SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 18, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Saxe, Freedman, Feinman, JJ.

9662 Gwendolyn Vasquez, et al., Index 302061/10
Plaintiffs-Respondents,

-against-

Baldwin A. Almanzar, et al.,
Defendants-Appellants,

Elvis Boamah,
Defendant.

_____

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

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered August 1, 2012, which denied the motion of defendants Baldwin A. Almanzar and NYLL Management, Ltd. for summary judgment dismissing the claims of plaintiff Gwendolyn Vasquez as against them on the ground that she did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and, upon a search of the record, summary judgment granted to defendant Boamah. The Clerk is directed to enter judgment

accordingly.

Defendants Almanzar and NYLL Management met their prima facie burden of showing that Vasquez did not suffer a serious injury. With respect to the alleged lumbar spine injury, defendants submitted, inter alia, the affirmed report of a radiologist who opined that the MRI of Vasquez revealed no evidence of recent traumatic injury causally related to the accident, and that the changes shown in the MRI were degenerative and due to a preexisting condition (*see Phillips v Tolnep Limo Inc.*, 99 AD3d 534 [1st Dept 2012]; *Williams v Horman*, 95 AD3d 650 [1st Dept 2012]).

In opposition, Vasquez failed to raise a triable issue. She submitted, inter alia, an unaffirmed MRI report, which included findings of "likely" degenerative changes in the lumbar spine, and her physicians failed to address those findings, thus supporting the conclusion that she had a preexisting condition (*see Lazu v Harlem Group, Inc.*, 89 AD3d 435 [1st Dept 2011]).

Regarding the alleged left knee injuries, defendants established their entitlement to judgment as a matter of law by submitting the affirmed report of their orthopedist, who examined Vasquez and found full range of motion, no significant abnormalities, and a preexisting condition. In opposition,

Vasquez failed to raise a triable issue of fact as to the existence of a serious injury under the "permanent consequential limitation of use of a body organ or member" category, as she did not submit objective evidence of permanent limitations based on a recent examination of her left knee (*see Zambrana v Timothy*, 95 AD3d 422, 422 [1st Dept 2012]). Moreover, the medical reports submitted by Vasquez showed that her surgeon found that she had full range of motion in her knee six weeks after her surgery.

However, "a significant limitation [of use of a body function or system] need not be permanent in order to constitute a serious injury" (*Estrella v Geico Ins. Co.*, 102 AD3d 730, 731 [2d Dept 2013][internal quotations omitted]; *see Partlow v Meehan*, 155 AD2d 647, 647 [2d Dept 1989]). Indeed, a "'permanent consequential limitation' requires a greater degree of proof than a 'significant limitation', as only the former requires proof of permanence" (*Altman v Gassman*, 202 AD2d 265, 265 [1st Dept 1994]; *see Oberly v Bangs Ambulance, Inc.*, 271 AD2d 135, 137 [3d Dept 2000], *affd on other grounds* 96 NY2d 295 [2001]). "Insurance Law § 5102(d) does not expressly set forth any temporal requirement," although assessment of the limitation's significance does require consideration of its duration in addition to its extent and degree (*see Estrella*, 102 AD3d at 731-32; *Griffiths v Munoz*, 98

AD3d 997, 998 [2d Dept 2012]; *Partlow*, 155 AD2d at 648; *Jones v US*, 408 F Supp 2d 107, 120 [SD NY 2006]). Therefore, the lack of a recent examination, while sometimes relevant, is not dispositive by itself in determining whether a plaintiff has raised a triable issue of fact in opposing a defendant's prima facie evidence under the "significant limitation" category.

Our decision in *Townes v Harlem Group, Inc.* (82 AD3d 583, 583-584 [1st Dept 2011]), should not be read to require a plaintiff to submit a recent examination as a necessary prerequisite to overcoming judgment as a matter of law in every instance of a claim under the "significant limitation" category. To the extent that the *Townes* Court did require a recent examination, it was due to the specific facts present in that case. Furthermore, the precedents that decision relied upon in requiring a recent examination do not specifically address the degree of proof necessary for a "significant limitation" claim as opposed to a "permanent consequential limitation" claim, instead conflating these two categories of serious injury (*see Antonio v Gear Trans Corp.*, 65 AD3d 869, 870 [1st Dept 2009] [determining that plaintiffs failed to raise a triable issue of fact on "a significant or permanent consequential limitation"]; *Thompson v Abbasi*, 15 AD3d 95, 97 [1st Dept 2005][referring only to "serious

injury"]).

Here, the reports submitted by Vasquez failed to refute the finding of defendants' expert that the condition identified in Vasquez's knee was preexisting and not causally related to the accident. Therefore, Vasquez failed to raise a triable issue of fact under either the "permanent consequential limitation" or "significant limitation" category.

Dismissal of the 90/180-day claim is warranted in light of Vasquez's bill of particulars wherein she alleged that she was confined to home for approximately one week following her left knee surgery and that she could not perform her household duties for one week after the accident. She denied being confined to bed and made no claim for lost earnings since she was unemployed at the time of the accident (*see Phillips*, 99 AD3d at 535; *Mitrotti v Elia* 91 AD3d 449, 450 [1st Dept 2012]). Vasquez's assertions that her ability to do everyday activities had been significantly limited was insufficient to raise a triable issue of fact without objective medical evidence to substantiate her claims (*see Colon v Bernabe*, 65 AD3d 969, 970-971 [1st Dept 2009]).

Since Vasquez is unable to meet the serious injury threshold, dismissal of her claims as against nonmoving defendant Boamah is also warranted (*see e.g. Britton v Villa Auto Corp.*, 89 AD3d 556 [1st Dept 2011]).

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

ENTERED: JUNE 18, 2013

CLERK

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

9731 The People of the State of New York, Ind. 4520/09
Respondent,

-against-

Delbart Loretta,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 23, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him to a conditional discharge, unanimously affirmed.

The court properly denied defendant's suppression motion. In a drug-prone neighborhood, the arresting detective saw defendant place what appeared to be an aluminum foil object, consistent with drug packaging, in his shirt pocket. With two other officers standing on either side of defendant, the detective approached defendant. As the detective approached, but before any police action other than the approach itself, defendant acted in a nervous manner and appeared to be using his

hand to block the officers' view of the pocket in which he had placed the object. The detective told defendant to stop moving his hand and asked him "if he had anything illegal or what he had in his pocket."

Contrary to defendant's contention, this police conduct constituted a level-two common-law inquiry, not a level-three seizure (*see e.g. People v Jenkins*, 209 AD2d 164 [1st Dept 1994]), and it was justified by, at least, a founded suspicion of criminality. Defendant's response to the detective's inquiry led to probable cause for defendant's arrest. The Court of Appeals' decision in *People v Garcia* (20 NY3d 317 [2012]) does not dictate a different result. In *Garcia* defendant's vehicle was pulled over because of a defective brake light. Aside from the faulty light, there was no indication of criminality by the occupants of the car; they merely appeared nervous and acted "furtive[ly]" by "stiffen[ing] up and "looking behind" upon being pulled over (*id.* at 320). The Court of Appeals agreed with this Court that a defendant's nervousness, without more, is not enough to give rise to a founded suspicion of criminality that allows for a common-law inquiry. Here, however, apart from seeming nervous, defendant was observed in a drug-prone neighborhood pulling what appeared to be an aluminum foil packet out of his pocket. The

arresting officer suspected that the aluminum foil contained cocaine because cocaine is often packaged in that manner. And, unlike *Garcia*, where the alleged "furtive" behavior was consistent with nervousness over being pulled over, here, defendant's attempt to block the officers' view of the shirt pocket in which he had placed the aluminum packet was consistent with someone in possession of a controlled substance attempting to avoid apprehension. These circumstances were sufficient to give the police the requisite founded suspicion to approach and question defendant.

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

ENTERED: JUNE 18, 2013

CLERK

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

10035 In re 150 RFT Varick Corp. doing business as Greenhouse, Petitioner, Index 104117/12

-against-

The New York State Liquor Authority, Respondent.

_____

Gary E. Divis, New York, for petitioner.

Jacqueline P. Flug, New York (Margarita L. Marsico of counsel), for respondent.

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Determination of respondent, dated October 15, 2012, which, after a hearing, cancelled petitioner's liquor license and imposed a $20,000 civil penalty, unanimously modified, on the law, to the extent of vacating the determination with respect to charges 1-4, 6-7, and 10-12, and remitting the matter to respondent for imposition of an appropriate penalty, and the proceeding brought pursuant to CPLR Article 78 (transferred to this Court by order of Supreme Court, New York County [Geoffrey D. Wright, J.], entered on or about November 30, 2012), otherwise disposed of by confirming the remainder of the determination, without costs.

Respondent's determination that petitioner suffered or permitted assaults to occur as alleged in charges 1, 3, 4, 6, 7,

and 10-12, and suffered or permitted the possession, use, or sale of drugs by a nightclub patron as alleged in charge 2, was not supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181 [1978]). Respondent failed to establish that petitioner knew or should have known of the alleged disorderly conditions asserted in these charges and tolerated its existence (*Matter of Playboy Club of N.Y. v State Liq. Auth.*, 23 NY2d 544, 550 [1969]). Seven of these charges involved sudden or spur of the moment acts of violence committed by club patrons. Notably, two of the assaults (charges 1 and 7) occurred in the women's bathroom and were not observed by security personnel, and a third assault (charge 4) stems from an incident involving a patron who was ejected from the club by security personnel. There is no evidence establishing that the patron was subjected to excessive force since she did not testify and the complaint report indicates that the complainant "sustained no injuries."

There is no support in the record for respondent's determination sustaining charge 2 which stems from an allegation that petitioner permitted the sale of drugs on its premises based on the conclusion that the seller was observed snorting cocaine at a table in the club. However, the complaint report does not

state that the seller was observed doing drugs in plain sight nor does the testimony of the police officers who were present. Thus, there is no substantial evidence that this drug transaction -- in which the seller apparently retrieved drugs from within a bathroom -- was readily observable by security personnel, and the facts do not justify the conclusion that petitioner suffered or permitted it (*see Matter of Missouri Realty Corp. v New York State Liq. Auth.*, 22 NY 2d 233, 238 [1968] [licensee did not suffer or permit employee's behavior that occurred surreptitiously in a bathroom]).

However, substantial evidence supported the other eight sustained charges, which relate to violations of Alcoholic Beverage Control Law § 106, failure to exercise adequate supervision over the premises in violation of State Liquor Authority Rule 54.2, allowing a sustained and continuing pattern of noise, disturbance, misconduct or disorder in violation of Alcoholic Beverage Control Law § 118, and two instances of use of

trade names without respondent's permission.

In light of the foregoing, we remand for the imposition of an appropriate penalty.

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

ENTERED: JUNE 18, 2013

CLERK

Sweeny, J.P., Saxe, Gische, Clark, JJ.

10253-
10254 Union Square Park Community Coalition, Inc., et al.,
Plaintiffs-Respondents,

-against-

New York City Department of Parks and Recreation, et al.,
Defendants-Appellants.

- - - - -

Union Square Partnership, Friends of the Union Square Dog Run, Victoria Owners Corp., Rothman's Union Square, Susan Kramer, Gail Fox, Buchbinder & Warren, LLC, Union Square Eye Care, and Vineyard Theatre,
Amici Curiae.

Index 102734/12

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for New York City Department of Parks and Recreation, Adrian Benepe, The City of New York and Chef Driven Market, LLC, appellants.

Davis Wright Tremaine LLP, New York (Victor A. Kovner and Camille Calman of counsel), for Urban Space Holdings, Inc., appellant.

Super Law Group, LLC, New York (Reed W. Super of counsel), for respondents.

Friedman Kaplan Seiler & Adelman LLP, New York (Jeffrey R. Wang of counsel), for amici curiae.

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered January 9, 2013, as amended on February 5, 2013, which granted plaintiffs' motion for a preliminary injunction

restraining defendants from altering Union Square Park's Pavilion to accommodate a restaurant, granting any further approvals for the restaurant, implementing a license agreement and operating the restaurant, and denied defendants' cross motion to dismiss the complaint, or, in the alternative, for summary judgment, unanimously reversed, on the law, without costs, plaintiffs' motion for a preliminary injunction denied, and defendants' cross motion to dismiss the complaint granted. The Clerk is directed to enter judgment accordingly.

The seasonal restaurant and holiday market concessions at issue do not violate the public trust doctrine (*see generally Friends of Van Cortlandt Park v City of New York*, 95 NY2d 623 [2001]), since they are permissible park uses (*see 795 Fifth Ave. Corp. v City of New York*, 15 NY2d 221 [1965]) and the concession agreements are revocable licenses terminable at will, not leases (*see Miller v City of New York*, 15 NY2d 34, 38 [1964]).

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10386 The People of the State of New York, Ind. 5459N/11
Respondent,

-against-

Andrea Boyd,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered April 11, 2012, as amended April 19, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of six years, unanimously affirmed.

When viewed as a whole (*see People v Ladd*, 89 NY2d 893, 895 [1995]), the court's main charge and its responses to a series of notes from the deliberating jury correctly instructed the jury on the agency defense. Defendant's main argument is that one of the court's supplemental instructions tended to direct a verdict.

However, this instruction essentially stated the principle that the agency defense is limited to "one who acts *solely* as an agent of a buyer" (*People v Ortiz*, 76 NY2d 446, 449 [1990] [emphasis added]), and it did not contradict the principles, thoroughly explained to the jury both before and after the instruction at issue, that "whether a particular defendant has acted only as an agent for the buyer is a factual question for the jury, which may consider [various] factors" (*id.*), and that "the receipt of an incidental benefit does not in itself negate an agency defense" (*People v Echevarria*, __ NY3d __, 2013 NY Slip Op 03019, *14 [Apr 30, 2013]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10389 Brown Harris Stevens Westhampton LLC, Index 110159/11
Plaintiff-Appellant,

-against-

Kelly Gerber,
Defendant-Respondent.

_____

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

Crowell & Moring LLP, New York (Alan B. Howard of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 4, 2012, which denied plaintiff's motion for, among other things, summary judgment on its claim for a real estate commission, unanimously affirmed, with costs.

The court properly denied plaintiff's second successive motion for summary judgment, since plaintiff failed to offer any newly discovered evidence or demonstrate other sufficient cause for making the second motion (*see 11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 81 AD3d 516, 517 [1st Dept 2011]). Defendant's deposition testimony, although not available at the time of the first motion, did not yield such new evidence as to warrant consideration of the second motion (*see Pavlovich v Zimmet*, 50 AD3d 1364, 1365 [3d Dept 2008]). Furthermore, the document

production, consisting of a series of emails between the parties and the proposed and final listing agreements, does not constitute new evidence, since they were available to the parties at the time of the first motion (*see id.*), and were extensively relied upon by the parties during oral argument of that motion.

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10390 In re Danielle Nevaeha S.E.,

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

Crystal Delores M.,
Respondent-Appellant,

Edwin Gould services for Children
and Families, et al.,
Petitioners-Respondents.

_____

Steven N. Feinman, White Plains, for appellant.

John R. Eyerman, New York, for respondents.

Andrew J. Baer, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about August 24, 2012, which, insofar as appealed from as limited by the briefs, upon a fact-finding determination that respondent mother permanently neglected the subject child, terminated the mother's parental rights and committed custody and guardianship of the child to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that the mother permanently neglected her daughter was established by clear and convincing evidence.

Despite diligent efforts made by the agency to encourage and strengthen the parental relationship, the mother failed during the relevant time period to plan for the future of the child (*see* Social Services Law § 384-b[7]). In particular, the record shows that petitioner met regularly with the mother to prepare a service plan and review her progress, arranged visitation between the mother and her child, and encouraged the mother to complete her drug treatment program. These efforts notwithstanding, the mother failed to complete her service plan within the statutorily relevant time frame (*see Matter of Jules S. [Julio S.]*, 96 AD3d 448 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]; *Matter of Dade Wynn F.*, 291 AD2d 218 [1st Dept 2002], *lv denied* 98 NY2d 604 [2002]).

A preponderance of the evidence supports the determination that it was in the best interests of the child to terminate the mother's parental rights rather than issue a suspended judgment (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Here, the child has lived most of her life with her foster parent with whom she maintains a positive relationship and who wants to adopt her and her older siblings. That the mother has made efforts to remain drug free does not warrant a different finding

under the circumstances (*see Matter of Jada Serenity H.*, 60 AD3d 469 [1st Dept 2009]; *Matter of Rutherford Roderick T.*, 4 AD3d 213 [1st Dept 2004]).

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

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10391- Index 30164/10
10391A In re The State of New York,
Petitioner-Respondent,

-against-

Charada T.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Deborah P. Mantell of counsel), for appellant.

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

_____

Orders, Supreme Court, New York County (Patricia Nuñez, J.), entered on or about January 6, 2012, which, upon a jury finding of mental abnormality, and upon a finding made after a dispositional hearing that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, unanimously affirmed, without costs.

The court erred in permitting the State expert to testify regarding respondent's admission, in a presentence report, that he was in the vicinity when a rape, with which he was never charged, was committed. While this statement was sufficiently reliable to show that respondent was in the vicinity of the rape, it was not reliable for the purpose of showing that he committed

the rape (*see Matter of State of New York v Floyd Y.*, 102 AD3d 80, 84, 87 [1st Dept 2012]). Nevertheless, this error was harmless given the expert's reliance on two brutal sexual assaults to which respondent pleaded guilty and a third that he admitted committing, and given the court's appropriate limiting instructions, which served to dispel any prejudice (*see id.* at 87).

The court properly permitted the State's expert to testify regarding evaluations by sex offender program staff indicating that respondent "did not understand his sexual assault cycle," that he minimized his criminal conduct, and that his treatment was "unsuccessful" (*see Floyd Y.*, 102 AD3d at 86). Indeed, Mental Hygiene Law § 10.08(c) provides that the State is entitled to request "any and all records and reports relating to the respondent's commission of a sex offense, the institutional adjustment and any treatment received by such respondent, and any medical, clinical or other information relevant to a determination of whether the respondent is a sex offender requiring civil management."

Respondent failed to preserve his argument that the court's alleged evidentiary errors deprived him of due process (*see Matter of State of New York v Trombley*, 98 AD3d 1300, 1302 [4th

Dept 2012], *lv denied* 20 NY3d 856 [2013]). In any event, the argument lacks merit (*see generally Matter of State of New York v Enrique T.*, 93 AD3d 158, 172 [1st Dept 2012], *lv dismissed* 18 NY3d 976 [2012]).

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

ENTERED: JUNE 18, 2013

CLERK

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

10392 In re Assembly Member Micah Z. Kellner, et al., Petitioners-Appellants, Index 102950/12

-against-

The City of New York Department of Sanitation, et al., Respondents-Respondents.

Albert K. Butzel Law Offices, New York (Albert K. Butzel of counsel), for appellants.

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

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for state respondents.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered November 29, 2012, denying the petition to declare that respondents City Department of Sanitation (DSNY) and State Department of Environmental Conservation (DEC) failed to comply with the State Environmental Quality Review Act (SEQRA), DEC's own rules, and the City's Solid Waste Management Plan, and to enjoin the City respondents from proceeding with construction of the 91st Street Marine Transfer Station until they complied therewith, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determinations of DSNY not to prepare and DEC not to require a Supplemental Environmental Impact Study (SEIS) were not affected by an error of law, arbitrary and capricious, or an abuse of discretion (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]; *Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 7-8 [1st Dept 2006]; *Matter of Coalition Against Lincoln W. Inc. v Weinshall*, 21 AD3d 215, 223 [1st Dept 2005], *lv denied* 7 NY3d 715 [2005]). As the lead agency, DSNY took the requisite "hard look" at the potential impacts of the delay in implementation and made a reasoned determination that an SEIS was not required. Petitioners' scenarios suggesting potential consequences of the delay are no more than speculation.

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

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10393 The People of the State of New York, Ind. 3333/09
Respondent,

-against-

Larry Dixon,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 20, 2011, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 10 years, unanimously affirmed.

The court properly denied defendant's suppression motion. After lawfully arresting defendant for robbery, the police lawfully searched the car in which he had been riding, including a closed container found in the trunk, based on probable cause to believe the car contained evidence or instrumentalities of the robbery. Since the search was based on the automobile exception (*see People v Blasich*, 73 NY2d 673 [1989]) rather than being a search incident to an arrest, the officers' right to search was

not affected by the fact that the occupants of the car had been removed and taken into custody. "[T]he justification to conduct such a warrantless search does not vanish once the car has been immobilized" (*Michigan v Thomas*, 458 US 259, 261 [1982]). Contrary to defendant's argument, there is nothing in *Arizona v Gant* (556 US 332 [2009]) that calls this principle into question (*see id.* at 347; *see also People v Green*, 100 AD3d 654, 655-656 [2d Dept 2012], *lv denied* 20 NY3d 1011 [2013]).

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10395 Keyon Williams, Index 103455/09
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

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

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered June 8, 2012, which, insofar as appealed from, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates that dismissal of the complaint was appropriate in this action where plaintiff was injured when, while playing basketball on an outdoor court, he tripped and fell over a large and highly visible crack on the court. Plaintiff was an experienced player and was aware that the subject court, where he had played on numerous occasions, had cracks. Under these circumstances, the motion court properly applied the assumption of risk doctrine because plaintiff was involved in an

athletic activity at a designated venue and was aware of the perfectly obvious risk of playing on the cracked court (*see e.g. Judge v The City of New York*, 101 AD3d 560 [1st Dept 2012]; *LaSalvia v City of New York*, 305 AD2d 267 [1st Dept 2003]).

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10396 The People of the State of New York, Ind. 4574/08
Respondent,

-against-

Jerome Jamison,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gregory Carro, J.), entered on or about January 5, 2010, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction (*see People v Judd*, 29 AD3d 431 [2006], *lv denied* 7 NY3d 709 [2006]). Although defendant's prior conviction of attempted rape in the first degree occurred in 1991, it involved a six-year-old girl. Furthermore, in 2008, defendant committed the underlying sex crime shortly after he had been placed on probation for his conviction of endangering the welfare of a child, based upon his stalking of a 10-year-old girl

and his attempt to lure her into his car. Even considering the mitigating factors cited by defendant, including his positive postrelease conduct, these "separate incidents, years apart, suggest[] a dangerous propensity" that supported the court's determination (*People v Poole*, 105 AD3d 654, 654 [1st Dept 2013]).

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10397 & M-2448 Anonymous, Plaintiff-Appellant, Index 314374/10

-against-

Anonymous, Defendant-Respondent.

_____

Raoul Felder & Partners, P.C., New York (Myrna Felder of counsel), for appellant.

Mulhern & Klein, New York (Jeff Klein of counsel), for respondent.

Karen D. Steinberg, New York, attorney for the children.

_____

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered October 17, 2012, which, after a nonjury trial, granted primary physical custody and sole legal custody of the parties' two children to defendant mother, with visitation to plaintiff father, unanimously affirmed, without costs.

The court's determination was based on a thorough assessment of the testimony of the parties and the court-appointed forensic expert, and has a sound and substantial basis in the record (*see Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). The evidence demonstrates that the acrimony and mistrust between the parties makes joint custody a nonviable option (*see Braiman v Braiman*, 44 NY2d 584, 589-590 [1978]). Indeed, the parties have disagreed on

most decisions with respect to the children, including important matters involving education, extracurricular activities and medical care. The record also shows that when the joint custody arrangement was in place during the pendency of this litigation, the father did not maximize the time that he spent with the children, as he often left the children with a caregiver.

The court appropriately weighed each party's strengths and weaknesses as a parent, and found the mother to be more willing to accept and address the children's respective special needs, which will be more conducive to their emotional and intellectual development (*see Lubit v Lubit*, 65 AD3d 954, 955 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* _ US _, 130 S Ct 3362 [2010]). The mother was also the children's primary caretaker before the commencement of this litigation (*id.*).

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

M-2448 - *Anonymous v Anonymous*

Motion to amend the caption to change the names of the parties granted to the extent indicated.

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10398 The People of the State of New York, Ind. 2291/10
Respondent,

-against-

Ariel Wilson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered January 24, 2011, convicting defendant, upon his plea of guilty, of criminal sexual act in the first degree, and sentencing him to a term of 23 years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. "The court was not obligated to inquire about a possible intoxication defense, because defendant said nothing about intoxication in his plea allocution itself, regardless of what he may have said on other occasions" (*People v Ortega*, 70 AD3d 416, 417 [1st Dept 2010], *lv denied* 15 NY3d 808 [2010]).

Defendant made a valid waiver of his right to appeal (*see*

People v Lopez, 6 NY3d 248 [2006]). Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10399 Derrick Clementson, et al., Index 101300/09
Plaintiffs-Appellants,

-against-

Anthony Price, Jr., et al.,
Defendants-Respondents.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Michael Villeck of counsel), for appellants.

Kay and Gray, Westbury (Theresa P. Mariano of counsel), for Anthony Price, Jr., respondent.

Martin, Fallon & Mullé, Huntington (Michael Jones of counsel), for David J. Lopez, respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 6, 2012, which granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to plaintiff Clementson's claim of permanent consequential or significant limitation to his lumbar spine, and otherwise affirmed, without costs.

Defendants made a prima facie showing that neither plaintiff suffered a serious injury by submitting the affirmed reports of a physician who found normal ranges of motion in all allegedly

injured body parts of both plaintiffs and a radiologist who opined that there was no trauma in Clementson's left knee or left ankle and that the bulging disc in his lumbar spine was attributable to degeneration, and that there was no injury or trauma in Lee's right shoulder or left ankle (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

In opposition, Clementson raised a triable issue of fact as to his lumbar spine by submitting an affirmation by his physician, who examined him in the period following the accident, then one year later, and again after the defense examination was conducted, and found range-of-motion deficits (*see Shu Chi Lam v Wang Dong*, 84 AD3d 515 [1st Dept 2011]). The physician also reviewed the MRI film showing a bulging disc, and adequately addressed the defense radiologist's opinion that such bulges are degenerative in origin by opining that the injury in this 23-year-old plaintiff with no history of back injury was caused by the accident (*see Eteng v Dajos Transp.*, 89 AD3d 506 [1st Dept 2011]).

However, Clementson's treating physician found near normal range of motion in the left knee, and stated that the MRI showed no abnormalities; moreover, the MRI report noting a tear was unaffirmed (*see Eisenberg v Guzman*, 101 AD3d 505, 506 [1st Dept

2012]). The physician found a partial tear in Clementson's left ankle, but no limitations (*see Dembele v Cambisaca*, 59 AD3d 352 [1st Dept 2009]; *Moore v Almanzar*, 103 AD3d 415 [1st Dept 2013]). Nevertheless, if Clementson prevails at trial on his serious injury claim, he will be entitled to recover also for his non-serious injuries caused by the accident (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

Plaintiff Lee failed to raise a triable issue of fact, as his physician's examination of all allegedly injured body parts showed normal ranges of motion, or minimal deficits (*see Moore v Almanzar*, 103 AD3d at 416; *Canelo v Genolg Tr., Inc.*, 82 AD3d 584, 585 [1st Dept 2011]).

Defendants demonstrated that neither Clementson nor Lee satisfied the 90/180-day category of serious injury, since neither of them alleged any inability to perform his usual and

customary activities during the relevant time period, and neither presented evidence sufficient to raise an issue of fact as to that category (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10401 Miguel Deasis, Index 307511/08
Plaintiff-Respondent,

-against-

Saladin K. Butler, et al.,
Defendants-Appellants,

Sergio D. Lorenzo,
Defendant.

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Adams, Hanson, Rego, Carlin, Hughes, Kaplan & Fishbein, Albany (Paul G. Hanson of counsel), for appellants.

Donald W. Becker, New York (Michael H. Zhu of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered July 30, 2012, which, insofar as appealed from, denied defendants-appellants' motion for summary judgment, unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident by submitting the affirmed reports of their orthopedist and dentist who both examined plaintiff and found full range of motion in both parts of the spine, and the jaw. In addition, the orthopedist concluded that plaintiff was not disabled and could

perform activities of daily living without restriction (*see Lavali v Lavali*, 89 AD3d 574 [1st Dept 2011]), and the dentist found no deviation, dislocation, or disability after jaw surgery (*see Luetto v Abreu*, 105 AD3d 558 [1st Dept 2013).

In opposition, plaintiff raised triable issues of fact by submitting the affirmations, and reports incorporated therein, of his treating orthopedist and oral surgeon. The orthopedist, who first examined plaintiff shortly after the accident, found range of motion limitations in all planes when compared to normal ranges of motion (*see Toure v Avis Rent A Car Sys, Inc.*, 98 NY2d 345, 350-351 [2002]), and opined that the injuries suffered by the 24-year-old plaintiff, who had no prior neck or back injuries, were caused by the accident (*see e.g. Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]; *Eteng v Dajos Transp.*, 89 AD3d 506 [1st Dept 2011]). The affirmation, and the records incorporated therein, of plaintiff's oral surgeon, who found internal derangement and disc displacement in the right and left temporomandibular joints during surgery, and persisting limitations and clicking of the jaw, approximately one month after surgery, opined that plaintiff had reached maximum medical improvement as of his most recent visit, that the injuries were permanent, and that plaintiff could be expected to suffer

significant disruptions in functional activities such as chewing or speaking, impaired social and personal functioning, and diminished overall quality of life (*Toure*, 98 NY2d at 350-351).

Although the MRI reports of plaintiff's radiologist were unaffirmed and, thus, inadmissible (see *Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011]), the MRI reports of defendants' radiologist confirmed the existence of disc herniations and bulges, providing an objective basis for the injuries (*see Toure*, 98 NY2d at 350-351).

Defendants' contention that there was a three-year gap in treatment between the day of the accident and the initial treatment of the jaw is unpreserved and, in any event, is undermined by the record, which shows that plaintiff complained of and sought treatment for pain in his jaw shortly after the accident.

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

ENTERED: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10402 In re Hsiu Yuan Wulin, Index 401648/11
Petitioner-Appellant,

-against-

New York State Office of Temporary
and Disability Assistance, et al.,
Respondents-Respondents.

_____

Hsiu Yuan Wulin, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for state respondent.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for municipal respondents.

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Judgment, Supreme Court, New York County (Laura Visitacion-Lewis, J.), entered November 3, 2011, denying the petition seeking, inter alia, to direct respondent Adult Protective Services (APS) to cease providing petitioner with voluntary protective services, and to direct respondent Commissioner of Social Services of the City of New York to withdraw and discontinue a related involuntary guardianship proceeding it commenced pursuant to CPLR article 81, and granting respondents' cross motions to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

To the extent that petitioner challenges respondent Office

of Temporary and Disability Assistance's (OTDA) determination directing APS to discontinue voluntary protective services, she is not aggrieved, since she was accorded the full relief that she requested (*see* CPLR 5511; *Parochial Bus. Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 544-545 [1983]). Nor was petitioner aggrieved by OTDA's failure to direct the discontinuance of involuntary guardianship proceedings, since, at that time, the article 81 involuntary guardianship proceedings had not yet been commenced.

To the extent that she seeks to challenge the order for involuntary guardianship entered in a separate article 81 proceeding, under a separate index number, petitioner may not use this article 78 proceeding as a vehicle for such review. Petitioner was free to raise any objections to orders entered in the article 81 proceeding in that proceeding itself.

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: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10403N Rosetta Marketing Group, LLC, et al., Index 654114/12
Plaintiffs-Appellants,

-against-

Steven Michaelson, et al.,
Defendants-Respondents.

_____

Jackson Lewis LLP, New York (Clifford R. Atlas and Peter R. Bulmer of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

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

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered December 19, 2012, which, in this breach of contract action, to the extent appealed from, denied plaintiffs' motion for a preliminary injunction, unanimously affirmed, with costs.

While the parties dispute the factual assertions surrounding the negotiation and execution of the separation agreements, which contain a one-year noncompete term, as well as whether those agreements concern and supersede the parties' earlier executed purchase agreement, which contains the disputed five-year term, the motion court correctly found that, overall, the comparative harm to the employee defendants in allowing enforcement of a five-year noncompete term is significantly greater than the harm

to the employer plaintiffs. Further, plaintiffs failed to establish, a likelihood of success on the merits (*see Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24-25 [1st Dept 2011]). Nor have plaintiffs shown that they would be irreparably harmed absent a preliminary injunction, as any harm could be compensated by money damages (*see GFI Sec., LLC v Tradition Asiel Sec., Inc.*, 61 AD3d 586, 586 [1st Dept 2009]).

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: JUNE 18, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10404N Kenneth Dlugaski, Index 307484/09
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey, et al.,
Defendants-Appellants.

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Segal McCambridge Singer & Mahoney, Ltd., New York (Simon Lee of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about December 4, 2012, which, insofar as appealed from, denied defendants' motion to transfer venue from Bronx County to New York County, unanimously affirmed, without costs.

Plaintiff was injured in a construction-site accident that occurred in New York County, and he commenced the instant action in Bronx County based on the residence of defendant Port Authority of New York and New Jersey (*see e.g. Rodriguez v Port Auth. of N.Y. & N.J.*, 293 AD2d 325 [1st Dept 2002]). In support of the motion to change the venue pursuant to CPLR 510(3), defendants submitted an affidavit from a safety manager employed

at the construction site by a nonparty company. The witness stated that he prepared the report for plaintiff's accident, that he would be inconvenienced by having to travel to Bronx County because he lived in New Jersey, and that he worked six days per week at the site in lower Manhattan, and needed to be able to immediately respond to safety incidents.

Here, the court exercised its discretion in a provident manner in denying the motion (*see e.g.*, *Bollman v Port Auth. of N.Y. & N.J.*, 17 AD3d 182 [1st Dept 2005]; *Argano v Scuderi*, 6 AD3d 211 [1st Dept 2004]). Defendants failed to show that the safety manager's testimony would be material. Moreover, defendants' contention that the witness would be seriously inconvenienced by a trial in Bronx County is unpersuasive (*see e.g. Pittman v Maher*, 202 AD2d 172, 177 [1st Dept 1994]; *Cardona v Aggressive Heating*, 180 AD2d 572, 573 [1st Dept 1992]; *compare Henry v Central Hudson Gas & Elec. Corp.*, 57 AD3d 452 [1st Dept 2008]).

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

ENTERED: JUNE 18, 2013

CLERK

Tom, J.P., Acosta, Saxe, Freedman, JJ.

10414 Abdoulaye Kone, Index 300522/10
Plaintiff-Respondent,

Issif Konate,
Plaintiff,

-against-

Jean Rodriguez,
Defendant-Appellant.

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Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel), for appellant.

Michael S. Grossman, New York, for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 27, 2012, which denied defendant's motion for summary judgment dismissing the complaint alleging serious injuries to plaintiff Abdoulaye Kone's cervical spine, lumbar spine, and left shoulder under the "permanent consequential limitation of use" and "significant limitation of use" categories of Insurance Law § 5102(d), unanimously modified, on the law, the motion granted to the extent of dismissing the claim alleging "permanent consequential limitation," and otherwise affirmed, without costs.

Defendant established prima facie absence of a serious injury by submitting the affirmed report of his orthopedist, who

examined plaintiff 2½ years after the accident and found full range of motion, negative test results, and resolved sprains in the cervical spine, lumbar spine, and left shoulder (*see Melo v Grullon*, 101 AD3d 452 [1st Dept 2012]; *Bailey v Islam*, 99 AD3d 633 [1st Dept 2012]). He also established lack of causation as to the lumbar spine and left shoulder by submitting the affirmed MRI reports of his radiologist, who reviewed the MRI films and concluded that the disc bulging and disc herniation in the lumbar spine, and subacromial bone spur in the left shoulder, were degenerative in nature, and found no evidence of acute trauma-related injury in either part of the body (*see Pannell-Thomas v Bath*, 99 AD3d 485, 485-486 [1st Dept 2012]).

Plaintiff failed to raise a triable issue of fact as to existence of a "permanent consequential limitation," as his orthopedist's findings of limitations and positive clinical test results in the cervical spine, lumbar spine, and left shoulder were not based on a recent examination, but on an examination that was performed over 14 months before the examination by defendant's orthopedist (*Vega v MTA Bus Co.*, 96 AD3d 506, 507 [1st Dept 2012]). Nevertheless, plaintiff raised a triable issue of fact as to "significant limitation of use" of all three parts of the body, as the affirmed report of his orthopedist shows

persisting meaningful limitations as of a year and three months after the accident (*see Vasquez v Almanzar*, __ AD3d __ [1st Dept 2013, Appeal No. 9662] [decided simultaneously herewith]; *see also Lopez v Senatore*, 65 NY2d 1017 [1985]; *Estrella v GEICO Ins. Co.*, 102 AD3d 730 [2d Dept 2013]). The orthopedist's opinion that plaintiff's injuries are directly related to the accident, based on his own examination, review of plaintiff's medical records, and plaintiff's reported history of an absence of prior problems in the neck, lower back, or left shoulder, sufficiently raises a triable issue of fact as to causation (*see Perl v Meher*, 18 NY3d 208, 218-219 [2011]; *Bonilla v Abdullah*, 90 AD3d 466, 467 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

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

ENTERED: JUNE 18, 2013

CLERK