of the enumerated factors, explained how 7 of them supported an upward deviation to $38,000 per month from the $12,500 a month in guideline support, and found that $38,000 per month was not "unjust or inappropriate."

We further find that the court properly imputed an annual income to plaintiff of $2.29 million when it computed maintenance, since this was his income on the most recent tax return. A court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential (*see Hickland v*

Hickland, 39 NY2d 1 [1976], *cert denied* 429 US 941 [1976]). The court properly took into account plaintiff's income from his investments, voluntarily deferred compensation, and substantial distributions (*see* Domestic Relations Law §§ 236[B)[5-a][b][4]; 240[1-b][b][5][i], [iv]), which was $50.5 million the previous year.

We reject plaintiff's argument that defendant waived temporary maintenance in the parties' prenuptial agreement. Notwithstanding that defendant waived any claim to a final award of alimony or maintenance in the prenuptial agreement, the court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance (*see Tregellas v Tregellas*, 169 AD2d 553 [1st Dept 1991]; *see also Vinik v Lee*, 96 AD3d 522 [1st Dept 2012]). Under the circumstances of this case, however, we deem it appropriate to charge the interim awards against the one-half share of the marital property to which defendant is entitled under the prenuptial agreement. In so doing, we find it significant that the parties provided in the agreement that each waived any right to the separate property of the other, that living expenses were to be paid out of the marital property, and, as previously noted, that the marital property would be equally

divided in the event of divorce. We also find it significant that, here, the equal division of the marital property to which the parties agreed will leave each of them with substantial wealth.

Domestic Relations Law § 237(a) authorizes the court in its discretion to direct either spouse to pay counsel fees to the other spouse "to enable the other [spouse] to carry on or defend the action or proceeding" (*see also Charpié v Charpié*, 271 AD2d 169, 172 [1st Dept 2000]). The court's award of interim counsel fees of $50,000 and expert fees of $35,000 was warranted under the circumstances where the parties' assets, appear to be anywhere from $77 million to $90 million. In any event, the amounts awarded were significantly less than the $200,000 and $75,000 amounts defendant requested for interim counsel and expert fees, respectively. While there are some funds in defendant's possession, plaintiff is in a far better financial position than defendant (see *Prichep v Prichep*, 52 AD3d 61, 66 [2d Dept 2008]), and defendant should not have to deplete her assets in order to have legal representation comparable to that

of plaintiff (*see Wolf v Wolf*, 160 AD2d 555, 556 [1st Dept 1990]).

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 26, 2013

CLERK

Friedman, J.P., Acosta, Saxe, Renwick, Freedman, JJ.

8694 William P.,
Petitioner-Respondent,

-against-

Yojacni P.,
Respondent-Appellant.

_____

Morrison & Foerster LLP, New York (Reema S. Abdelhamid of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Graham Morrison of counsel), for respondent.

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Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 7, 2011, which denied respondent's objections to a prior order, same court (Kemp J. Reaves, Support Magistrate), entered on or about April 7, 2011, which modified an order of support, unanimously affirmed, without costs.

The Support Magistrate's finding that respondent failed, despite multiple opportunities in a three-year period, to present credible proof of her income and his finding that she lacked credibility are supported by the record (*see Matter of Jennifer H.S. v Damien P.C.*, 50 AD3d 588 [1st Dept 2008], *lv denied* 12 NY3d 710 [2009]). For example, respondent testified that she worked washing hair at a beauty salon, but her 2009 Schedule C lists her as the sole proprietor of the salon. Respondent filed

two financial disclosure affidavits within months of each other, with her expenditures shown as markedly lower on the second than on the first and in any event far in excess of her reported income. Under the circumstances, the Support Magistrate was not bound to determine respondent's income solely from the figures reported on her 2008 and 2009 income tax returns, and appropriately set support based on the children's needs (*see Matter of Childress v Samuel*, 27 AD3d 295 [1st Dept 2006]). In view of the fact that there has been no finding that respondent is impoverished, the court appropriately declined to reach the issue of capping her arrears, as she requested, at $500 (*see Matter of Commissioner of Social Servs. v Campos*, 291 AD2d 203, 205 [1st Dept 2002]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8786N Agustin Paez, Index 117172/09
Plaintiff-Appellant,

-against-

1610 Saint Nicholas Avenue L.P., et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Rakower, J.), entered September 19, 2011, which granted defendants' motion to vacate their default in appearing in this action, unanimously reversed, on the law, without costs, the motion denied, and the matter remanded for further proceedings consistent herewith.

Defendants made their motion under CPLR 317 which permits a defendant who defaults in appearing to move for leave to defend an action "upon a finding of the court that he [or she] did not personally receive notice of the summons in time to defend and has a meritorious defense." The motion should have been denied because neither requirement of late receipt nor a meritorious defense has been met.

Defendants are alleged to be the owners and managers of the

premises where plaintiff was injured. By operation of Revised Limited Partnership Act (Partnership Law) § 121-109 and Limited Liability Company Law § 303, service upon each defendant was complete upon delivery of the summons and complaint to the Secretary of State on December 29, 2009. Accordingly, defendants were required to appear within 30 days thereafter (CPLR 320 [a]). Proof of service was filed on January 13, 2010 and this motion was made on or after July 13, 2011. The affidavit of Philip Tager, a principal of both defendants, does not meaningfully state when defendants received notice of this action. Instead, Tager makes the vague assertion that he first saw the summons and verified complaint when affidavits of service "were made available to us as exhibited in later court filings." The time period covered by Tager's affidavit could include January 13, 2010, the date proof of service was filed, as well as any other date prior to the making of defendants' motion. Therefore, Tager's affidavit is conclusory and insufficient for the purpose of demonstrating that defendants did not personally receive notice of the summons until it was too late to put in a defense (*see e.g. Morrison Cohen LLP v Fink,* 81 AD3d 467 [1st Dept 2011]).

Defendants' attempt to show a meritorious defense fares no

better. The motion court determined that a meritorious defense was set forth in defendants' proposed verified answer. This was error because the answer was verified by defendants' attorney who did not claim to have personal knowledge of the facts (*see e.g. Lopez v Trucking & Stratford,* 299 AD2d 187 [1st Dept 2002]). Moreover, it does not avail defendants to argue that the duty to maintain the premises was assumed by their tenant under a written lease. A building owner's statutory duty to maintain its premises in a reasonably safe condition remains nondelegable as between the owner and an injured party despite any contractual delegations of maintenance obligations by the owner to another party (*Wagner v Grinnell Hous. Dev. Fund Corp.,* 260 AD2d 265, 266 [1st Dept 1999].

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9024 Juan V. Fernandez, Index 20248/06
Plaintiff-Appellant,

-against-

BBD Developers, LLC, et al.,
Defendants-Respondents.

_____

Gorayeb & Associates, P.C., New York (John M. Shaw of counsel), for appellant.

Westermann Sheehy Keenan Samaan & Aydelott, Uniondale (Robert M. Conti of counsel), for respondents.

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Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 20, 2011, which denied plaintiff's motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff, an employee of subcontractor Casino Development, was performing demolition work on the top floor of a construction site located at 236 East 17th Street in Manhattan. The roof of the building was already off and plaintiff was directed by his supervisor to remove 500 pound steel beams, approximately 10 feet long, by cutting them with a torch and letting them drop down to the floor level below.

Plaintiff, who had to stand on a narrow exterior wall to

perform the work, was given a safety belt and rope. His supervisor helped him fasten the rope to the safety belt, and directed him to tie it to one of the beams that was not being removed. No one measured the rope to ensure it was shorter than the distance to the ground. When plaintiff and a co-worker pushed down a beam that was being cut, it somehow hit the security rope and plaintiff was pulled backwards off the exterior wall onto the concrete floor approximately 14 feet below.

To establish a cause of action under Labor Law § 240(1), a plaintiff must "show that the statute was violated and that the violation proximately caused his injury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]; *see also Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 50 [2004]). Liability is contingent upon the existence of a hazard contemplated in § 240(1) and a failure to provide, or the inadequacy of, a safety device of the kind enumerated in the statute (*see Narducci v Manhasset Bay* Associates, 96 NY2d 259 [2001]). The injured worker's contributory negligence is not a defense (*see Bland v Manocherian*, 66 NY2d 452 [1985]; *Ernish v City of New York*, 2 AD3d 256, 257 [1st Dept 2003]). However, if adequate safety devices are provided and the worker either chooses for no good reason not to use them, or misuses them, the plaintiff will be

deemed the sole proximate cause of his injuries, and liability will not attach under § 240(1) (*see Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]).

Plaintiff met his initial burden on the motion with evidence that he fell through the open roof while in the course of demolishing the building and that the safety device he was given — a safety belt with a rope which may have been as long as 30 feet — failed to prevent his fall (*see generally Blake v Neighborhood Hous. Servs. of NY City*, 1 NY3d 280, 289 [2003]; *Collado v City of New York*, 72 AD3d 458 [1st Dept 2010]; *Williams v 520 Madison Partnership*, 38 AD3d 464 [1st Dept 2007]; *Kyle v City of New York*, 268 AD2d 192 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]).

Defendants argue that the safety belt and rope were not defective and provided adequate protection, and that plaintiff's failure to tie the rope to a length that would have prevented him from hitting the floor below was the sole proximate cause of his injuries. However, a plaintiff cannot be the sole proximate cause of his or her injuries where uncontroverted evidence shows that the plaintiff followed his or her supervisor's instructions and did not, on his or her own initiative, take a foolhardy risk which resulted in injury (*see Harris v City of New York*, 83 AD3d

104 [1st Dept 2011]). Here, plaintiff did not unilaterally elect to use a rope that was too long to protect him. His supervisor directed him to use the rope, and helped fasten it to plaintiff's safety belt (*see Romanczuk v Metropolitan Ins. and Annuity Co.*, 72 AD3d 592 [1st Dept 2010]). The supervisor instructed plaintiff to tie the rope to a beam that was not being cut and defendants have not presented evidence demonstrating that plaintiff was instructed to measure or shorten the rope when he did so. Nor did defendant refute plaintiff's testimony that he had worked for Casino for only three months and had not been provided with instruction on how to use a safety belt and rope. Furthermore, plaintiff fell through an unprotected opening and was not provided with other safety devices which would have prevented his fall. Nor was he provided with any hoisting equipment or any type of chain to prevent the beams he was cutting from swinging, dropping or hitting his safety rope.

Given these circumstances, defendants have not shown that plaintiff, through intentional misuse or other egregious misconduct, neutralized the adequate protections afforded him or that plaintiff was the sole proximate cause of the accident *(see Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d at 39; *Allen v New York City Tr. Auth.*, 35 AD3d 231 [1st Dept 2006]). Any

negligence on plaintiff's part in the use of the safety rope would amount, at most, to contributory negligence (*see Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207, 207-208 [1st Dept 2003]; *Gizowski v State of New York*, 66 AD3d 1348, 1349 [4th Dept 2009]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

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

9056 Michael Chenkin, Index 100116/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Michael Chenkin, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Cathy H. Chang of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 6, 2011, which granted defendant's motion to dismiss the complaint, and denied plaintiff's motion for leave to amend the complaint, unanimously affirmed, without costs.

The dismissal of plaintiff's state tort claims was proper, either because those claims were not included in the notice of claim, because they were untimely or because the facts alleged failed to state a cause of action. Plaintiff's cause of action under 42 USC § 1983 (*see Monell v Department of Social Servs. of the City of New York*, 436 US 658, 690 [1978]), based on a claimed policy under which the police automatically arrest the accused in domestic disputes regardless of whether the criminal conduct of which they are accused is "trivial," was also properly dismissed.

While a notice of claim is not a prerequisite for such a claim (*see Wanczowski v City of New York*, 186 AD2d 397 [1st Dept 1992]), the allegations failed to state a viable § 1983 claim. The police are authorized to make arrests upon reasonable cause to believe that the person being arrested has committed a misdemeanor constituting a family offense (*see* CPL 140.10[4][c]), and plaintiff's arrest fell within these parameters.

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 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9347 The People of the State of New York, Ind. 2687/10
Respondent,

-against-

Naiquan Walters,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 12, 2011, as amended April 26 and April 28, 2011, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously affirmed.

Defendant's arguments concerning evidence of uncharged crimes are entirely unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. The probative value of this evidence outweighed its prejudicial effect.

Most of the evidence supporting the element of intent to sell came from a civilian witness, who saw defendant engaging in

what reasonably appeared to be drug transactions shortly before defendant's arrest, as well as on prior occasions. Defendant argues that testimony about events on prior dates was inadmissible evidence of criminal propensity. However, a material issue in the case was whether the civilian witness had misidentified defendant. The witness's testimony that he observed defendant conducting hand-to-hand transactions outside his building in the past was probative of his ability to make a reliable identification. The fact that the witness had seen defendant engaging in criminal activity explained why he focused on defendant, and the value of this evidence would have been unduly restricted had it been limited to testimony that the witness had simply seen defendant on unspecified prior occasions (*see e.g. People v Matthews*, 276 AD2d 385 [2000], *lv denied* 96 NY2d 736 [2001]).

The fact that the witness was unable to identify the objects defendant had sold on the prior occasions did not undermine the probative value of this evidence, since "any person observing defendant..., using good common sense, would have, in the totality of circumstances, concluded that defendant was involved in the sale of narcotics" on those occasions (*People v Graham*, 211 AD2d 55, 60 [1995], *lv denied* 86 NY2d 795 [1995]). We also

find that defendant was not prejudiced by the lack of an advance ruling, or the lack of limiting instructions.

Defendant's arguments concerning expert testimony on street-level drug sales, and the court's instructions on that subject, are likewise unpreserved, and we decline to review them in the interest of justice. We note that defendant conceded that an officer could give the testimony at issue on the basis of his experience as a narcotics officer; defendant only objected to labeling the officer an expert witness. As an alternative holding, we also reject them on the merits. The court properly exercised its discretion in admitting the officer's brief and limited testimony that drug sellers often keep a stash of drugs hidden nearby. Defendant did not have any drugs in his possession when arrested, and was repeatedly observed returning to a trash can, near which the drugs were ultimately recovered. Defendant made an issue of the absence of any drugs on his person, and jurors might not have been familiar with the use of hidden stashes (*see People v Brown*, 97 NY2d 500, 505-507 [2002]). The court's instructions on expert testimony were sufficient to convey the applicable standards.

We have considered and rejected defendant's ineffective assistance of counsel argument (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9348 Peter Cooke-Zwiebach, et al., Index 104181/06
Plaintiffs-Appellants,

-against-

Robert I. Oziel,
Defendant,

Bernard H. Vogel, et al.,
Defendants-Respondents.

_____

Hubell & Associates LLC, New York (Richard A. Hubell of counsel), for appellants.

Davis S. Hammer, New York, for respondents.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 6, 2011, which, to the extent appealed from as limited by the briefs, denied plaintiffs' cross motion for summary judgment as against defendant Bernard H. Vogel, unanimously affirmed, without costs.

This action alleging fraud and conversion arises out of the misconduct of defendant Oziel while a member of defendant law firm (*see Matter of Oziel*, 66 AD3d 145 [2d Dept 2009]), a limited liability partnership. Plaintiffs failed to establish, as a matter of law, that defendant Vogel "shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by him . . . or by any person under his . .

. direct supervision and control while rendering professional services on behalf of such registered limited liability partnership" (Partnership Law § 26[c][i]). Indeed, the wording of the partnership agreement does not establish, as a matter of law, that Vogel had supervisory control over Oziel. Nor does the record conclusively establish that Vogel knew, or reasonably should have known, of Oziel's malfeasance.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9351 In re Charles DaCruz, Index 106833/11
Petitioner-Appellant,

-against-

Banking Department of the
State of New York, et al.,
Respondents-Respondents.

Westerman Ball Ederer Miller & Sharfstein, LLP, Uniondale (Richard F. Harrison of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered February 2, 2012, denying the petition to annul respondents' determination, dated October 4, 2011, which denied petitioner's application for a Mortgage Loan Originator (MLO) license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioner lacked the character and general fitness to hold an MLO license is rationally based on the record and not arbitrary and capricious (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]; *Matter of Gallo v State of N.Y., Off. of Mental Retardation & Dev. Disabilities*, 37 AD3d 984 [3d Dept 2007]). In January 2007, the

National Association of Securities' Dealers' (NASD) National Adjudicatory Council affirmed an NASD hearing panel's findings that, in 1998 and 1999, while working as a registered securities representative, petitioner failed to disclose sales incentive compensation and made baseless price predictions when recommending a security to customers, in violation of the antifraud provisions of the federal securities laws and NASD rules. The Council permanently barred petitioner from working in the securities industry "in all capacities," and ordered him to disgorge the $67,000 he had received from his financial misconduct.

In addition to the NASD decision, respondents considered, among other things, mitigating factors, such as petitioner's age at the time of the misconduct in 1998 and 1999, the amount of time that had elapsed since the misconduct, and favorable reference letters by mortgage loan customers dating from 2009 and 2010. Contrary to petitioner's contention, the fact that respondents weighed factors unfavorable to him more heavily than those favorable to him does not support a finding that they did not consider the favorable factors (*see Arrocha*, 93 NY2d at 366-367).

Petitioner's argument that respondents failed to show a

"direct relationship" between his misconduct and his duties as an MLO rests on the incorrect premise that they are required to abide by the antidiscrimination provisions of the Correction Law (*see* Correction Law § 752). By their terms, these protections extend only to persons convicted of crimes (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 611 [1988]). They have no application here, where petitioner was stripped of his securities license in a regulatory proceeding but was not convicted of any crime.

Moreover, pursuant to the 2009 amendments to the Banking Law (*see* Banking Law § 599-e[1][b]), even if petitioner had been convicted of a crime, Correction Law § 752 would not avail him (*see Matter of Rampolla v Banking Dept. of the State of N.Y.*, 93 AD3d 526 [1st Dept 2012]). In any event, respondents could rationally have concluded that there was a "direct relationship" between petitioner's securities-related misconduct and his prospective duties as an MLO (*see* Banking Law § 599-m[4][d] [MLO must report any "action or proceeding brought against him or her

by a state or federal governmental unit or self-regulatory organization in connection with a financial services-related activity or business or involving fraud, misrepresentation, consumer deception, larceny or perjury"]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9357 Excise Bond Underwriters, Index 604433/06
Plaintiff-Appellant,

-against-

Zurich American Insurance
Company, etc., et al.,
Defendants-Respondents.

_____

John W. Russell, New York, for appellant.

Scarola Malone & Zubatov LLP, New York (Richard J.J. Scarola of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 1, 2011, which, inter alia, granted defendants' motion to dismiss the complaint for failure to comply with discovery orders, unanimously affirmed, with costs.

After finding that plaintiff had failed to comply with three prior discovery orders, the motion court issued a further order, dated December 17, 2010, which directed plaintiff to produce documents related to the calculation of withdrawal amounts for certain former members and to produce other documents in camera. Following defendants' motion to dismiss for non-compliance, the issue was referred to a Special Referee to hear and report. The Special Referee determined that plaintiff had failed to comply, but nonetheless, gave plaintiff an additional opportunity to

comply. Plaintiff still failed to comply and the Special Referee issued a report recommending dismissal. Defendants then made a motion to confirm the Special Referee's report. In opposition, plaintiff produced materials it claimed were responsive to the December 17, 2010 order and otherwise offered the deposition of its CEO to explain how the calculations were made. No in camera materials were ever produced. The motion court reviewed the materials provided and correctly found that they were not responsive. The CEO's deposition is no substitute for the documents. Under these circumstances, the motion court appropriately exercised its discretion dismissing the complaint as a discovery sanction (*see: Arts4all, Ltd. v Hancock,* 54 AD3d 286 [1st Dept 2008, *affd*. 12 NY3d 846 [2009]). Plaintiff's contentions that its failure to produce the requested materials was not willful and contumacious and that its conduct has not prejudiced defendants are without merit.

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9358 Commissioners of the State Insurance Fund,
Plaintiff-Respondent,

-against-

Private One of New York, LLC, doing business as, New York Airport Service,
Defendant-Appellant.

Index 401412/09

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Goldberg & Rimberg, PLLC, New York (Alexander Markus of counsel), for appellant.

Michael Miliano, Deputy General Attorney, New York (Isaac N. Guy Okafor of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 1, 2011, which granted plaintiff Commissioner of the State Insurance Fund of New York's motion for summary judgment in its action to recover $453,358.95 in workers' compensation policy premiums due to the State Insurance Fund (SIF) with statutory interest from November 30, 2008, and denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly determined that defendant owes workers' compensation premiums to SIF for its employees that were leased from employee leasing companies. Under the Rules set

forth in the Workers' Compensation Rating Manual, defendant could have ensured that its leased employees were covered by workers' compensation policies by obtaining the coverage directly or by having the employee leasing company obtain a separate policy naming defendant as an additional insured. Since there is no evidence in the record of the latter, SIF properly concluded that defendant was providing the workers' compensation coverage itself and was responsible for paying the premiums.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9360 Philip Ralph Belpasso, Index 100363/11
Plaintiff-Appellant,

-against-

Port Authority of New York
and New Jersey,
Defendant-Respondent.

_____

Philip Ralph Belpasso, appellant pro se.

James M. Begley, New York (Megan Lee of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 8, 2011, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff failed to demonstrate that any papers or pleadings previously served upon defendant satisfied the statutory notice of claim requirements which require, among other things, that the notice of claim be sworn to by the claimant and served at least 60 days prior to commencement of an action against defendant (*see* McKinney's Uncons Laws of NY § 7107, § 7108). Absent compliance

with the notice of claim requirement, the court lacks subject matter jurisdiction (*see Lyons v Port Auth. of N.Y. & N.J.*, 228 AD2d 250 [1st Dept 1996]; *Luciano v Fanberg Realty Co.*, 102 AD2d 94, 96 [1984]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli J.P., Acosta, Freedman, Richter, Gische, JJ.

9361 Fernando Venegas, Index 110511/08
Plaintiff-Appellant,

-against-

Parmjit Signh, et al.,
Defendants-Respondents.

_____

Belluck & Fox LLP, New York (Michael A. Macrides 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, New York County (George J. Silver, J.), entered January 12, 2012, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied to the extent it sought dismissal of plaintiff's claim of "permanent consequential" and "significant limitation" injuries to his left shoulder and lumbar spine and his 90/180-day claim, and otherwise affirmed, without costs.

Plaintiff alleges that he was struck by defendants' taxi while crossing the street. As a result of the accident, plaintiff sustained injuries that left him home-bound and unable to work for over three months and eventually required spinal

fusion surgery on his lumbar spine and arthroscopic surgery to repair a rotator cuff tear.

Defendants met their prima facie burden of showing that plaintiff did not sustain serious injury to his lumbar spine, left knee, or left shoulder as a result of the accident. Defendants submitted, inter alia, affirmed expert reports opining that plaintiff had preexisting degeneration and no traumatic injuries in his shoulder and lumbar spine, and that any knee injury had resolved.

In opposition, plaintiff raised an issue of fact as to his shoulder injury by submitting the affirmation of his treating orthopedic surgeon, who opined that the MRI films showed evidence of a tear, diagnosed a rotator cuff tear and impingement after surgery, and measured significant limitations in range of motion at a recent examination. Based upon his examinations, observations made during arthroscopic surgery, and review of the MRI films, he opined that plaintiff's left shoulder injuries were caused by the accident. Contrary to defendants' contention, plaintiff's orthopedist sufficiently addressed causation by proffering a "different, yet equally plausible" opinion from that of defendants' experts (*Vaughan v Leon*, 94 AD3d 646, 648 [1st Dept 2012]; *see Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482

[1st Dept 2011]).

As to the lumbar spine, plaintiff raised an issue of fact by submitting the affirmation of his orthopedic surgeon, who described permanent qualitative limitations in use of the lumbar spine following fusion surgery, including instability requiring use of a cane (*see Delgado v Paper Tr., Inc.*, 93 AD3d 457 [1st Dept 2012]). Moreover, defendants' independent expert found significant quantitative limitation in lumbar flexion upon recent examination, and with respect to causation, plaintiff's orthopedic surgeon, while acknowledging degenerative changes, opined that they were post-traumatic in origin (*see Perl v Meher*, 18 NY3d 208, 219 [2011]).

As the plaintiff has met the threshold, plaintiff is entitled to recover for all the injuries incurred as a result of the accident.

Defendants met their burden with respect to plaintiff's 90/180-day claim by relying on their experts' opinions that the injuries were not causally related to the accident. Plaintiff's evidence that his injuries were caused by the accident, and his physician's statements that he was totally disabled for over

three months during the relevant period is sufficient to raise an issue of fact (*see Martinez v Goldmag Hacking Corp.*, 95 AD3d 682 [1st Dept 2012]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9363 Drucilla Alfonso, Index 400038/09
Plaintiff-Respondent,

-against-

Metropolitan Transit Authority,
Defendant,

New York City Transit Authority,
Defendant-Appellant.

_____

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered July 25, 2011, upon a jury verdict, insofar as appealed from as limited by the briefs, awarding plaintiff $450,000 for past pain and suffering and $800,000 for future pain and suffering, unanimously affirmed, without costs.

Plaintiff, a 52-year-old office worker, fractured her right wrist, and injured her neck and right shoulder, after she was struck by a truck owned by the Transit Authority, and operated by an Authority track worker. Plaintiff sustained a comminuted intra-articular fracture of the distal radial metaphysis of her right wrist, and a cervical herniated disc. A closed reduction

was performed in efforts to repair the wrist. When that failed, an open reduction surgery was performed with internal fixation (a plate and screws), which will remain in the wrist permanently. She underwent physical therapy for three months for her wrist, and an additional six months for her shoulder. Plaintiff was left with reduced ranges of motion, continued pain, and progressive arthritis in her wrist.

The jury's award for $450,000 for past pain and suffering and $800,000 for future pain and suffering did not deviate materially from reasonable compensation under the circumstances (*see Diouf v New York City Tr. Auth.*, 77 AD3d 600 [1st Dept 2010]; *Ramos v City of New York*, 68 AD3d 632 [1st Dept 2009]; *Hayes v Normandie LLC*, 306 AD2d 133 [1st Dept 2003], *lv dismissed* 100 NY2d 640 [2003]; *Cabezas v City of New York*, 303 AD2d 307 [1st Dept 2003]; CPLR 5501[c]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9364 In re Fabian J.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about January 4, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and two counts of menacing in the third degree, and placed him on enhanced supervision probation for a period of 12 months, unanimously modified, on the law, to the extent of vacating the menacing finding under the fifth count of the petition and dismissing that count, and otherwise affirmed, without costs.

We reject appellant's arguments concerning the sufficiency

and weight of the evidence supporting the "aided by another person actually present" (Penal Law § 160.10[1]) element of second-degree robbery (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the inference that a second person, acting at appellant's direction, took part in the robbery by placing himself where he could intimidate the victim and be ready to render immediate assistance to appellant (*see e.g. People v Stokes*, 278 AD2d 18 [2000], *lv denied* 96 NY2d 763 [2001]).

The fifth count of the petition was jurisdictionally defective. The factual allegations described a contingent threat of possible future harm, which did not constitute third-degree menacing (*see* Penal Law § 120.15).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9365 Facie Libre Associates I, LLC, et al., Plaintiffs-Respondents, Index 651696/11

-against-

SecondMarket Holdings, Inc., Defendant-Appellant.

_____

O'Hare Parnagian LLP, New York (Robert A. O'Hare Jr. of counsel), for appellant.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., New York (Dominic J. Picca of counsel), for respondents.

_____

Order, Supreme Court, New York County, (Shirley Werner Kornreich, J.), entered August 10, 2012, which, to the extent appealed from, denied defendant's motion to dismiss the cause of action alleging intentional misrepresentation, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Dismissal of the negligent misrepresentation claim is warranted because plaintiffs failed to allege any out-of-pocket loss as a result of the subject transaction, as opposed to lost profits *(see Lama Holding Co. v Smith Barney,* 88 NY2d 413, 421 [1996]). Although defendant raised this argument for the first

time on appeal, "[s]o long as the issue is determinative and the record on appeal is sufficient to permit our review, we may consider a new legal argument raised for the first time in this Court" (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9366 In re Joshua P.,

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 (Karen M. Griffin of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Jeanette Ruiz, J.), entered on or about January 11, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of sexual abuse in the first and third degrees, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was supported by 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. Although, at the fact-finding hearing, the young victim was unable to provide any incriminating testimony, her statement to

hospital personnel immediately after the incident was properly admitted pursuant to CPLR 4518, and it established the charges against appellant. While appellant points to factors allegedly undermining the reliability of the victim's statement at the hospital, these factors are outweighed by the presence of corroborating evidence. Both the victim's mother and the victim's 10-year-old sister observed conduct that strongly indicated sexual abuse (*see e.g. Matter of Justique R.*, 99 AD3d 597 [1st Dept 2012]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9367 The People of the State of New York, Ind. 4683/08
Respondent,

-against-

David Galindez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Anthony Lekas 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 (Judith Lieb, J.), rendered on or about November 18, 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 26, 2013

CLERK

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

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9368 Canofi Master LDC, etc., et al., Index 651801/11
Plaintiffs-Respondents,

-against-

The ComVest Group, et al.,
Defendants-Appellants.

_____

Akerman Senterfitt LLP, New York (Michael C. Marsh and Scott M. Kessler of counsel), for appellants.

Akin Gump Strauss Hauer & Feld LLP, New York (Douglas A. Rappaport of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about June 19, 2012, which granted plaintiffs' motion to vacate the partial stay granted on defendants' prior motion to compel arbitration, unanimously affirmed, without costs.

Vacatur of the partial stay was a provident exercise of discretion in light of the timely amendment of the complaint as of right (*see* CPLR 3025[a]) and the discontinuance of the arbitrable claims against the signatory to the agreement containing the arbitration clause. We reject defendants' present

attempt to raise arguments against vacatur with respect to non-signatories and certain claims that it had previously failed to advance.

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9370 In re Kuriakose Mathew, Index 100741/11
Petitioner-Appellant,

-against-

Coler Goldwater Specialty Hospital
and Nursing Facility, et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered February 16, 2012, dismissing this proceeding brought pursuant to CPLR article 78 seeking to, among other things, compel respondents to reinstate petitioner's employment as a respiratory therapist, unanimously affirmed, without costs.

Respondents' termination of petitioner's employment was rational and was not arbitrary and capricious or contrary to law (*see Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363 [1999]). At the time of the termination, petitioner did not have a valid active license as a respiratory therapist, which was a minimum job requirement (*see Matter of Felix v New York City Dept. of Citywide Admin. Servs.*, 3 NY3d 498 [2004]).

Petitioner was not entitled to a hearing, as there was no triable issue of fact (*see* CPLR 7804[h]). Indeed, petitioner admitted that he did not have a valid license when he was terminated from his employment (*see Matter of Moogan v New York State Dept. of Health*, 8 AD3d 68, 69 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9371N In re Jacqueline Lopez, Index 102517/12
Petitioner-Appellant,

-against-

The City of New York,
Respondent-Respondent.

_____

Decolator, Cohen & DiPrisco, LLP, Garden City (Joseph L. Decolator of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 26, 2012, which denied petitioner's application for leave to file a late notice of claim, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the application granted.

Petitioner was in a motor vehicle accident while she was a passenger in a Police Department vehicle owned by respondent City of New York. The Police Department conducted a prompt investigation into the accident, and petitioner was examined by a Police Department physician shortly thereafter. Thus, the overall circumstances support the inference that respondent had actual notice of the claim within 90 days of its accrual (*see Matter of Gerzel v City of New York*, 117 AD2d 549, 550-551 [1st

Dept 1986]) and respondent failed to rebut petitioner's demonstration of the absence of prejudice. Its conclusory assertions of prejudice, based solely on the delay in serving the notice of claim, are insufficient (*see Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 449 [1st Dept 2011]; Matter of Ansong v City of New York, 308 AD2d 333, 334 [1st Dept 2003];

Given respondent's actual knowledge, within a reasonable time after the accident, of the essential facts underlying petitioner's claim and the lack of prejudice, petitioner's unexplained delay in seeking leave to serve a late notice of claim is of minimal significance (*see Bertone Commissioning v City of New York*, 27 AD3d 222, 222-224 [1st Dept 2006]; *Richardson v New York City Tr. Auth.*, 210 AD2d 38 [1st Dept 1994]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9372 The People of the State of New York, Ind. 3824/07
Respondent,

-against-

Mauro Amaya,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Lester Adler, J.), rendered July 30, 2009, as amended October 30, 2009, convicting defendant, after a jury trial, of burglary in the third degree, and sentencing him to a term of two to six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There was ample evidence that defendant unlawfully entered an apartment with intent to commit a crime. A videotape showed defendant rummaging through a drawer, mattress, and coat in the victim's apartment. The locks on the doors to the apartment and the bedroom were broken and the victim noticed that his Social Security card, passport, and $2,400 in cash, which he had stored in the same

areas where defendant was seen rummaging, were missing.

The court properly declined to charge criminal trespass in the second degree as a lesser included offense since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, that he was guilty of that charge but not of the greater offense (*see generally People v James*, 11 NY3d 886 [2008]). Defendant's actions had no rational explanation other than that he entered intending to find valuable items to steal (*see People v Warfield*, 6 AD3d 218 [1st Dept 2004], *lv denied* 3 NY3d 650 [2004]; *People v Mauricio*, 215 AD2d 326 [1st Dept 1995], *lv denied* 86 NY2d 738 [1995]). Defendant's alternative theory as to why he was rummaging through the victim's property is speculative and "at war with common sense" (*People v Zokari*, 68 AD3d 578, 578 [2009], *lv denied* 15 NY3d 758 [2010]).

The record does not support defendant's assertion that, in a colloquy about the parameters of a *Sandoval* ruling made by another justice, defendant requested the trial court to modify

that ruling. Since defendant made no application to modify the prior ruling, the court did not err in failing to revisit it sua sponte (*see People v Freeman*, 253 AD2d 692 [1st Dept 1998], *lv denied* 92 NY2d 982 [1998]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9373 Oasis Sportswear, Inc., Index 115500/07
Plaintiff,

-against-

Patricia Rego, et al.,
Defendants.
- - - - -
[And A Third-Party Action]
- - - - -
Patricia Rego, et al.,
Third-Party Plaintiffs-Appellants,

-against-

CBIZ Mahoney Cohen, Inc., etc., et al.,
Third-Party Defendants-Respondents.

_____

Kevin T. Mulhearn, Orangeburg, for appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (William J. Kelly of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about January 24, 2012, which, to the extent appealed from as limited by the briefs, granted third-party defendants' motion for summary judgment dismissing third-party plaintiffs' breach of contract cause of action, unanimously affirmed, with costs.

The court correctly dismissed the breach of contract claim as duplicative of the time-barred negligence claim, which was

essentially a professional malpractice claim (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 109 [1st Dept 2001]). Third-party plaintiffs failed to allege facts sufficient to show that the accounting contract entered into between plaintiff Oasis and third-party defendant CBIZ was intended to benefit third-party plaintiffs (*LaSalle*, 285 AD2d at 108-109 [1st Dept 2001]). Accordingly, third-party plaintiffs failed to allege third-party beneficiary status (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786 [2006]). Nor did they allege any promises or assurances made to them by CBIZ.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9376 In re Georges P.,

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

Yvelisse A.
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Carol Kahn, New York, for appellant.

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

_____

Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about March 27, 2012, which, insofar as appealed from, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supported the finding of permanent neglect. Despite the diligent efforts exerted by the agency to strengthen and encourage the parental relationship, which included referring respondent for a mental health

evaluation, attempting to assist her in obtaining suitable housing and scheduling regular visits with the child (*see Matter of Nahajah Lituarrah Lavern K. [Tiffany Renee W.]*, 67 AD3d 565 [1st Dept 2009]), respondent failed to plan for the child's future. Respondent did not avail herself of the services offered by the agency, refused to provide her contact information, and failed to consistently visit the child (*see Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

A preponderance of the evidence demonstrated that the termination of respondent's parental rights was in the child's best interests. The child resided in his foster home since 2007, and wanted to be adopted by his foster mother, who wished to adopt him, and respondent failed to overcome the deficiencies that led to the child's placement (*see Matter of Brandon R. [Chrystal R.]*, 95 AD3d 653 [1st Dept 2012], *lv denied* NY3d , NY Slip Op 60620 [2013]). Respondent's contention that the matter should be remanded for an in camera hearing is unpersuasive, as there is no requirement that the Family Court conduct an in camera hearing with the child (*see Matter of Jayden C. [Michelle R.]*, 82 AD3d 674, 675 [1st Dept 2011]). Furthermore, under the circumstances presented, although the agency caseworker had testified that the child had been somewhat

conflicted about adoption, he also testified that the child understood that adoption would allow him the most stable home, which was important to the child.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz DeGrasse, Román, JJ.

9378 Anna Evangelista, Index 107648/09
Plaintiff-Appellant,

-against-

The Church of St. Patrick, et al.,
Defendants-Respondents.

_____

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

Chesney & Nicholas, LLP, Baldwin (Stephen V. Morello of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered January 18, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff was allegedly injured when she slipped and fell on a patch of ice on the sidewalk outside defendants' premises. Defendants submitted, inter alia, the testimony of their maintenance supervisor that he inspected the subject sidewalk approximately 50 minutes prior to plaintiff's fall and saw no ice to remove or to apply salt to (*see Roman v Met-Paca II Assoc., L.P.*, 85 AD3d 509 [1st Dept 2011])

In opposition, plaintiff failed to raise a triable issue of

fact. Although plaintiff contradicts the testimony of the maintenance supervisor by stating she saw and slipped on ice, there is no evidence that defendants either created the condition through the negligent removal of snow and ice prior to the accident, or that the ice existed for a sufficient period of time prior to the accident for defendants to discover and remedy the condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *compare Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]).

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9379 Sandra S. Adelsberg, Ind. 36317/06
Plaintiff-Appellant,

-against-

Kenneth Amron,
Defendant-Respondent.

_____

Kornstein Veisz Wexler & Pollard, LLP, New York (Daniel J. Kornstein of counsel), for appellant.

Polly N. Passonneau, P.C., New York (Polly N. Passonneau of counsel), for respondent.

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Order, Supreme Court, Bronx County (La Tia W. Martin, J.), entered January 13, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's cross motion for an order directing that the parties' retirement assets be distributed without postcommencement earnings and/or losses in value as a result of market forces, unanimously reversed, on the law, without costs, and the cross motion granted.

A stipulation is an independent contract which is subject to the principles of contract law (*see Matter of Caruso v Ward*, 146 AD2d 22 [1st Dept 1989]). A court should construe a stipulation made in open court in accordance with the intent of the parties and the purpose of the stipulation by examining the record as a whole (*see id.*; Sklerov *v Sklerov*, 231 AD2d 622 [2d Dept 1996]).

The parties' postjudgment stipulation entered into on May 13, 2010 provided that the commencement date of the divorce action would serve as the valuation date for the distribution of their retirement assets (*see* Domestic Relations Law § 236 [B][4][b]; *Greenwald v Greenwald*, 164 AD2d 706 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]), which they had previously agreed to distribute equally. While the stipulation was indeed silent on the issue of whether the transfers of all retirement accounts were with losses and/or earnings, courts are required to equitably distribute not only the parties' assets but their liabilities as well (*see Mahoney-Buntzman v Buntzman* (12 NY3d 415, 420 [2009]). Nevertheless, the stipulation was clear that the valuation date of the retirement assets would be the commencement date of the action, and therefore plaintiff is only required to share in the earnings and/or losses as of that date.

She did not stipulate that valuation as of the date of the commencement of the action was to also include "post-commencement" value changes attributable to market forces.

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9381 The People of the State of New York, Ind. 1842/98
Respondent,

-against-

Kamal Gajadhar,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about June 14, 2011, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied* 558 US__, 130 S Ct 552 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). The circumstances of the underlying crime were egregious, and they indicated a potential that a reoffense by

defendant would cause a high degree of harm. Defendant has not shown that his age (late 40s) or any of the other factors he cites warranted a downward departure.

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9382 Inmaculada Perez, Index 300408/09
Plaintiff-Respondent,

-against-

Abbey Associates Corporation,
et al.,
Defendants-Appellants.

_____

Scher & Scher, P.C., Great Neck (Robert A. Scher of counsel), for appellants.

Sheldon J. Tashman, P.C., New York (Sheldon J. Tashman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 7, 2011, denying defendants' motion for summary judgment, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff testified at her deposition that she slipped and fell on rainwater on an outdoor staircase leading to the basement garbage disposal area. She stated that she did not see any dangerous or unsafe conditions on the steps, other than the rainwater. Defendants made a prima facie showing that it was raining until approximately one hour before the accident, and the building superintendent stated that there were no violations

relating to the stairs. Defendants sustained their burden of demonstrating that they neither caused nor created the condition which was the proximate cause of plaintiff's injuries (*see Brewer v Stonehill & Taylor Architects*, 93 AD3d 462 [1st Dept 2012]).

The burden shifted to plaintiff to raise a triable issue of fact (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). Plaintiff's affidavit and the letter from her expert were insufficient to sustain her burden. Plaintiff's affidavit appears to have been tailored to avoid the consequences of her deposition testimony *(see Singh v Actors Equity Holding Corp.*, 89 AD3d 488 [1st Dept 2011]). The expert's letter was irrelevant because, based on plaintiff's testimony, the conditions cited were not the proximate cause of her fall. Nor did plaintiff's expert demonstrate that the Building Code sections alleged were applicable to the exterior stair where

plaintiff fell.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9383-
9383A-
9383B-
9383C-
9383D In re Ashley R.,
and Others,

Dependent Children under
Eighteen Years of Age, etc.,

Latarsha R.,
Respondent-Appellant,

Catholic Guardianship Society
and Home Bureau,
Petitioner-Respondent.

_____

Israel P. Inyama, New York, For appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the children Alexis Kaliyah H., Anthony Kenneth H., Ashley R., and Treyvaughn Andrew H.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child Jayquan Tyrik R.

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Orders of fact-finding and disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about April 21, 2011, which, to the extent appealable, upon a finding of permanent neglect as to the five subject children, terminated respondent mother's parental rights to three of the children, Treyvaughn,

Anthony, and Alexis, and transferred custody of those children to petitioner agency Catholic Guardianship Society and Home Bureau for the purpose of adoption, unanimously affirmed, without costs. Appeal from that portion of the orders which granted a suspended judgment with respect to the other two children, Ashley and Jayquan, unanimously dismissed, without costs.

Petitioner agency met its burden of establishing, by clear and convincing evidence that all five of the subject children were permanently neglected (*see* Social Services Law § 384-b[7][a]). Petitioner made diligent efforts to strengthen and encourage the parent-children relationship by, among other things, scheduling and facilitating visitation with the children and referring respondent for various parenting programs and mental health services (*see e.g. In re Sheila G.*, 61 NY2d 368, 381 [1984]; *Matter of O. Children*, 128 AD2d 460, 464 [1st Dept 1987]). Despite such efforts, respondent did not seem to improve or gain insight into the children's care or the reasons for their placement in foster care (*see In re Irene C.*, 68 AD3d 416 [1st Dept 2009]).

In addition, respondent's visitation with the children remained consistently poor. During the majority of the supervised visits, respondent was unable to control the

children's behavior, the visits erupted into violence and respondent failed to engage or bond with the children. Moreover, respondent could not handle the children during the few unsupervised, overnight visits, and, on at least one occasion, one child returned from an extended visit with visible bruises and welts (*see In re Toshea C.J.*, 62 AD3d 587, 587 [1st Dept 2009]).

As to Anthony, Alexis and Treyvaughn, a preponderance of the evidence supported the determination that it was in their best interests to terminate respondent's parental rights and free them for adoption by their foster parents, who wish to adopt them, have provided a loving and stable home for all three children, and have met the children's special needs (*see In re Anthony P.*, 84 AD3d 510, 511 [1st Dept 2011]; *In re Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007]).

The appeal from that portion of the orders granting a one-year suspended judgment with respect to Ashley R. and Jayquan R., is moot since the term has expired (*see Matter of Jonathan F.*, 3 AD3d 336 [1st Dept 2004]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9385-
9386 Index 303374/08

Helena S. Martin, et al.,
Plaintiffs-Appellants,

-against-

DNA Restaurant Corp., etc., et al.,
Defendants,

Nwachukwu C. Nwosisi, et al.,
Defendants-Respondents.

_____

George S. Bellanttoni, White Plains, for appellants.

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

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered March 14, 2012, which granted defendants Nwosisi, Alapo, Nnah, and The Eternal Sacred Order of Cherubim and Seraphim Church of NY, Inc.'s motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 2, 2012, which denied plaintiffs' motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

The record demonstrates that none of the provisions of the Administrative Code of the City of New York on which plaintiffs

rely as a predicate for imposing liability on defendants, who are out-of-possession landlords with a limited right of reentry, is applicable (*see Kittay v Moskowitz*, 95 AD3d 451 [1st Dept 2012]; *Boateng v Four Plus Corp.*, 22 AD3d 323 [1st Dept 2005]). Former sections 27-127 and 27-128 were general, rather than the requisite specific, safety provisions (*Kittay*, 22 AD3d at 452). Sections 27-375(d)(2) and (f) do not apply because the single step is not an "interior stair[]"; it does not "serve[] as a required exit," i.e., as defined in § 27-232, a required "means of egress from the interior of [the] building to an open exterior space." The step does not serve as an exit, is not a ramp, and is not near a door (*see* §§ 27-370[d]; 27-377[c][5]; 27-371[h]).

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9388 Elaine Savio, Index 306152/09
Plaintiff-Appellant,

-against-

Rose Flower Chinese Restaurant, Inc.,
Defendant-Respondent.

_____

Scott A. Wolinetz, New York, for appellant.

Kim, Patterson & Sciarrino, LLP, Bayside (Stephen E. Kwan of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered November 18, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this personal injury action, defendant made a prima facie showing that the claimed defect, a worn and slippery step, at the entrance to a restaurant, was not actionable. Defendant established, inter alia, the lack of prior complaints or injuries relating to the step and the lack of any claimed structural defect (*see e.g. Cintron v New York City Tr. Auth.*, 77 AD3d 410, 411-412 [1st Dept 2010]*; Santiago v United Artists Communications*, 263 AD2d 407, 408 [1st Dept 1999]). In

opposition, plaintiff failed to raise a triable issue of fact (*see e.g. Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Román, JJ.

9389 Arbor Realty Funding, LLC, Index 651079/11
Plaintiff-Respondent,

-against-

Herrick, Feinstein LLP,
Defendant-Appellant.

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Herrick, Feinstein LLP, New York (Susan T. Dwyer of counsel), for appellant.

Tannenbaum, Halpern, Syracuse & Hirschtritt LLP, New York (Vincent J. Syracuse of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 29, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the first, second, fourth and fifth causes of action, unanimously affirmed, without costs.

Defendant argues that even if, but for its allegedly erroneous legal advice as to zoning issues, plaintiff would not have made bridge loans to the developer of a residential tower at 303 East 51st Street in Manhattan, plaintiff cannot establish legal malpractice or negligent representation because it cannot demonstrate that the zoning advice proximately caused its loss on the defaulted loans. Plaintiff made the loans in mid-2007. Defendant contends that the crane collapse at the project site in

March 2008, which killed seven people, the market collapse beginning in late 2007 and continuing through 2008, and plaintiff's insufficient response to the Department of Buildings letter notifying plaintiff of its intent to revoke the project's building permits, constituted intervening events that severed the causal link between defendant's zoning advice and plaintiff's loss (*see Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]).

There is, however, evidence in the record that raises an issue of fact as to causation (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). It appears that potential takeout lenders had concerns about the zoning issues even before March 2008. To the extent later events contributed to plaintiff's loss, they are properly considered by a fact-finder (*see e.g. Schauer v Joyce*, 54 NY2d 1 [1981]).

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, JJ.

9390 In re Kew Gardens Dev. Corp., Index 100859/12
Petitioner-Appellant,

-against-

Matthew M. Wambua, etc., et al.,
Respondents-Respondents.

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

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 21, 2012, which denied and dismissed the petition brought pursuant to CPLR article 78 to annul a determination of respondent Department of Housing Preservation and Development (HPD), denying petitioner's application for a tax exemption pursuant to RPTL 421-a, unanimously affirmed, without costs.

The determination was not arbitrary and capricious and was rational (*see 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]).

Section 421-a of the Real Property Tax Law provides for an exemption from local taxation for certain new multiple dwellings. It explicitly provides authority for a local housing

agency in a city with a population of one million or more to exclude certain new multiple dwellings through the passage of a local law (see RPTL 421-a [2][a][i]).

In 2006, under Local Law 58 of 2006, Administrative Code of City of NY § 11-245.1-b was enacted, and made effective on December 28, 2007. Pursuant to that provision, tax exemption benefits under RPTL 421-a for buildings in New York City may only be provided to multiple dwellings with certificates of occupancy indicating that there are four or more dwelling units in the building. Specifically, the provision states:

> "(c) No benefits under section four hundred twenty-one-a of the real property tax law shall be conferred for any multiple dwelling containing fewer than four dwelling units, as set forth in the certificate of occupancy, unless the construction of such multiple dwelling is carried out with substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality where such assistance is provided pursuant to a program for the development of affordable housing."

It is well settled that an "agency cannot promulgate rules or regulations that contravene the will of the Legislature. If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail" (*Weiss v City of New York*, 95 NY2d 1, 4-5 [2000] [internal citations omitted]). Further, a

special local law which is inconsistent with a general law "must give way to the later general [law]" *(Ling Ling Yung v County of Nassau*, 77 NY2d 568, 570-71 [1991]).

Here, it was undisputed that the subject property's certificate of occupancy states that there are three dwelling units in each building and that the development has not received any governmental assistance. It was also undisputed that construction on the property did not commence until June 2008. Thus, it was rational for HPD to determine that petitioner was not entitled to RPTL 421-a tax exemption benefits.

Petitioner's reliance on the "maisonette rule" (Rules of City of NY Department of Housing Preservation and Development [28 RCNY] § 6-02 [e][1]), which allowed for partial tax exemption for garden-type maisonettes meeting certain criteria, even if the certificate of occupancy was issued for three units, is misplaced. While that rule was not formally repealed, it conflicts with Administrative Code § 11-245.1-b., and is effectively superseded by the newer law. Indeed, for projects, like this one, commenced after the effective date of Administrative Code § 11-245.1-b., that section's requirement that the certificate of occupancy indicate that the dwelling

contains four or more units in order to be eligible for tax benefits under RPTL 421-a governs.

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

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, Román, JJ.

9391 Roger Dunson, Index 300327/08
Plaintiff-Appellant,

-against-

Riverbay Corporation,
Defendant-Respondent.

_____

Paul G. Vesnaver, PLLC, Baldwin (Victor A. Carr of counsel) for appellant.

Malapero & Prisco LLP, New York (Glenn E. Richardson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 11, 2012, which, to the extent appealed from, denied plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff testified at his deposition that, before May 2007, when the ceiling in his bathroom fell and allegedly caused him injuries, he complained to defendant on numerous occasions, and to the Department of Housing Preservation (DHP), which inspected his apartment twice. However, defendant denied that it received plaintiff's complaints, and DHP records suggest that no such complaints or inspections were made before the incident. Thus, there exist triable issues of fact whether defendant had actual notice of the defective condition (*see Figueroa v Goetz*, 5 AD3d

164, 165 [1st Dept 2004]).

While defendant's records contain a February 2007 work order that confirms that plaintiff complained, at least once, about the bathroom ceiling, the work order, which is dated approximately four months before the incident at issue, does not state whether there was a leak, or whether repairs were ordered, and therefore does not demonstrate conclusively that defendant had notice of the specific defective condition (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]).

Given that plaintiff had represented to defendant that he had no witness information before filing his summary judgment motion, less than two weeks before he filed his note of issue and certificate of readiness for trial affirming that all discovery was complete, the motion court properly refused to consider a letter and affidavit from a previously undisclosed notice witness (*see Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]). In any event, the letter complained only of "dangerous plaster that is falling from the ceiling" in the apartment, without specifying the bathroom ceiling, and therefore does not suffice as notice of the particular dangerous condition that caused plaintiff's injury (*see Piacquadio*, 84 NY2d at 969).

The only evidence that plaintiff submitted of violations of

Multiple Dwelling Law §§ 78(1) and 309(1)(b) and Administrative Code of the City of New York §§ 27-2005, 27-2013, and 27-2026 is DHP notices of violation that are not only based on inspections that post-date the incident at issue, but also do not mention any leak in the bathroom ceiling.

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

ENTERED: FEBRUARY 26, 2013

CLERK

Friedman, J.P., Saxe, DeGrasse, Román, JJ.

9392N Richard Djeddah, Index 111319/95
Plaintiff,

Rachel Djeddah,
Plaintiff-Appellant,

-against-

Daniel Turk Williams,
Defendant-Respondent.

_____

Rachel Djeddah, appellant pro se.

Callan, Koster, Brady & Brennan, LLP, New York (Janine L. Peress of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 24, 2011, which denied plaintiff Rachel Djeddah's motion to amend the complaint, unanimously affirmed, without costs.

Even if plaintiff received treatment from defendant, any such treatment ceased in or around June 1994. The limitations periods for the claims plaintiff seeks to add to the complaint expired long ago (*see* CPLR 214-a [medical malpractice]; 215[3]

[defamation and intentional infliction of emotional distress]). The "relation back" doctrine does not avail plaintiff because her original pleading asserted only a loss of consortium claim (*see* 83 AD3d 590 [1st Dept 2011]; CPLR 203[f]).

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

ENTERED: FEBRUARY 26, 2013

CLERK