SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 13, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6288 The People of the State of New York, Respondent, Ind. 27917C/09

-against-

Rubin Moye, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Edward M. Davidowitz, J.), rendered August 31, 2009, convicting defendant, after a nonjury trial, of disorderly conduct, and sentencing him to time served, unanimously affirmed.

Defendant was convicted of disorderly conduct under a theory that he recklessly created a risk of public inconvenience, annoyance, or alarm by obstructing traffic (*see* Penal Law § 240.20[5]). The People's proof demonstrated that even after an officer identified himself, defendant continued running from an unmarked police vehicle, zigzagging between the sidewalk and the street, and interfering with traffic.

Defendant's defense was that he was appropriately and justifiably running into and out of the street in order to escape from a suspicious van at night in a high-crime area and that he was taking evasive actions to avoid being hit by the pursuing van, which followed him onto the sidewalk.

Defendant's argument that the People's evidence is legally insufficient to support the conviction is unpreserved. As an alternative holding, assuming that the argument is preserved, we find that the conviction is supported by sufficient evidence. We further conclude that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Viewing the evidence as a whole in the exercise of our factual review powers, we find that the People presented sufficient evidence to refute defendant's defense beyond a reasonable doubt.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6293 In re Probate Proceeding, File No. 1057/09
Will of Robin Moles,
Deceased.
- - - - -
Elsie McCarthy, et al.,
Proponents-Respondents,

-against-

Christopher R. Ljungkull,
Contestant-Appellant.

_____

Ross & Orenstein LLC, Minneapolis, MN (Jeff I. Ross of counsel), for appellant.

Turret & Associates, P.C., Melville (Ira A. Turret of counsel), for respondents.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about May 16, 2011, admitting the document dated December 27, 2007 to probate as the last will and testament of Robin Moles, a/k/a Robin A. Moles, and bringing up for review an order, same court and Surrogate, entered on or about April 6, 2011, that granted proponents' motion for summary judgment dismissing the objection to probate based, inter alia, on undue influence and lack of testamentary capacity, unanimously reversed, on the law, without costs, the decree vacated, and the motion denied.

This proceeding relates to the validity of a will the deceased, Robin A. Moles, executed on December 27, 2007, in which

the deceased disinherited all of the beneficiaries of her longstanding earlier will, including her nephew, objectant Christopher Ljungkull, and left her entire estate, worth in excess of $8 million, to her long-time companion and caregiver, petitioner Elsie McCarthy. Ljungkull filed objections on the grounds that, inter alia, the deceased lacked testamentary capacity and executed the will under undue influence.

Because there are issues of fact as to whether the decedent understood the consequences of executing the 2007 will and whether she was under undue influence at the time she executed it, we reverse. Circumstantial evidence may demonstrate undue influence, provided that the evidence is substantial (*Matter of Walther*, 6 NY2d 49, 54 [1959]). Here, there is considerable circumstantial evidence. The facts and circumstances surrounding the will signing, the nature of the will, decedent's family relations, the condition of her health and mind, her dependency upon and subjection to the control of petitioner, the opportunity and disposition of petitioner to wield her influence over the decedent, and the acts and declarations of petitioner all raise questions as to whether or not there was undue influence over the decedent when she executed the will (*see Matter of Ryan*, 34 AD3d 212, 213 [2006], *lv denied* 8 NY3d 804 [2007]). In particular, a report Adult Protective Services issued several months prior to

the execution of the 2007 will found that the decedent's judgment was impaired and recommended implementation of an Article 81 Guardianship to "safeguard" her. The attesting witnesses to the execution ceremony on December 27, 2007 were petitioner's friend, Neils Lauersen, and one of his former employees. Although the attorney who prepared the will was not present at the execution, it is significant that Lauersen referred the attorney to the decedent whereas a different attorney had prepared the decedent's prior will. "Where a will has been prepared by an attorney associated with a beneficiary, an explanation is called for, and it is a question of fact for the jury as to whether the proffered explanation is adequate" (*Matter of Elmore*, 42 AD2d 240, 241 [1973] [internal citation omitted]).

Further, there is evidence that the decedent, both before and after the 2007 will signing, expressed her intent to maintain Ljungkull as the beneficiary of the bulk of her estate. In July

2008, she confirmed her 1974 will in a discussion with her prior attorney at the same time that she signed a durable general power of attorney in favor of her financial advisor, as a matter of law replacing any former powers of attorney.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6294- Ind. 7567/02
6294A The People of the State of New York, 675/03
Respondent,

-against-

Cesar Melendez,
Defendant-Appellant.

_____

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

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

_____

Judgments of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered November 4, 2009, as amended December 8, 2009, resentencing defendant to concurrent terms of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6296 The People of the State of New York, Ind. 4400/03
Respondent,

-against-

Ronald Nesbitt,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of resentence of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about June 30, 2009,

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

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

ENTERED: DECEMBER 13, 2011

CLERK

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

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6298 Mercury Casualty Co., Index 102610/11
Plaintiff-Appellant,

-against-

Encare, Inc., Assignee of Robert Manley,
Defendant-Respondent.

_____

Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for appellant.

Werner, Zaroff, Slotnick, Stern & Ashkenazy LLP, Lynbrook (Howard J. Stern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 18, 2011, which granted defendant's motion to dismiss the complaint for failure to state a claim and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

The trial court properly dismissed the complaint on the ground that a no-fault insurer who issues the denial of a claim in an untimely or otherwise defective manner is prohibited from challenging the claim (*see* Insurance Law § 5106; 11 NYCRR 65-3.8[c]; *Presbyterian Hosp. in City of N.Y. v Maryland Cas. Co.*, 90 NY2d 274 [1997]).

We are unpersuaded by Mercury's effort to fit this case within the narrow exception for denials based on lack of coverage (*see Central Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195

[1997]). *Central General Hospital* and its progeny address situations in which "[the] lack of coverage defense [is] premised on the fact or founded belief that the alleged injury does not arise out of an insured incident" (90 NY2d at 199).

Nor do we find it significant, in light of the genesis and purposes of the preclusion rule, that Insurance Law § 5108 prohibits a medical provider from seeking fees in excess of the fee schedule. Virtually every application of the preclusion rule involves the compromise of statute, policy provision, or judge-made rule in service of effectuating the important purposes of the No-Fault Law. The expansion of the lack of coverage exception proposed by Mercury would substantially weaken the long-established rule of preclusion.

Accordingly, the trial court's order is affirmed.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6299-
6300 &
M-3442

The People of the State of New York,
Respondent,

-against-

Jamel Barnes,
Defendant-Appellant.

Ind. 2016/09
2767/09

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered June 2, 2010, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed. Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered June 8, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a consecutive term of two years, unanimously affirmed.

Defendant's challenges to the legal sufficiency of the evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them

on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

A videotape, taken together with the testimony of the victim, established a forcible theft that began as an act of shoplifting. After stealing merchandise, defendant initially attempted to go around the victim, a store security guard. When defendant failed to get around her, he lunged forward with great force as she attempted to hold defendant and prevent him from leaving the store. As a result, defendant dragged the victim with him and banged her hand into a door, causing injury. The evidence warranted the inference that defendant was not merely attempting to evade the victim, but was using force to overcome her resistance to his retention of stolen merchandise (*see People v Gonzalez*, 60 AD3d 447, 448 [2009], *lv denied* 12 NY3d 915 [2009]; *People v Tucker*, 41 AD3d 210, 211 [2007], *lv denied* 9 NY3d 882 [2007], *cert denied* 552 US 1153 [2008]).

The evidence also established the element of physical injury. The victim's testimony amply supported the conclusion that her injuries caused substantial pain (*see People v Chiddick*, 8 NY3d 445, 447 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]). Moreover, the victim's testimony was corroborated by

photographs.

Defendant's remaining arguments concerning his robbery conviction are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

We perceive no basis for disturbing the imposition of consecutive sentences for the robbery and drug convictions.

Whether or not the payment of the surcharge could be deferred, the court properly denied the application on the sparse record here.

M-3442 - *People v Jamel Barnes*

Motion to enlarge the record on appeal denied as academic.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6304-
6304A In re Keyevon Justice P., etc.,
and Others,

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

Lativia Denice P., etc.,
Respondent-Appellant,

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

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Rhonda J. Panken of counsel), attorney for the children.

_____

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about October 29, 2010 and November 1, 2010, which, upon findings of abandonment, terminated respondent mother's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence shows, among other things, that respondent had no contact with the children for two years before the filing of the petition. Under the circumstances,

Family Court providently exercised its discretion in denying respondent's request for a dispositional hearing after the finding of abandonment (*see Matter of "Male" G.*, 30 AD3d 337, 338 [2006], *lv denied* 7 NY3d 711 [2006]). Respondent's belated argument that she is engaged in services and has an alternative plan for the children is unavailing.

Family Court properly denied the maternal grandmother's custody petition. The children had not expressed a desire to see the mother's side of the family, and the grandmother has no preemptive statutory or constitutional right to custody (*Matter of Peter L.*, 59 NY2d 513, 520 [1983]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6305 Melissa Feldman, etc., Index 103962/07
Plaintiff-Appellant,

-against-

Susan M. Levine, M.D.,
Defendant-Respondent.

_____

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

Callan Koster Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered May 13, 2009, dismissing the complaint and bringing up for review orders, same court and Justice, entered on or about March 26, 2009 and April 29, 2009, which granted defendant's motion for, inter alia, judgment notwithstanding the verdict, unanimously reversed, on the law, without costs, the judgment vacated, defendant's motion denied and the jury verdict awarding plaintiff the principal sum of $1,200,000 reinstated. The Clerk is directed to enter judgment accordingly.

The oncological issues presented by the competing causation experts, namely, the estimation of the rate of progression of decedent's cancer, do not involve the type of novel scientific

methodology contemplated for a *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]). Rather, the experts' disagreement as to whether decedent's lung cancer was present and could have been diagnosed during her treatment with defendant prior to her diagnosis of Stage IV lung cancer, was a jury issue (*see Marsh v Smyth*, 12 AD3d 307 [2004]). Moreover, the medical literature cited by plaintiff supported the methodology used by her expert to estimate the progression of decedent's cancer (*see Leffler v Feld*, 51 AD3d 410 [2008]).

Accordingly, defendant's motion for judgment notwithstanding the verdict should have been denied. It cannot be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Here, there is evidence from which the jury reasonably could have concluded that the delay in diagnosis and treatment of

the decedent's lung cancer caused her pain and suffering, diminished her chance of survival and hastened her death (*see Schaub v Cooper*, 34 AD3d 268 [2006]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6306 The People of the State of New York, Ind. 3876/07
Respondent,

-against-

Thor Corbin,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered March 23, 2009, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 14 years, unanimously affirmed.

The People established that the victim had a sufficient familiarity with defendant to make a confirmatory identification (*see People v Rodriguez*, 79 NY2d 445 [1992]). A few months before the crime the victim had a conversation with defendant about mating their dogs, after which the victim saw defendant many times in the neighborhood while defendant was driving his car. The victim also had a fight with defendant shortly before the shooting, and was able to provide the investigating detective with defendant's first name.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We reject defendant's challenge to the weight of the evidence supporting the element of serious physical injury. Seventeen months after the shooting, the victim, a high school student, led a less active life than before the crime because he still suffered pain from his wound. This established a protracted impairment of health (*see* Penal Law § 10.00[10]; *People v Graham*, 297 AD2d 579, 580 [2002], *lv denied* 99 NY2d 535 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6308-
6309N Index 308252/08

Charmaine Thomas, as Administratrix of the Lost Goods, Chattels and Credits which were of the Estate of Rose Richards, etc.,
Plaintiff-Respondent,

-against-

Orange Regional Medical Center, et al.,
Defendants-Appellants,

Crystal Run Healthcare, LLP, et al.,
Defendants.

_____

Martin Clearwater & Bell LLP, New York (Stewart G. Milch of counsel), for Orange Regional Medical Center, appellant.

Tarshis, Catania, Liberth, Mahon & Milligram, PLLC, Newburgh (Rebecca Baldwin Mantello of counsel), for Radiologic Associates, P.C., Lisa Fisher and Stephen Daly, appellants.

Irom, Wittels, Freund, Berne & Serra, P.C., Bronx (Richard W. Berne of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered April 13, 2011, which, in this action alleging, inter alia, medical malpractice, denied defendants-appellants' motion to change venue from Bronx County to Orange County pursuant to CPLR 510(3), unanimously affirmed, without costs.

Defendants' moving papers were deficient since the addresses of the two proposed nonparty witnesses who would purportedly be inconvenienced by a trial in Bronx County were not provided. Nor

was the nature and materiality of their anticipated testimony detailed (*see Jacobs v Banks Shapiro Gettinger Waldinger & Brennan, LLP*, 9 AD3d 299 [2004]; *Nolan v Mount Vernon Hosp.*, 172 AD2d 368 [1991]).

We note however that, contrary to Supreme Court's finding, defendant's motion was not untimely.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6310N-
6310NA &
M-4612 Index 111625/06

Michael McGlone, et al.,
Plaintiffs-Appellants,

-against-

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

Semcor Equipment and Manufacturing
Corporation,
Defendant.

_____

David W. McCarthy, Woodbury, for appellants.

Fabiani Cohen & Hall, LLP, New York (Michele V. Ficarra of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 10, 2011, which, in this personal injury action, to the extent appealed from, denied plaintiffs' motion to strike defendants-respondents' answer, and granted defendants' motion for discovery to the extent of requiring plaintiff Michael McGlone to provide authorizations for all of his medical records unrestricted as to date as addressed in defendants' motion, including plaintiff's medical records from his enlistment in the United States Marine Corp., unanimously affirmed, without costs.

Although defendants did not timely comply with prior court-ordered deadlines, the record supports the motion court's

determination that they substantially complied with their disclosure obligations and that any failure to comply was not wilful, contumacious or in bad faith (*see Perez v New York City Tr. Auth.*, 73 AD3d 529, 530 [2010]; *Banner v New York City Hous. Auth.*, 73 AD3d 502, 503 [2010]).

The court also properly directed plaintiff to provide authorizations for all medical records unrestricted by date as sought by defendants in prior discovery requests. Plaintiff averred in his bill of particulars that the injuries he allegedly sustained as a result of the subject accident aggravated or exacerbated underlying conditions that were asymptomatic before the accident, and that he was disabled as a result. In light of his averments, plaintiff voluntarily placed his physical condition in issue; therefore, defendants are entitled to discovery to determine the extent, if any, that plaintiff's claimed injuries "are attributable to accidents other than the one at issue here" (*Rega v Avon Prods., Inc.*, 49 AD3d 329, 330 [2008]; *cf. Noble v Ackerman*, 216 AD2d 140 [1995]).

M-4612 - *McGlone, et al., v Port Authority, et al.,*

Motion to strike portions of respondents' brief referring to matters dehors the record granted.

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

ENTERED: DECEMBER 13, 2011

CLERK

Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ.

6311 In re Leon Greathouse,
[M-5008] Petitioner,

-against-

Hon. Rita Mella,
Respondent.

_____

Leon Greathouse, petitioner pro se.

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

_____

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

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

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Abdus-Salaam, Román, JJ.

5522 Bruce Grilikhes, Index 104734/06
Plaintiff-Appellant,

-against-

International Tile & Stone Show Expos, etc., et al.,
Defendants-Respondents,

New York Convention Center Development Corporation,
Defendant.

_____

Arnold E. DiJoseph, New York, for appellant.

Milber Makris Plousadis & Seiden, Woodbury (Lorin A. Donnelly of counsel), for International Tile & Stone Show Expos, etc., respondents.

Katz & Rychik P.C., New York (Abe M. Rychik of counsel), for Metropolitan Exposition Services, Inc., respondent.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered September 14, 2009, which, to the extent appealed from as limited by the briefs, granted defendants International Tile & Stone Show Expos's and Metropolitan Exposition Services, Inc.'s motions for summary judgment dismissing the Labor Law § 241(6) cause of action as against them, unanimously affirmed, without costs.

Defendant International Tile & Stone Show, Inc. (ITSS) was the producer of a trade show at the Javits Center. ITSS's right to operate the show derived from a license agreement between it

and the New York Convention Center Operating Corporation (NYCCOC), the operator of Javits. The license agreement provided that "[NYCCOC] hereby gives to [ITSS] a License to use the facilities described in paragraph 3 (the 'Space') and a right of passage to the Space, through the outdoor areas maintained by the Center, through the loading dock, and through the entrance and lobby of the Center for the sole purposes of conducting (the 'Event') to be called INTERNATIONAL TILE & STONE SHOW." It further provided that ITSS "shall have no right, title, estate or interest in the Center, its facilities or equipment." The agreement also required ITSS to clean up the space after the event. In paragraph 31, ITSS "assume[d] full responsibility for all acts or omissions of contractors . . . and vendors" and agreed to "insure that all such persons fully compl[ied] with [NYCCOC]'s Work Rules." Those rules stated that "[c]ontractor and exhibitor must hire Javits labor to perform" all work involved in the erection and dismantling of exhibits, displays, backgrounds and booths (emphasis in original). ITSS chose defendant Metropolitan Exposition Services, Inc. (MES) from an approved list of contractors.

Plaintiff was a union carpenter who worked at the Javits Center and was injured while dismantling one of the exhibit booths. His paycheck was issued by NYCCOC. In addition, the

workers' compensation benefits that plaintiff began to receive after the subject accident were paid by NYCCOC. Plaintiff testified at his deposition that, during the exhibition in question, including on the day of his accident, he signed in at an NYCCOC desk and was then sent to an MES desk, to sign in there as well. MES gave plaintiff a list of tasks to complete each day and supplied him with all necessary work materials, including safety equipment. According to his testimony, plaintiff considered MES his supervisor during the tile show.

A representative of MES similarly testified that MES regarded plaintiff as under its supervision and control. The representative stated that "every single one of those [union] employees [was] ours to do whatever we want with in terms of, we decide how many hours they're going to work, what section they're going to work in." If MES was dissatisfied with a particular worker, it was entitled to instruct NYCCOC not to send that worker back to work on the show. ITSS's two former owners testified that ITSS did not play any role in the setup or breakdown of the exhibits. ITSS did not hire or direct workers or have any control over how the workers performed their work. It had no say in the manner in which the temporary exhibit booths were set up or taken down. The former owners also testified that ITSS had no responsibility for ensuring the safety of the

workers.

Plaintiff commenced this action against MES and ITSS alleging common-law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). MES moved for summary judgment dismissing the complaint on the ground that plaintiff was its special employee and therefore his claim was barred by Workers' Compensation Law § 29(6). ITSS also moved for summary judgment, on the ground that it was neither an owner nor a contractor and therefore could not be held liable. The court granted both motions. It found that MES was plaintiff's employer for workers' compensation purposes since it told him what to do, and when and where to do it, and because there was no evidence that NYCCOC retained any control over plaintiff once he left the NYCCOC sign-in desk in the morning. As for ITSS, the court stated that "the Revised Agreement entered into between NYCCOC and ITSS for a period of ten days was a license, not a lease, which did not endow ITSS with an interest in the Javits Center such that ITSS could be considered an 'owner' within the intendment of the Labor Law." Plaintiff does not challenge the dismissal of his common-law negligence and Labor Law §§ 200 and 240(1) causes of action.

A worker may be deemed a special employee where he or she is "transferred for a limited time of whatever duration to the service of another" (*see Thompson v Grumman Aerospace Corp.*, 78

NY2d 553, 557 [1991]). While the mere transfer does not compel the conclusion that a special employment relationship exists, a court is most likely to find that it does where the transferee "controls and directs the manner, details and ultimate result of the employee's work" (*id.* at 558). It is undisputed that MES directed and supervised plaintiff in the tasks he was to perform and the manner in which he was to perform them, and that it furnished his work equipment. Moreover, plaintiff's work was exclusively for the furtherance of MES's business of building the trade show, and MES had the authority to request and reject particular employees. Thus, the record establishes, as a matter of law, that MES was plaintiff's special employer, and that therefore plaintiff's Labor Law § 241(6) claim against it is barred by the Workers' Compensation Law.

We agree with plaintiff that, contrary to the motion court's findings, it is irrelevant what type of interest ITSS had in the real property comprising the Javits Center. Whether ITSS was a lessee, a licensee or a permittee, it could be considered an owner for purposes of the Labor Law if it had the ability to control the work site. "[T]he key criterion is the right to insist that proper safety practices were followed" (*Bart v Universal Pictures*, 277 AD2d 4, 5 [2000] [internal citations and quotation marks omitted]). However, all of the deposition

testimony indicates that ITSS had no authority over plaintiff or any other worker and that MES was exclusively in control of safety and the manner in which the work was performed.

Further, nothing in the license agreement itself authorized ITSS to supervise the MES workers or charged it with overseeing safety. Plaintiff argues that paragraph 31 of the license agreement placed ITSS in the position of an owner by providing that ITSS "assumes full responsibility for all acts and omissions of contractors" and will "insure that all such [contractors] fully comply with [NYCCOC]'s Work Rules." However, the Work Rules themselves direct both contractor and exhibitor to hire Javits labor. It can thus be deduced that paragraph 31 refers to contractors hired by ITSS for purposes other than the erecting and dismantling of exhibit space. The provision merely ensures that if any such contractors needed construction work performed within the space they would hire approved union workers such as those utilized by MES.

This case stands in contrast to *Bart v Universal Pictures*, (277 AD2d 4, 5-6 [2000] *supra*), where the defendant, a permittee, was deemed an owner because it "was contractually charged with the right and the obligation to control the work site, and the responsibility of ensuring that the work contemplated by the

permit was performed in a safe and proper manner." Because ITSS had no such authority, it cannot be deemed an owner for purposes of Labor Law liability. Accordingly, its motion for summary judgment dismissing the § 241(6) claim was properly granted.

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

ENTERED: DECEMBER 13, 2011

CLERK

Andrias, J.P., Friedman, Renwick, Richter, Manzanet-Daniels, JJ.

5631N Roland's Electric, Inc., Index 109510/08
Plaintiff-Appellant,

-against-

USA Illumination, Inc.,
Defendant-Respondent,

Philips Lighting Electronics,
North America, etc.,
Defendant.

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Mark J. Volpi of counsel), for appellant.

White & McSpedon, P.C., New York (Zena Goldszer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered March 1, 2011, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to, inter alia, strike the answer of defendant USA Illumination, Inc. (USA), or in the alternative, to compel USA to produce documents and materials responsive to plaintiff's notice for discovery and inspection dated December 6, 2010, and an additional witness for examination before trial after USA has responded to such discovery demand, unanimously modified, on the law and the facts, to grant the request to compel USA to produce such documents and materials, and to produce such witness, and otherwise affirmed, without costs.

Although we find that the motion court properly exercised its discretion in declining to strike USA's answer, we grant the alternative relief that plaintiff seeks. The record shows that since 2008, USA, the manufacturer and/or distributor of the emergency light fixture alleged to have caused injury to the plaintiff in the underlying suit, has failed to respond and/or has furnished inadequate responses to plaintiff's numerous discovery requests, including requests to produce basic documents pertaining to the subject emergency light fixture, such as specifications, blueprints, installation instructions, warranty information, repair requests, complaints and work orders. As plaintiff notes, "Counsel for USA has furnished spurious objections to patently appropriate demands, declined to furnish materials clearly in their possession until their own witness testified to the materials' existence, provided illegitimate and inapplicable responses, and failed to supplement their own stop-gap responses to ongoing demands."

USA maintains that it has no documents in its possession relating to most of the requests, including no documents concerning the emergency lighting fixture's testing, plans, schematics, instruction manual, or installation instructions, and no purchase receipts for component parts, nor documents sufficient to identify USA employees who maintained the fixtures'

purchase and sales records.

Plaintiff rightfully asserts that it "cannot simply take it on faith that these basic records cannot be located," especially when the witness produced by USA admittedly did not conduct any searches himself for, inter alia, repair requests, work orders, or documents reflecting complaints, while employed by USA or during the pendency of both actions. USA has furnished no proof that it is no longer a functioning entity or that counsel is unable to obtain documents. Indeed, the witness produced on behalf of USA testified in December 2010 that USA is still a functioning business.[1] Accordingly, we grant plaintiff's request to compel USA to produce documents and materials responsive to plaintiff's notice of discovery and inspection, dated December 6, 2010, and following such responses to produce a witness with knowledge for examination before trial on the issues raised herein. With respect to any discovery requests as to which USA claims no responsive documents can be located, USA is directed to provide an affidavit from the custodian of records setting forth,

[1]Even if counsel for USA were to be believed that certain records are no longer available, similar records have been demanded by the parties to this litigation and in the underlying action since 2003. These records would have been available at some point during this span of time, yet USA has nonetheless failed to respond and/or furnished inadequate responses to discovery demands throughout this period.

at a minimum (1) the qualifications of the affiant; (2) a description of the diligent and reasonable efforts made to locate and produce such records; (3) a meaningful explanation as to why such records are not now available; (4) the identity of the person generating the records and persons in the authorized chain of custody, and if unknown, an explanation should be provided; (5) the identity of the last known possessor of the records, and, if unknown, an explanation should be provided; (6) the locations where such records were kept; and (7) copies of any applicable document retention policies.

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

ENTERED: DECEMBER 13, 2011

CLERK

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

5751 In re Jaden C.,

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

Phillip J.,
Respondent-Appellant,

Teeoka C.,
Respondent,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Abbey Marzick of counsel), for Administration for Children's Services, respondent.

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

_____

Order of fact-finding, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 16, 2010, which found that respondent father neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect against the father vacated, and the petition dismissed as against him.

The father testified at the fact-finding hearing that he accompanied his then eight-month-old child and the child's

mother[1] from his home in Queens to the maternal grandmother's home in the Castle Hill neighborhood of the Bronx. When they arrived, he took the child to a bedroom and got him ready for bed. After placing the child in the playpen, he told the mother he was going to leave, instead of staying the night like he originally planned. According to the father, the mother started a fight with him, and the grandmother blocked the door when he tried to leave the apartment.

The father further testified that, as he was trying to get around the grandmother, the maternal uncle and his girlfriend started banging and kicking the apartment door. According to the father, when the grandmother opened the door, the uncle ran inside and told the father he was going to murder him right now. Then the uncle ran to the back bedroom and returned with a gun. He pointed the gun at the father and pulled the trigger, but the gun jammed and the cartridges fell to the floor. The father grabbed a box cutter from his pocket, swung, and cut the uncle on the hand. The uncle then took the gun and repeatedly hit the father on the head, causing him to bleed profusely. While the uncle and father were fighting, the uncle's girlfriend was

[1] The mother entered a 1051A submission to the court's jurisdiction, which resulted in a finding of neglect without admission based on all allegations in the petition.

standing in the same room, holding the child. The father again attempted to leave and was able to run out the front door and onto the street, where he flagged down a police car. The child was not physically injured during the fight.

The court, accepting the father's testimony regarding the chain of events, found that the father showed poor judgment in deciding to accompany the mother and child in the first place. In reaching this conclusion, the court noted that the father had suspicions of drug dealing at the location and had a criminal history, albeit remote in time, which showed some familiarity with illegal narcotics activity.

A determination of neglect requires "first, that a child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship" (*Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Petitioner presented no evidence to establish that the father knew or should have known that going to the grandmother's apartment would result in a dangerous situation for himself, the child's mother or his child. In support of its case, petitioner relied on the father's statement to a caseworker, during an

interview the day after the incident, that the mother's uncle was in the apartment when he arrived and that the uncle had threatened him previously. However, the father offered a different version of the events at the hearing and the court did not make any findings crediting the caseworker's account. Moreover, even if the uncle was in the apartment when the father arrived, and had threatened him prior to the subject incident, that does not establish that the father should not have gone there in the first place. There is no proof that the father knew the uncle's whereabouts when he agreed to escort the mother to the location. Nor does it explain how accompanying the mother and child, in and of itself, would be neglect especially since the father testified he did this because it was a dangerous neighborhood.

The court improperly relied upon the notation in a caseworker's notes that the uncle was a known drug dealer and kept drugs, drug records and weapons in the grandmother's apartment. This information was provided by an emergency room doctor who did not testify at the hearing[2]. The court incorrectly attributed this statement to the father, though the source of the doctor's information is unknown. "[O]nly

[2]The caseworker who testified at the hearing was not the person who spoke to the doctor.

competent, material and relevant evidence may be admitted" at the fact-finding hearing (Family Ct Act § 1046[b][iii]). Although a caseworker's notes may be admissible as a business record if petitioner can establish that the notes were made in the ordinary course of business (*Matter of Isaiah R.*, 35 AD3d 249, 249-50 [2006]), to render the entire statement admissible under the business records exception, all the participants in the chain must be under a business duty to record the information and must be acting within the scope of that duty (*Matter of Leon RR*, 48 NY2d 117, 122 [1979]). Here, we have no idea who provided this information to the doctor and cannot determine whether it was the father, the police or someone else. Even though the doctor is under a duty to report suspected child abuse and maltreatment (Social Services Law § 413), the critical statement was not based on the doctor's own knowledge or observations made in the course of treating the father. In the absence of any information about the source, there is no way to ascertain whether the information given the doctor came from someone who also had a business duty to report it or would be admissible under another hearsay exception.

Petitioner concedes that the court improperly admitted both the father's criminal history and that of the uncle; thus, this evidence cannot be relied on as a basis for sustaining the

neglect finding. Similarly, the fact that a fight ultimately occurred between the uncle and the father cannot support a neglect finding in the absence of any proof that the father was the person who brought the gun to the location or that he was the aggressor in the incident. Moreover, this was not the theory on which the court made its neglect finding.

Beyond the inadmissible hearsay contained within the caseworker's notes, petitioner did not provide any evidence that the father knew or should have known of the uncle's drug dealings, knew of the presence of drugs and weapons in the grandmother's home, or knew the uncle would be there when he escorted the mother to the location. Further, the father testified at the hearing, but petitioner never asked the father about these issues. Thus, the father's decision to accompany his child and the child's mother to the grandmother's house, even if it was poor judgment, did not amount to an actual failure to provide a minimum degree of care (Family Ct Act § 1012[f][i][B]; *see Nicholson*, 3 NY3d at 368).

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

ENTERED: DECEMBER 13, 2011

CLERK

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

6050 Julia Schwartz, Index 117377/06
Plaintiff-Respondent,

-against-

Bleu Evolution Bar & Restaurant Corp., etc., et al.,
Defendants-Appellants.

_____

Lewis, Brisbois, Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for appellants.

Grover & Fensterstock, P.C., New York (Ernest T. Lawson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 13, 2011, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff tripped and fell when her foot got caught in a gap between two sidewalk flags. The gap was approximately one-half-inch-wide and the height differential between the flags was also approximately one-half-inch. Defendants are entitled to summary judgment based on plaintiff's theory of how the accident occurred. The gap between the flags and the height differential was trivial and plaintiff has not come forward with evidence to

show that the defect presented a significant hazard despite being de minimis (*see Gaud v Markham*, 307 AD2d 845 [2003] citing *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6312-
6312A The People of the State of New York, Respondent,

Ind. 1159/06
3163/06

-against-

Radhames Mojica-Sanchez,
Defendant-Appellant.

_____

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

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

_____

Judgments, Supreme Court, New York County (Bruce Allen, J.), rendered November 13, 2008, convicting defendant, upon his pleas of guilty, of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 5½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. The suppression issue turns on whether the warrantless entry into defendant's apartment, made after an informant advised the police that a very large quantity of drugs was present, was justified by exigent circumstances. The suppression hearing was conducted in two stages; after initially denying suppression, the court reopened the hearing to permit a prosecution witness to be

questioned about documents that may not have been available to the defense at the initial hearing. Defendant made no arguments after the reopened hearing, and the court subsequently adhered to its original decision.

On appeal, defendant's principal argument is that the reopened suppression hearing revealed new evidence proving that the police had a longer opportunity to obtain a warrant than the time frame established at the initial hearing, and that the police had, at least, sufficient time to obtain a telephone warrant under CPL 690.36. Defendant's arguments at the initial hearing were inadequate to alert the court to this specific issue or permit the People to address it (*see People v Tutt*, 38 NY2d 1011, 1013 [1976]). Furthermore, defendant has failed to create a record adequate for review of this fact-based claim (*see People v Kinchen*, 60 NY2d 772 [1983]).

Accordingly, this claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The evidence amply established exigent circumstances, and the testimony at the reopened hearing did not undermine that conclusion. As the hearing court concluded, the police had reason to believe defendant and his accomplices were likely to realize they were under police surveillance, which would lead them to flee or remove the drugs.

The new testimony did not establish that the police had additional time to obtain a warrant that was not accounted for at the initial hearing. In any event, even accepting the new time frame posited by defendant on appeal, the evidence still does not establish that the police had sufficient time to obtain a warrant, by telephone or otherwise, so as to defeat a claim of exigent circumstances (*see United States v Malik*, 642 F Supp 1009, 1012 [SD NY 1986]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6314 In re Jabari I.,

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

_____

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

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

_____

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about February 28, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of sexual abuse in the third degree, and placed him on supervised probation for a period of 18 months with mandatory sex offender counseling, unanimously reversed, on the law and the facts, without costs, and the petition dismissed.

The then-13-year-old complainant testified that the then-13-year-old appellant made rude sexual comments and gave her a quick slap on her buttocks in a classroom in which other students and their teacher were all present. Even if fully credited, this evidence was legally insufficient to establish beyond a

reasonable doubt that appellant performed this highly offensive behavior "for the purpose of gratifying sexual desire" (Penal Law § 130.00[3]; *see Matter of Shamar D.*, 84 AD3d 605 [2011]; *Matter of Keenan O.*, 273 AD2d 167 [2000]).

Regardless of whether the evidence was legally sufficient, we also conclude that the court's finding was against the weight of the evidence.

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6315 Maylin Silva Arias, et al., Index 115701/08
Plaintiffs-Respondents, 590645/09

-against-

PM Partners, a general partnership,
Defendant,

Commerce Bancorp, Inc.,
Defendant-Appellant,

200 East 65th Street Condominium, et al.,
Defendants-Respondents.

- - - - -

T.D. Bank N.A., formerly known
as Commerce Bancorp, Inc.,
Third-Party Plaintiff-Appellant,

-against-

Milford Management Corp., et al.,
Third-Party Defendants-Respondents.

_____

White and Williams LLP, New York (Rafael Vergara of counsel), for appellant.

Isaacson, Schiowitz & Korson, LLP, New York (Martin Schiowitz of counsel), for Arias respondents.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for 200 East 65th Street Condominium, 210 East 65th Street Condominium, Milford Management Corp., Milro Associates and Mastic Associates, Inc., respondents.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered June 2, 2011, which denied the motion of defendant/third-party plaintiff TD Bank N.A. for summary judgment dismissal of the complaint as against it and on its

indemnification claims in the third-party action, unanimously affirmed, without costs.

The trial court properly denied summary judgment because TD Bank failed to "tender[] sufficient evidence to demonstrate the absence of [a] material issue[] of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) regarding whether it created the defect that caused plaintiff's accident. The only evidence on which TD Bank relied, the testimony of an employee of the property manager, who was not employed by TD Bank, and whose testimony provided no basis to conclude that he would have been aware if TD Bank or someone in its control created a defect in the sidewalk, was inadequate to make out the required prima facie showing that neither TD Bank nor someone under its control created the defect (*compare Martinez v Hunts Point Coop. Mkt., Inc.*, 79 AD3d 569, 570 [2010]).

In light of the foregoing, the court correctly denied summary judgment as to the indemnification claims.

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6317 Cleonice Caiazza, Index 309700/09
Plaintiff-Appellant

-against-

Jerry Merola,
Defendant-Respondent.

_____

AmedLaw, New York (Naved Amed of counsel), for appellant.

Stern & Zingman, LLP, New York (Andrew D. Stern of counsel), for respondent.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered on or about May 13, 2010, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

In this action for equitable distribution of property following a partial foreign judgment of divorce, plaintiff now seeks equitable distribution of certain property which was not specifically addressed in the Italian judgment of divorce. However, the record did not support plaintiff's contention that her claims could not have been raised during the Italian proceedings, and the instant action was properly dismissed as barred by res judicata (*see O'Connell v Corcoran,* 1 NY3d 179, 185 [2003]; *De Ganay v De Ganay*, 269 AD2d 157 [2000]).

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: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6318 The People of the State of New York, Respondent, Ind. 1004/07

-against-

Eric Harding, Defendant-Appellant.

_____

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

Eric Harding, appellant pro se.

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

_____

Judgment, Supreme Court, New York County, (James A. Yates, J.), rendered June 8, 2008, convicting defendant, upon his plea of guilty, of robbery in the first degree and assault in the first degree, and sentencing him, as a second violent felony offender, to concurrent terms of 13 years, unanimously affirmed.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they primarily involve matters outside the record. On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see*

People v Ford, 86 NY2d 397, 404 [1995]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant's other pro se claims are without merit.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6319 Luis Ramos, Index 25735/02
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

_____

Judgment, Supreme Court, Bronx County (Stanley Green, J.), entered April 15, 2010, upon a jury verdict, apportioning liability at 100% to defendant and awarding plaintiff, inter alia, the principal amounts of $270,000 for past pain and suffering and $325,000 for future pain and suffering over nine years, unanimously affirmed, without costs.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see generally McDermott v Coffee Beanery, Inc.*, 9 AD3d 195, 206 [2004]). The jury reasonably concluded that defendant's bus was negligent in striking the partially opened door and front panel of plaintiff's car, and rejected the defense theory that plaintiff caused the accident by opening the door into the side of the passing bus. While the jury apparently found that plaintiff was negligent in

leaving his door partially open, it fairly found that such negligence was not a substantial factor in causing the accident, in light of the photographic evidence.

Defendant's assertion that the verdict was irreconcilably inconsistent is unpreserved since it failed to raise this issue before the court discharged the jury (*see Gavitt v Citnalta Constr. Corp.*, 33 AD3d 406 [2006]). Were we to review this argument, we would find that "the verdict can be reconciled with a reasonable view of the evidence" (*Rodriguez v New York City Tr. Auth.*, 67 AD3d 511, 511 [2009]).

The awards for past and future pain and suffering do not deviate materially from what would be reasonable compensation (CPLR 5501[c]). The evidence showed that as a result of the accident, plaintiff, who was 59 years old at the time, sustained multiple disc herniations in his lumbar spine, and four years after the accident underwent a combined discectomy, laminectomy and spinal fusion of his lumbar spine, with insertion of metal plates and screws, which did not provide relief (*see e.g. Vargas v ML 1188 Grand Concourse, L.P.*, 24 AD3d 104 [2005]; *Valentin v City of New York*, 293 AD2d 313 [2002]). Furthermore, plaintiff's medical expert testified with respect to the permanency of plaintiff's pain, his loss of function, and

nerve damage, and defendant did not challenge this testimony by calling its own expert (*see Rubin v First Ave. Owners*, 209 AD2d 367 [1994]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6321 Charles Mensah, Index 103717/06
Plaintiff-Respondent,

-against-

Salah Enterprises, Inc., et al,
Defendants-Appellants.

_____

Steven N. Feinman, White Plains, for Salah Enterprises, Inc. and Sammy Kababji, appellants.

Law Offices of Nancy I. Isserlis, Long Island City (Lawrence R. Miles of counsel), for Grand Style Transportation, Inc., and Juan R. Portal, appellants.

Apicella & Schlesinger, New York (Alan C. Kestenbaum of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 12, 2010, which, insofar as appealed from, in this action for personal injuries arising out of a motor vehicle accident, denied defendants' cross motions for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants did not establish their entitlement to judgment as a matter of law. Defendants submitted affirmed medical reports of an orthopedist and a neurologist, who both examined plaintiff and found that he had normal ranges of motion in his lumbar spine and knees. However, the failure to indicate the

objective tests used to determine the range of motion in plaintiff's lumbar spine precludes the grant of summary judgment (*see Garvey v Talukder*, 74 AD3d 477 [2010]*; Beazer v Webster*, 70 AD3d 587 [2010]).

In view of the foregoing, it is not necessary to consider plaintiff's opposition to the motion (*see Reyes v Diaz*, 82 AD3d 484 [2011]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6323 Franklin Knobel, Index 603372/09
Plaintiff-Appellant,

-against-

Doris Shaw, etc., et al.,
Defendants-Respondents,

Helen Licitra, etc., et al.,
Defendants.

_____

Shaw & Binder, P.C., New York (Stuart F. Shaw and Daniel S. LoPresti of counsel), for appellant.

Davidoff Malito & Hutcher LLP, New York (Gary I. Lerner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about December 9, 2010, which granted the motion of defendants Doris Shaw (individually and as executrix of the estate of J. Stanley Shaw), Anthony Turzo, Lon Goldstein, Lisa Goldstein, the Shaw Family Limited Partnership, Spin Realty LLC, and Sige Realty LLC to dismiss the amended complaint as time-barred, unanimously modified, on the law, to deny the motion of Mrs. Shaw (individually and as executrix), Turzo, and the Goldsteins as to the accounting cause of action; to deny the motion of Mrs. Shaw, as executrix, as to the breach of contract cause of action with respect to the six years preceding the commencement of this action; to deny the motion of Mrs. Shaw

(individually and as executrix), the Goldsteins, and Turzo as to the breach of fiduciary duty cause of action with respect to their retention of all of the profits from the properties at issue for the three years preceding the commencement of this action; to deny the motion of Mrs. Shaw, as executrix, as to the fraud cause of action with respect to Mr. Shaw's statements in 2004 and 2005 that the properties at issue were not generating income; to deny defendants' motion as to the declaratory judgment cause of action; to deny the motion of Mrs. Shaw (individually), Turzo, and the Goldsteins as to the unjust enrichment cause of action with respect to their retention of all of the profits from the properties at issue for the six years preceding the commencement of this action; to deny the motion of Mrs. Shaw (individually), Turzo, and the Goldsteins as to the money had and received cause of action for the six years preceding the commencement of this action, and otherwise affirmed, without costs.

When using plaintiff's affidavit in opposition to defendants' motion "to remedy defects in the complaint" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]), one can infer that plaintiff and Mr. Shaw had a contractual agreement that plaintiff would identify which of nonparty Bohack Corporation's properties could become profitable; in return, he would get a

share of the profits generated by the properties. The complaint alleges that his share is 31%.

Plaintiff has stated a cause of action for breach of contract against Mrs. Shaw, as executrix of Mr. Shaw's estate, but not against any of the other defendants, for he fails to identify any contract with them (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [2010]; *ESI, Inc. v Coastal Corp.*, 61 F Supp 2d 35, 73 [1999]; *Crabtree v Tristar Auto. Group, Inc.*, 776 F Supp 155, 166 [1991]). To the extent plaintiff's claim arises within six years of the commencement of this suit in November 2009, it is timely. Indeed, Mr. Shaw had a "recurring obligation" to pay plaintiff his 31% share of the profits generated by the properties at issue (*Sirico v F.G.G. Prods., Inc.*, 71 AD3d 429, 435 [2010]); therefore, plaintiff's contract claim "accrued each time [Mr. Shaw] allegedly breached" this obligation (*id.; see also Bulova Watch Co. v Celotex Corp.*, 46 NY2d 606, 611 [1979]).

Contrary to plaintiff's contention, defendants are not equitably estopped from asserting the statute of limitations for those portions of his claim that predate November 2003 (six years before he commenced this action). "[E]quitable estoppel does not apply where the misrepresentation or act of concealment underlying the estoppel claim is the same act which forms the

basis of plaintiff's underlying substantive cause of action" (*Kaufman v Cohen*, 307 AD2d 113, 122 [2003]). Here, the same wrongful acts underlie both plaintiff's estoppel argument and his underlying substantive claim — namely, Mr. Shaw's alleged misrepresentations about the profitability of the properties at issue.

Plaintiff's unjust enrichment claim is time-barred to the extent it is based on his provision of services to Mr. Shaw in the 1970s (*see* CPLR 213[1]; *Sirico*, 71 AD3d at 434). However, the part of the claim that is based on the individual defendants' keeping all the profits from the properties for themselves is viable for the six years preceding the commencement of this action. Accepting plaintiff's allegations as true — as one must on this pre-answer motion to dismiss — it would be contrary to equity and good conscience to permit the individual defendants to keep 100% of the profits when plaintiff was entitled to 31%.

Because the money had and received cause of action is similar to the unjust enrichment claim, it is reinstated against the individual defendants for the six years preceding the commencement of this action (*see generally Insurance Co. of State of Pa. v HSBC Bank USA*, 37 AD3d 251, 254-255 [2007], *revd on other grounds* 10 NY3d 32 [2008]).

To the extent plaintiff alleges that Mr. Shaw misrepresented

in 2004 and 2005 that the properties at issue were not generating income, the fraud cause of action is timely and plaintiff has stated a cause of action with respect to those statements (*see* CPLR 213[8]; *see Prichard v 164 Ludlow Corp.*, 49 AD3d 408, 409 [2008]; *see Kaufman*, 307 AD2d at 119-120). The remaining parts of the cause of action — based on defendants' alleged conversion of plaintiff's interests in nonparties Joton Realty Corp. and Sige Realty Co. and withholding of his share of the profits — are time-barred (*see Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 263-264 [1937]; *Garber v Ravitch*, 186 AD2d 361, 362 [1992], *lv denied* 81 NY2d 707 [1993]).

Because plaintiff's fraud allegations are incidental to his breach of fiduciary duty claim and the complaint primarily seeks money damages, a three-year statute of limitations applies to the breach of fiduciary duty claim (*see Kaufman*, 307 AD2d at 118-119). The only parts of plaintiff's claim that fall within three years of the commencement of this action are defendants' alleged transfers of profits to themselves and exclusion of plaintiff. Contrary to defendants' contention, plaintiff's claim states a cause of action. As plaintiff's attorney and acknowledged holder of his 31% interest in Joton and Sige Realty Co., Mr. Shaw stood in a fiduciary relationship to him (*Matter of Levy*, 19 AD2d 413, 416 [1963]; *see Matter of Elmezzi*, 24 Misc 3d 1214[A], 2009 NY

Slip Op 51449[U], *8 [2009]). The individual defendants' argument that plaintiff cannot "establish" that he was their business partner is inappropriate on a pre-answer motion to dismiss, especially since there is an absence of documentary evidence conclusively refuting plaintiff's claim.

Plaintiff's cause of action for an accounting is timely for at least the six years preceding the commencement of this action, since the retention of profits is a continuing wrong (*see e.g. Sadov Realty Corp. v Shipur H'Shechuna Corp.*, 202 AD2d 178, 179 [1994], *lv dismissed* 84 NY2d 923 [1994]). The cause of action is also viable even before November 2003. Indeed, the statute of limitations against a fiduciary for an accounting "does not begin to run until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*Westchester Religious Inst. v Kamerman*, 262 AD2d 131, 131 [1999]; *see also Matter of Barabash*, 31 NY2d 76, 80 [1972]). Here, defendants did not submit documentary evidence definitively establishing that they had repudiated their obligations to plaintiff or that their relationship had terminated before November 2003.

Plaintiff seeks a declaration that he possesses a 31% membership interest in Sige Realty LLC, Spin, and their predecessors. This cause of action is similar to his claim for

an accounting; therefore, it is timely (*see generally Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 40-41 [1995]).

Contrary to defendants' contention, laches does not bar the timely portions of plaintiff's claims. Indeed, defendants have not shown that plaintiff's delay in bringing the claims "hampered [their] ability to defend against [them]" (*Sirico*, 71 AD3d at 434). Moreover, as noted earlier, Mr. Shaw had a fiduciary relationship with plaintiff and there is no indication that he openly repudiated that relationship; thus, he is not entitled to rely upon the defense of laches (*Barabash*, 31 NY2d at 82).

The constructive trust claim was properly dismissed as time-barred. Such a claim "is governed by the six-year statute of limitations provided by CPLR 213(1), which commences to run upon occurrence of the wrongful act giving rise to a duty of restitution, and not from the time when the facts constituting the fraud are discovered" (*Kaufman*, 307 AD2d at 127). Plaintiff notes that "[t]he continuing performance doctrine applies to constructive trust claims" (*Bice v Robb*, 324 Fed Appx 79, 81 [2d Cir 2009]). However, his claim is not based on lost profits. Rather, it is based on Mr. Shaw's 1993 transfer of his and plaintiff's interest in Sige Realty Co. to Mrs. Shaw and the Goldsteins; the 1980 assignment of the drugstore lease from Joton

to Sige Realty Inc.; the subsequent assignment of the lease from Sige Realty Inc. to Sige Realty Co.; and the 2000 assignment of the lease from Sige Realty LLC — Sige Realty Co.'s successor — to Spin. These events all occurred more than six years before commencement of the action.

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6324 Heather Ungruhe, Index 109967/08
Plaintiff-Respondent,

-against-

Blake-Riv Realty LLC, et al.,
Defendants-Appellants.

_____

Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for appellants.

Law Office of Todd A. Restivo, P.C., Garden City (Todd A. Restivo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered May 31, 2011, which, in this action for personal injuries allegedly sustained when plaintiff tenant was assaulted and robbed in an apartment building owned and managed by defendants, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"A landlord has a common-law duty to take minimal security precautions to protect tenants and members of the public from the foreseeable criminal acts of third parties. This duty is also applicable to managing agents" (*Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 303 [2001] [internal citations omitted]). Here, defendants' summary judgment motion was properly denied since the record presents triable issues as to whether the assault on plaintiff was foreseeable.

There was evidence of complaints by the building's tenants of continuously broken locks on the exterior doors of the building and that despite these complaints, the locks were not repaired. Furthermore, evidence including complaints by tenants, printouts of police reports and well-published accounts of similar assaults tended to show prior violent criminal activity in close proximity to the subject building, including attacks on female tenants by perpetrators who gained access to the buildings in which the tenants resided (*see Baez v 2347 Morris Realty, Inc.*, 69 AD3d 480 [2010]). Contrary to defendants' assertion that the attack upon plaintiff was not sufficiently similar to other attacks in the area to raise an inference of liability, "[t]here is no requirement . . . that the past experiences relied on to establish foreseeability be of criminal activity at the exact location where plaintiff was harmed or that it be of the same type of criminal conduct to which plaintiff was subjected" (*Jacqueline S. v City of New York*, 81 NY2d 288, 294 [1993]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6325 The People of the State of New York, Respondent, Ind. 6728/08

-against-

Gregory Palmer, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about March 24, 2010, unanimously affirmed.

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

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

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

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Freedman, Manzanet-Daniels, JJ.

6326 150 Broadway N.Y. Associates, L.P., Index 601950/09
Plaintiff-Appellant-Respondent,

-against-

Richard Shandell,
Defendant-Respondent,

Shoshanna Bookson,
Defendant-Respondent-Appellant,

Burt Blitz, et al.,
Defendants.

_____

Avrom R. Vann, New York, for appellant-respondent.

Law Offices of Fred L. Seeman, New York (Peter Kirwin of counsel), for respondent-appellant.

Lazare Potter & Giacovas LLP, New York (David E. Potter of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 17, 2010, which granted defendant Shandell's motion for summary judgment dismissing the complaint as against him, denied plaintiff's cross motion for summary judgment on such claims, denied plaintiff's motion for summary judgment on its claims against defendant Bookson and denied Bookson's application for summary judgment dismissing the claims as against her upon a search of the record, unanimously affirmed, without costs.

In an action against former law firm partners seeking to recover the firm's rent arrears and other charges from the

individual partner guarantors, the motion court properly interpreted the guaranty's provision for the release of withdrawing partners' obligations. The guaranty's requirement that the firm be "then current" in its payment of rent at the time of a guarantor's withdrawal is not to be interpreted in a hypertechnical manner that is contrary to the purpose of the guaranty and would have the effect of broadening the guarantors' obligations (*see Lo-Ho LLC v Batista*, 62 AD3d 558, 559-560 [2009]). We note with respect to the cross appeal that plaintiff's mere silence as to its reason for rejecting Bookson's notice of withdrawal did not waive its right to enforce the release provision (*see Bank of New York v Murphy*, 230 AD2d 607, 608 [1996], *lv dismissed* 89 NY2d 1030 [1997]).

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

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6327 The People of the State of New York, Respondent, Ind. 5935/07

-against-

Steven McMillan, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little 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 (Daniel Conviser, J.), rendered October 14, 2008, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth and fifth degrees, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

Defendant's legal sufficiency argument is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant challenges the evidence establishing that a stolen item was a credit card as defined by law. However, under the circumstances of the case the jury was

entitled to rely on the victim's unchallenged testimony that the item was her credit card. "A sufficiently specific motion might [have] provid[ed] the opportunity for cure" (*People v Gray*, 86 NY2d 10, 20) by alerting the People to elicit additional proof of the nature of the card.

We have considered and rejected defendant's pro se claims.

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6328- Index 600610/08
6329N Deephaven Distressed Opportunities 590803/08
Tradings, Ltd., et al.,
Plaintiffs-Respondents,

-against-

3V Capital Master Fund Ltd., et al.,
Defendants-Appellants.
- - - - -
3V Capital Master Fund Ltd.,
Third-Party Plaintiff-Appellant,

-against-

Imperial Capital, LLC, et al.,
Third-Party Defendants-Appellants.

_____

O'Melveny & Myers LLP, New York (Tancred V. Schiavoni of counsel), for Post Distressed Master Fund, LP, Post Aggressive Credit Master Fund, LP and Post Total Return Master Fund, LP, appellants.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Andrew Kazin of counsel), for 3V Capital Master Fund, Ltd., Scott Stagg, SV Special Situations Master Fund Ltd., SV Special Situations Fund LP, SV Special Situations Master Fund, Inc., Stagg Capital Group LLC, Stagg Capital LLC, and Stagg Capital Partners LLC, appellants.

Friedman Kaplan Seiler & Adelman LLP, New York (Andrew W. Goldwater of counsel), for Imperial Capital, LLC, appellant.

Gibbons P.C., New York (Jeffrey A. Mitchell of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 1, 2011, which, insofar as appealed from, denied defendants' motion to vacate the note of issue, and

denied third-party defendant Imperial Capital's motion to stay arbitration, unanimously modified, on the facts, to grant defendants' motion, and otherwise affirmed, without costs.

Since the certificate of readiness incorrectly stated that discovery proceedings had been completed, the note of issue should have been vacated (*see* 22 NYCRR 202.21[e]; *Nielsen v New York State Dormitory Auth.*, 84 AD3d 519 [2011]). Although plaintiffs later exchanged a copy of the outstanding statement of claim filed in the arbitration proceeding against third-party defendant Imperial Capital, that did not cure the defect in the note of issue since it was to be expected that the exchange would generate additional discovery requests.

Imperial argues that plaintiffs should be deemed to have waived their right to arbitrate by delaying their request for arbitration for more than three years after the commencement of this action, engaging in substantial litigation in this action, and causing prejudice to Imperial by engaging in discovery without allowing Imperial the same opportunity (*see S&R Co. of Kingston v Latona Trucking, Inc.*, 159 F3d 80, 83 [2d Cir 1998], *cert dismissed* 528 US 1058 [1999]). However, plaintiffs never asserted any claims against Imperial in this action (*see Matter of Advest, Inc. v Wachtel*, 253 AD2d 659, 660 [1998] ["a party

waives the right to arbitrate when it engages in protracted litigation that results in prejudice to the opposing party"] [internal quotation marks and citation omitted]).

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

ENTERED: DECEMBER 13, 2011

CLERK

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6330N Jeffrey Squitieri, Index 350138/06
Plaintiff-Respondent,

-against-

Beth Squitieri,
Defendant-Appellant.

_____

Port & Sava, Garden City (George S. Sava of counsel), for appellant.

Jeffrey P. Squitieri, respondent pro se.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered March 10, 2011, which, inter alia, directed that plaintiff husband pay child support in the amount of $6887.50 per month and that no maintenance be awarded to defendant wife, unanimously modified, on the law and the facts, to remand for clarification of the court's calculations underlying the amount of child support awarded and for further proceedings, consistent with this opinion, to determine the amount of maintenance to be awarded, and otherwise affirmed, without costs.

The court has broad discretion in imputing income to a parent, particularly, where, as here, there is evidence that the parent underreported income (*see Ansour v Ansour*, 61 AD3d 536 [2009]; *Baruch v Blum*, 301 AD2d 479 [2003]; *Matter of Klein v Klein*, 251 AD2d 733, 735 [1998]). Indeed, the husband's annual

income could not be accurately ascertained because of his apparently evasive testimony, and his failure to produce appropriate documentation.

Nonetheless, the IAS court did not state how it arrived at a figure of $300,000 for the cap "on the marital income." Although the court does state that it used the 29% calculation for three children found in DRL § 240(1-b)(c)(2), and that the husband is responsible for 95% of the support, the order is far from transparent on how it arrived at the $300,000 figure. It is not clear, for example, how much of this amount is attributable to the husband and how much attributable to the wife, or whether the court based this amount on the husband's testimony. As a result, the matter is remitted to the Supreme Court so that it may explain how it arrived at the figure of $300,000 as a cap on the income subject to child support calculations (*see Cohen v Cohen*, 28 AD3d 840, 841 [2006]).

While an award of maintenance is within the court's discretion (*Hughes v Hughes*, 79 AD3d 473, 475 [2010]), the court erred in failing to award any maintenance. At the time of the award, the husband was in a clearly superior financial position, and the wife stopped working outside the home so that she could care for the parties' three children. Moreover, the illness of the parties' daughter could reasonably interfere with the wife's

obtaining and maintaining gainful employment. As a result, the matter should be remitted for a calculation of such maintenance (*see Atweh v Hashem*, 284 AD2d 216 [2001]; *cf. Ansour* at 537 [2009]).

We have considered the wife's remaining contentions and find them without merit.

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

ENTERED: DECEMBER 13, 2011

CLERK

Tom, J.P., Andrias, Friedman, Abdus-Salaam, Román, JJ.

4899 J.P. Morgan Securities Inc., et al., Index 600979/09
Plaintiffs-Respondents,

-against-

Vigilant Insurance Company, et al.,
Defendants-Appellants.

_____

DLA Piper LLP (US), New York (Joseph G. Finnerty III of counsel), for Vigilant Insurance Company and Federal Insurance Company, appellants.

Drinker Biddle & Reath LLP, New York (Douglas M. Mangel of counsel), for Travelers Indemnity Company, appellant.

D'Amato & Lynch, LLP, New York (Luke D. Lynch, Jr. of counsel), for National Union Fire Insurance Company of Pittsburgh, Pa., appellant.

Kaufman Borgeest & Ryan LLP, New York (Scott A. Schechter of counsel), for Liberty Mutual Insurance Company, appellant.

Clyde & Co. US LLP, New York (Edward J. Kirk of counsel), for Certain Underwriters, etc., appellant.

Landman Corsi Ballaine & Ford P.C., New York (Michael L. Gioia of counsel), for American Alternative Insurance Corporation, appellant.

Proskauer Rose LLP, New York (John H. Gross of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2010, reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Andrias, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
David Friedman
Sheila Abdus-Salaam
Nelson S. Román, JJ.

4899
Index 600979/09

_____x
J.P. Morgan Securities Inc., et al.,
Plaintiffs-Respondents,

-against-

Vigilant Insurance Company, et al.,
Defendants-Appellants.
_____x

Defendants appeal from the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2010, which denied their motions to dismiss the complaint.

DLA Piper LLP (US), New York (Joseph G. Finnerty III, Megan Shea Harwick, Eric S. Connuck and Miles D. Norton of counsel), for Vigilant Insurance Company and Federal Insurance Company, appellants.

Drinker Biddle & Reath LLP, New York (Douglas M. Mangel, Marsha J. Indych, Ericka R. Lenz and David F. Abernathy of counsel), for Travelers Indemnity Company, appellant.

D'Amato & Lynch, LLP, New York (Luke D. Lynch, Jr., Richard F. Russell and Liza A. Chafiian of counsel), for National Union Fire Insurance Company of Pittsburgh, Pa., appellant.

Kaufman Borgeest & Ryan LLP, New York (Scott A. Schechter of counsel), for Liberty Mutual Insurance Company, appellant.

Clyde & Co. US LLP, New York (Edward J. Kirk and Allison M. Calkins of counsel), for Certain Underwriters at Lloyd's London, appellant.

Landman Corsi Ballaine & Ford P.C., New York (Michael L. Gioia of counsel), for American Alternative Insurance Corporation, appellant.

Proskauer Rose LLP, New York (John H. Gross, Francis D. Landrey, Steven E. Obus and Seth Schafler of counsel), for respondents.

ANDRIAS, J.

The disgorgement payment to the Securities and Exchange Commission (SEC) in settlement of charges that plaintiffs' predecessors wilfully facilitated illegal mutual fund trading practices does not constitute an insurable loss under the primary professional liability policy issued by defendant Vigilant Insurance Company (Vigilant) or the "follow the form" excess policies issued by the other insurer defendants. Accordingly, we reverse and grant defendants' motions to dismiss the complaint.

In 2006, the SEC notified Bear Stearns & Co., Inc., an introducing broker, and Bear Stearns Securities Corp., a clearing firm, (collectively Bear Stearns), that it intended to institute proceedings against them seeking broad injunctive relief and monetary sanctions of $720 million. The SEC alleged that between 1999 and September 2003, Bear Stearns, in violation of securities law, knowingly facilitated a substantial amount of late trading and deceptive market timing for certain customers, predominantly large hedge funds, and affirmatively assisted them in evading detection, which enabled those customers to earn hundreds of millions of dollars in profits at the expense of mutual fund shareholders.[1] Bear Stearns disputed these allegations in a

[1] Mutual funds generally are required to calculate their net asset values daily by 4:00 p.m. Eastern Standard Time, when

"Wells Submission" in which it asserted that for the most part it was a clearing broker that processed transactions initiated by others, that it did not knowingly violate any law or regulation, that its management and supervisory personnel did not facilitate either market timing or late trading, and that it did not share in the profits or benefit in any way from the late trading, which generated only $16.9 million in revenue to Bear Stearns.

On or about November 17, 2005, Bear Stearns made a formal offer of settlement which the SEC accepted. On March 16, 2006, the SEC issued an "Order Instituting Public Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions" (SEC Order) in which Bear Stearns, "without admitting or denying the findings [made pursuant to its offer of settlement]", agreed to pay "disgorgement in the total amount of $160,000,000" and "civil money penalties in the amount

---

the closing bell rings on the major U.S. stock exchanges (17 C.F.R. 270.22c-1(b)(1). Late trading is the illegal practice of permitting a purchase or redemption order received after the 4:00 p.m. pricing time to receive the share price calculated as of 4:00 p.m. that day before the release of any after-market information (*see e.g. SEC v Pentagon Capital Mgmt. PLC*, 612 F Supp 2d 241, 248 [SDNY 2009]). "Market timing is a mutual fund share trading strategy that exploits brief discrepancies between the stock prices used to calculate the shares' value once a day, and the prices at which those stocks are actually trading" (*SEC v Ficken*, 546 F3d 45, 48 [1st Cir 2008] [internal quotations and citation omitted]).

of $90,000,000."[2] The SEC also censured Bear Stearns for its willful violations, ordered it to "cease and desist" from future violations and mandated business restructuring to prevent future illegal trading. On March 10, 2006, the New York Stock Exchange (NYSE) issued Exchange Hearing Panel Decisions that included factual findings substantively identical to the SEC's. NYSE levied a sanction of "$160,000,000 as disgorgement" and "$90,000,000 as a penalty," which would be deemed satisfied by Bear Stearns's payment of the sanctions imposed by the SEC.

The insurance program at issue obligates the insurers to indemnify Bear Stearns for all "Loss which the insured shall become legally obligated to pay as a result of any Claim . . . for any Wrongful Act" on its part. The term "Loss" includes "(1) compensatory damages, multiplied damages, punitive damages where insurable by law, judgments, settlements, costs, charges and expenses or other sums the Insured shall legally become obligated to pay as damages resulting from any claim"; and (2) "costs, charges and expenses or other damages incurred in connection with any investigation by any governmental body or self-regulatory organization (SRO), provided however, Loss shall

[2]The SEC's practice of allowing settlements in which the wrongdoer does not admit or deny the finding of facts has been subject to criticism (*see SEC v Vitesse Semiconductor Corp.*, 771 F Supp 2d 304, 309-310 [SDNY 2011]).

not include: (i) fines or penalties imposed by law; or . . . (v) matters which are uninsurable under the law pursuant to which this policy shall be construed." The term "Wrongful Act" means "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty by the Insured(s) in providing services as a Security Broker/Dealer and/or Investment Advisor and/or Administrator."

The program excludes claims made against the insured "based upon or arising out of any deliberate, dishonest, fraudulent or criminal act or omission," provided there has been an adverse final adjudication to that effect. It also excludes claims "based upon or arising out of the Insured gaining in fact any personal profit or advantage to which the Insured was not legally entitled." The Lloyd's of London excess policy also includes a "Known Wrongful Acts Exclusion" which excluded claims for Wrongful Acts committed before March 21, 2000 "if any officer of the Assured, at such date, knew or could have reasonably foreseen that such Wrongful Act(s) could lead to a Claim."

Plaintiffs demanded that defendant insurers indemnify Bear Stearns for the disgorgement payment under the program. Defendant insurers refused on the ground that the payment was not an insurable loss, or was excluded from coverage. Plaintiffs then commenced this action for breach of contract and a declaration

that defendants had a duty to indemnify them, asserting that the disgorgement payment, despite its label, constituted compensatory damages.

Disgorgement is an equitable remedy aimed at "forcing a defendant to give up the amount by which he was unjustly enriched" through violations of the federal securities laws (*SEC v Tome*, 833 F2d 1086, 1096 [2d Cir 1987]; *see also SEC v Fischbach Corp.*, 133 F3d 170, 175 [2d Cir 1997] ["The primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains"]). Securities Act Section 8A(e), Exchange Act Section 21B(e), and Exchange Act Section 21C(e) authorize the SEC to seek disgorgement in a cease-and-desist proceeding and a proceeding in which a civil money penalty may be imposed (15 USC §§ 77h-1[a], 78u-2[e], 78u-3[e]).

Under New York law, "[t]he risk of being directed to return improperly acquired funds is not insurable" (*Vigilant Ins. Co. v Credit Suisse First Boston Corp.*, 10 AD3d 528, 528 [2004]). Thus, disgorgement of ill-gotten gains or restitutionary damages does not constitute an insurable loss (*see Millennium Partners, L.P. v Select Ins. Co.*, 68 AD3d 420 [2009], *appeal dismissed* 14 NY3d 856 [2010]; *Reliance Group Holdings v National Union Fire Ins. Co. of Pittsburgh, Pa*, 188 AD2d 47, 55 [1993], *lv dismissed*

in part and denied in part 82 NY2d 704 [1993]). The public policy rationale for this rule is that the deterrent effect of a disgorgement action would be greatly undermined if wrongdoers were permitted to shift the cost of disgorgement to an insurer, thereby allowing the wrongdoer to retain the proceeds of his or her illegal acts (s*ee Vigilant Ins. Co. v Credit Suisse First Boston*, 6 Misc 3d 1020A [2003], *affd in part, modified in part*, 10 AD3d 528 [2004], *supra*).

In *Millenium Partners*, the insured disgorged $148 million in connection with a market timing investigation by the SEC. Although the settlement agreements did not specifically state that the disgorgement was for improperly obtained funds, we affirmed the grant of summary judgment to the insurers on the ground that the findings recited in the orders with the SEC and the Attorney General of the State of New York "conclusively link[ed] the disgorgement to improperly acquired funds," notwithstanding that the plaintiff consented and agreed to these orders "without admitting or denying the findings [t]herein" (68 AD3d at 420; *see also Reliance Group v Natl. Union*, 188 AD2d at 55 [the settlement of the action was essentially equivalent to a determination, reached through agreement of the parties, that plaintiff had been unjustly enriched through its actions]). Here too, read as a whole, the offer of settlement, the SEC Order, the

NYSE order and related documents are not reasonably susceptible to any interpretation other than that Bear Stearns knowingly and intentionally facilitated illegal late trading for preferred customers, and that the relief provisions of the SEC Order required disgorgement of funds gained through that illegal activity.

The SEC Order illustrates how the Bear Stearns timing desk actively collaborated with Bear Stearns's clients to execute illegal mutual fund trading. Specifically, Bear Stearns processed these late trades as if they had been submitted hours earlier and then "falsified internal order tickets" to misrepresent that it had received late trading orders prior to the 4 p.m. deadline.

The SEC Order details how Bear Stearns operated its late trading and market timing scheme in direct disregard of demands by mutual funds that Bear Stearns stop allowing timing in their funds. In response, rather than prevent the timing activity, Bear Stearns assigned "multiple account numbers to customers so that the mutual funds could not identify them as customers whose trades they had previously blocked, or by assigning multiple [registered representative] numbers to registered representatives at [Bear Stearns] to try to conceal the identity of the traders." The SEC Order also specifies that in multiple taped telephone

conversations, a Bear Sterns supervisor and a timing desk employee specifically advised a new customer (broker) that late trades would be "populated" at either "4:00 or 3:59." Further, the "PCS Administrative Head," and the "MFOD Administrative Head," when recruiting a new broker, discussed the "cut off" time to do trades (5:45 p.m.), and certain department heads discussed the cut off time with a new customer, a large Texas hedge fund, and a Florida correspondent broker. Based on these findings, the SEC concluded that Bear Stearns:

> (1) "willfuly violated, willfuly aided and abetted, and caused violations of" Section 17(a) of the Securities Act, and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, which prohibit fraudulent conduct in the offer or sale of securities;
>
> (2) "willfuly violated, willfuly aided and abetted, and caused violations of Section 15(c) of the Exchange Act and Rule 15c-1-2 thereunder, which prohibit a broker or a dealer from effecting transactions in, or inducing or attempting to induce, the purchase or sale of securities (other than on a national securities exchange of which it was a member) by means of a manipulative, deceptive, or other fraudulent device or contrivance;"
>
> (3) "willfuly violated" and "willfuly aided and abetted, and caused violations of Rule 22c-1(a)," as adopted under Section 22(c) of the Investment Company Act, which requires mutual fund shares to be sold and redeemed at a price based on the net asset value computed after receipt of an order to buy or redeem; and
>
> (4) "willfuly violated, willfuly aided and abetted, and caused violations of Section 17(a) of the Exchange Act and Rule 17a-3(a)(6) thereunder[,] . . . by

preparing inaccurate records and by, among other things, falsifying [mutual fund] order tickets."

Given these findings, it cannot be seriously argued that Bear Stearns was merely found guilty of inadequate supervision and a failure to place adequate controls on its electronic entry system.[3]

The fact that the SEC did not itemize how it reached the agreed upon disgorgement figure does not raise an issue as to whether the disgorgement payment was in fact compensatory.[4]

---

[3]In this regard, we note that in an SEC press release, the Director of the Northeast Regional Office of the SEC explained:

> "Bear Stearns was the Northeast hub that connected the many spokes of market timing and late trading - hedge funds, brokers and the mutual funds. Tape-recorded phone calls of its employees make plain the two roles played by Stearns that were fundamental to mutual fund trading abuses. Bear Stearns made it possible for hedge funds and brokers to submit orders long after the 4:00 pm cut off. Bear Stearns made it easier for the hedge funds and the brokers to engage in market timing, and harder for the mutual funds to detect and stop it."

Similarly, the Chief Executive Officer, NYSE Regulation, Inc., stated in his press release:

> "It is disturbing how so many people in so many different units [at Bear Stearns] worked to circumvent the blocks and restrictions set up by the mutual funds. . . . This type of behavior is completely outrageous and unacceptable."

[4]While the SEC order does not set forth the amount of Bear Stearn's ill gotten gains, SEC's Enforcement Director stated in a press release:

Although the disgorged amount must be "causally connected to the violation" (*see SEC v First Jersey Sec., Inc.*, 101 F3d 1450, 1475 [2d Cir 1996]), the SEC "is not required to trace every dollar of proceed[s]" or "to identify misappropriated monies which have been commingled" (*SEC v Anticevic*, 2010 US Dist LEXIS 83538 at *14, 2010 WL 3239421, at *5 [SD NY 2010] [internal quotation omitted]). Accordingly, a disgorgement calculation requires only a "reasonable approximation of profits causally connected to the violation" (*SEC v First Pac. Bancorp*, 142 F3d 1186, 1192 n6 [9th Cir 1998] [internal citation omitted]), and the amount of disgorgement should include "all gains flowing from the illegal activities" (*SEC v JT Wallenbrock & Assocs*, 440 F3d 1109, 1114 [9th Cir 2006]). Further, joint and several liability for combined profits may be imposed on collaborating or closely related parties (*see SEC v AbsoluteFuture.com*, 393 F3d 94, 97 [2d Cir. 2004]; *see also SEC v Anticevic,* 2010 US Dist LEXIS 83538 at *14, 2010 WL 3239421, at *5 [SD NY 2010] supra, [in insider

---

> "For years Bear Stearns helped favored hedge fund customers evade the systems and rules designed to protect long term mutual fund investors from the harm of market timing and late trading. As a result, market timers profited while long term investors lost. *This settlement will not only deprive Bear Stearns of the gains it reaped by its conduct*, but also require Bear Stearns to put in place procedures to prevent similar misconduct from recurring" (emphasis added).

trading cases, the tipper may be held jointly and severally liable for the profits obtained by his tippees]). Here, in addition to admittedly generating at least $16.9 million in revenues for itself, Bear Stearns knowingly and affirmatively facilitated an illegal scheme which generated hundreds of millions of dollars for collaborating parties and agreed to disgorge $160,000,000 in its offer of settlement.

Nor is the nature of the disgorgement payment altered by the fact that the $250 million sanction was to be placed in a Fair Fund pursuant to Section 308(a) of the Sarbanes-Oxley Act of 2002 to be distributed to compensate investors harmed in the mutual funds. "[M]ost SEC cases involving a substantial economic settlement include a provision providing for distributions to aggrieved investors. This is because 'once the primary purpose of disgorgement has been served by depriving the wrongdoer of illegal profits, the equitable result is to return the money to the victims of the violation'" (*SEC v Bear, Stearns & Co.*, 626 F Supp 2d 402, 407 [SD NY 2009]; *see also SEC v Fischbach*, 133 F3d at 175 ["Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal"]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered September 14, 2010, which denied

defendants' motions to dismiss the complaint, should be reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment dismissing the complaint.

All concur.

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

ENTERED: DECEMBER 13, 2011

CLERK