SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 24, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Catterson, Renwick, Román, JJ.

3596 DLJ Mortgage Capital Corp., Inc., Index 600714/07
Plaintiff-Respondent,

-against-

Fairmont Funding, Ltd.,
Defendant-Appellant.

_____

Thomas Torto, New York, for appellant.

Duval & Stachenfeld, LLP, New York (Joshua C. Klein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 16, 2009, which granted plaintiff's motion for summary judgment on the issue of liability, unanimously affirmed, with costs.

In this breach of contract action, plaintiff made a prima facie showing of entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) by conclusively establishing that the subject mortgages qualified as Early Payment Default (EPD) mortgages requiring repurchase under section 3.05 of the Purchase, Warranties and Interim Servicing Agreement (Purchase Agreement).

The court concluded that plaintiff was not estopped from

demanding the repurchase of the EPDs, noting that defendant's estoppel claim was deficient as a matter of law because its conduct in continuing to sell mortgages to plaintiff was not inconsistent with the terms of the Purchase Agreement and thus it could not establish that it changed its conduct because of any alleged oral modification of the Purchase Agreements or representation by plaintiff (*see Richardson & Lucas, Inc. v New York Athletic Club of City of N.Y.*, 304 AD2d 462 [2003]).

Waiver requires a "clear manifestation of an intent by [a party] to relinquish [a] known right" (*Courtney-Clarke v Rizzoli Intl. Publs.*, 251 AD2d 13, 13 [1998]). Here, the court properly rejected defendant's claim that plaintiff waived its right to require repurchase of the EPDs, noting that, while plaintiff did waive repurchase on four occasions between 2003 and 2005, each such waiver was a discrete event that did not promise another waiver, and that plaintiff had retained its rights under the Purchase Agreement.

Furthermore, the Purchase Agreement in effect in the period at issue specifically contains a written waiver of default provision. No such writing was produced by defendant (*Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [2007], *affd* 14 NY3d 791 [2010]). Absent an express waiver in writing, defendant

is precluded from establishing a waiver of the right to require repurchase of the EPDs.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

4210 The People of the State of New York, Ind. 3169/08
Respondent,

-against-

Luis Almonte,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered February 25, 2009, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence showed that defendant intentionally and unjustifiably stabbed the victim with a knife, causing severe injuries.

Defendant did not preserve his claim that the court failed to provide defense counsel with adequate notice and an opportunity to respond to a jury note (*see generally People v O'Rama*, 78 NY2d 270, 277-278 [1991]). The court read the note to counsel verbatim, except for insignificant changes from first to third person. It then announced its proposed response to the

note, and defense counsel had no objection. Accordingly, the court fulfilled its "core responsibility" under *People v Kisoon* (8 NY3d 129, 135 [2007]) and there was no mode of proceedings error which would exempt defendant's present claim from preservation requirements (*see e.g. People v Starling*, 85 NY2d 509, 516 [1995]; *People v Donoso*, 78 AD3d 129 [2010]). We decline to review defendant's unpreserved claim in the interest of justice. As an alternative holding, we find no basis for reversal.

Defendant's challenge to the substance of the court's response is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the court provided a meaningful response to the jury's inquiry, and that it was not obligated to go beyond what the jury specifically requested (*see People v Barreto*, 70 AD3d 574 [2010], *lv denied* 15 NY3d 772 [2010]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, Román, JJ.

4211 Rolanda Kingston, Index 107425/09
Plaintiff-Appellant,

-against-

The Sophie Davis School of Biomedical Education,
Defendant-Respondent.

_____

Rolanda Kingston, appellant pro se.

Andrew M. Cuomo, Attorney General, New York (Carol Fischer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered October 16, 2009, dismissing the petition seeking reinstatement as a student, unanimously affirmed, without costs.

Petitioner failed to commence this proceeding within four months after she received notice of the denial of her final administrative appeal. Thus, the proceeding is time-barred (*see* CPLR 217[1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Were we to consider the merits, we would find, that in light of petitioner's marginal academic record, respondent's determination not to reinstate her was not arbitrary or irrational (*see Matter of Olsson v Board of Higher Educ. of City of N.Y.*, 49 NY2d 408, 413-414 [1980]). Nor was the fact that she was not given proper instructions for the exam in question a basis for judicial intervention. Indeed, petitioner was given a

chance to qualify to take the subject exam again, but she failed the reassessment test.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Catterson, Manzanet-Daniels, Román, JJ.

4214 In re Estate of H. Kenneth Ranftle, Deceased. Index 4585/08

- - - - -

Richard R. Ranftle,
Appellant,

-against-

J. Craig Leiby,
Respondent.

- - - - -

New York City Bar Association,
Office of the Attorney General,
City of New York,
Amici Curiae.

_____

Alexander M. Dudelson, Brooklyn, for appellant.

Lambda Legal Defense and Education Fund, Inc., New York (Susan L. Sommer of counsel), for respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Eve Preminger of counsel), for The New York City Bar Association, amicus curiae.

Andrew M. Cuomo, Attorney General, New York (Allison J. Nathan of counsel), for the Office of the Attorney General, amicus curiae.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for the City of New York, amicus curiae.

_____

Order, Surrogate's Court, New York County (Kristen Booth Glen, S.), entered on or about July 27, 2010, which denied appellant's petition to vacate the probate of his brother's will, unanimously affirmed, without costs.

In his Last Will and Testament, executed on August 12, 2008, the decedent made bequests to three brothers, including appellant, and a goddaughter. He left the residue of his estate

to respondent, his same-sex partner, whom he had married in Canada on June 7, 2008. Decedent appointed respondent as the executor of his will, which included an in terrorem clause. On December 12, 2008, respondent, as the executor named in the will, filed a petition for probate in the Surrogate's Court. Respondent identified himself as the decedent's surviving spouse and the sole distributee. On December 12, 2008, respondent served the legatees with notice of probate, and on December 15, 2008, the Surrogate's Court issued a decree granting probate.

On January 26, 2009, the Surrogate's Court issued an opinion finding that respondent was "decedent's surviving spouse and sole distributee" (EPTL 4-1.1) and thus, citation of the probate proceeding need not issue to anyone under SCPA § 1403(1)(a). The court found that the decedent's same-sex marriage to respondent was valid under the laws of Canada, where it was performed, and did not fall into either of the two exceptions to the marriage recognition rule, as the marriage was not affirmatively prohibited or proscribed by natural law. Accordingly, the Surrogate's Court found that the marriage was entitled to recognition.

By order to show cause, dated June 23, 2009, appellant petitioned the Surrogate's Court for vacatur of the probate decree and permission to file objections, alleging that the court was without jurisdiction to grant probate without citation having

been issued on the decedent's surviving siblings. Appellant argued that the recognition of the decedent's same-sex marriage violated public policy in New York and that he should have been cited in the probate proceeding and provided with an opportunity to file objections thereto as a distributee.

In denying the instant petition, the Surrogate found that appellant's position that same-sex marriage violated public policy had been "specifically addressed and rejected by the Appellate Division in *Martinez v County of Monroe* (50 AD3d 189 [2008], *lv dismissed* 10 NY3d 856 [2008]) and is patently without merit." We agree.

New York's long-settled marriage recognition rule affords comity to out-of-state marriages and "recognizes as valid a marriage considered valid in the place where celebrated" (*Van Voorhis v Brintnall*, 86 NY 18, 25 [1881], *see also Mott v Duncan Petroleum Trans.*, 51 NY2d 289, 292 [1980]). This rule does not extend such recognition where the foreign marriage is "contrary to the prohibitions of natural law or the express prohibitions of a statute" (*Moore v Hegeman*, 92 NY 521, 524 [1883]; *see also Thorp v Thorp*, 90 NY 602, 606 [1882]). Same-sex marriage does not fall within either of the two exceptions to the marriage recognition rule.

The failure of the Legislature to enact a bill "affords the most dubious foundation for drawing positive inferences" (*see*

Clark v Cuomo, 66 NY2d 185, 190-191 [1985], citing *United States v Price*, 361 US 304, 310-311 [1960]). Thus, the Legislature's failure to authorize same-sex couples to enter into marriage in New York or require recognition of validly performed out-of-state same-sex marriages, cannot serve as an expression of public policy for the State. In the absence of an express statutory prohibition (*Moore*, 92 NY at 524) legislative action or inaction does not qualify as an exception to the marriage recognition rule.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, Manzanet-Daniels, JJ.

4227-
4227A In re Richard Ronga, Index 114627/08
Petitioner-Appellant,

-against-

Joel I. Klein, etc., et al.,
Respondents-Respondents.

_____

Ballon, Stoll, Bader & Nadler, P.C., New York (Marshall B. Bellovin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered March 24, 2009, which granted the motion by respondents(collectively, DOE) to dismiss the petition challenging the termination of his employment as a school principal, unanimously affirmed, without costs. Judgment, same court and Justice, entered November 27, 2009, which, granted petitioner's motion for renewal and reargument, and, upon renewal and reargument, adhered to its prior determination, unanimously affirmed, without costs.

Petitioner failed to demonstrate that he acquired tenure by estoppel. The record establishes that he did not perform the duties of a principal with DOE's knowledge or consent beyond the expiration of his probationary term (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 451 [1993]). On the contrary, prior to the expiration of the

probationary period DOE notified petitioner that he would not be given tenure. Petitioner and DOE then negotiated a resignation agreement, which petitioner signed. Petitioner then attempted to revoke his consent to the resignation agreement later that same day.

Finally, petitioner has utterly failed to sustain his burden of showing that DOE acted in bad faith when it terminated his status as principal, as he provides no support for his claims (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320 [2006]; *Matter of Thomas v Abate*, 213 AD2d 251, 251-252 [1995]).

We have considered the parties' remaining arguments and find them without merit.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4355 In re Bryan G.,

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

_____

Steven N. Feinman, White Plains, for appellant.

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

_____

Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at suppression motion; Nancy M. Bannon, J. at disposition), entered on or about February 22, 2010, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and imposed a conditional discharge for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The police responded to a radio call of shots fired by a described suspect. When the police arrived, they saw a teenager who met the description, and who was accompanied by appellant. Appellant and his companion immediately engaged in evasive conduct and then fled. The police apprehended the two teenagers and recovered a weapon from appellant's companion's bag. At this point, the police had, at least, reasonable suspicion upon which to frisk appellant.

This also warranted a precautionary frisk of appellant's backpack, which was on the ground in appellant's grabbable area (*see People v Brooks*, 65 NY2d 1021 [1985]; *see also People v Wylie*, 244 AD2d 247 [1997], *lv denied* 91 NY2d 946 [1998]). When an officer felt a hard object in the backpack, she was entitled to open it and remove a weapon (*see e.g. People v Corbett*, 258 AD2d 254, 255 [1999], *lv denied* 93 NY2d 898 [1999]).

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4356 Vue Management, Inc., Index 602886/08
Plaintiff-Appellant,

-against-

Photo Associates, et al.,
Defendants-Respondents.

_____

Sam P. Israel, New York, for appellant.

Leavitt, Kerson & Duane, New York (Paul E. Kerson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered August 26, 2009, which, insofar as appealed from as limited by the briefs, granted the motion of individual defendants Kauffman and Abramovitz for summary judgment dismissing the complaint as against them, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, with costs.

Plaintiff failed to rebut the individual defendants' prima facie showing that to the extent they engaged in the alleged underlying contractual relationship, they did so solely as corporate representatives. Therefore, they could not be held liable in their individual capacities (*see Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]; *Do Gooder Prods., Inc. v American Jewish Theatre, Inc.*, 66 AD3d 527, 528 [2009]).

The court also properly denied the cross motion for leave to amend the complaint. Although such leave should be freely given

absent prejudice or undue surprise caused by the delay, it may be denied where the additional claims sought to be asserted are "palpably insufficient as a matter of law" (*Davis & Davis v Morson*, 286 AD2d 584, 585 [2001]). Plaintiff's additional fraud claim was premised upon factual allegations germane to its initial claim for breach of contract, and was duplicative of that claim (*see Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1998]). Plaintiff's proposed claim for piercing the corporate veil was based upon an allegation that the individual defendants dominated and controlled the corporate defendant, and thus, was insufficient as a matter of law (*see Itamari v Giordan Dev. Corp.*, 298 AD2d 559, 560 [2002]; *Metropolitan Transp. Auth. v Triumph Adv. Prods.*, 116 AD2d 526, 528 [1986]).

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4357 Rahel Tadesse, Index 18830/07
Plaintiff-Respondent,

-against-

Nabil M. Degnich, et al.,
Defendants-Appellants,

Daniel Awvah et al.,
Defendants.

_____

Mead, Hecht, Conklin & Gallagher, LLP, Mamaroneck (Sharon A. Mosca of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered June 28, 2010, which, insofar as appealed from, in this action for personal injuries sustained in a motor vehicle accident, granted plaintiff's motion to reargue a prior order granting defendants-appellants' motion for summary judgment dismissing the complaint as against them on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), and, upon reargument, vacated the prior order and denied appellants' motion for summary judgment, unanimously affirmed, with costs.

The motion court properly granted plaintiff's motion for reargument, since it had misapplied a "controlling principle of law" (*Foley v Roche*, 68 AD2d 558, 567 [1979]; *see* CPLR 2221[d]). When dismissing the complaint as against appellants, the court

improperly relied on the gap-in-treatment argument, which appellants raised for the first time in their reply papers (*see McNair v Lee*, 24 AD3d 159 [2005]). Indeed, the court determined that plaintiff had otherwise raised a triable issue of fact, but that her failure to address the gap in her treatment was "fatal" to her case.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4359 Empire Healthchoice Assurance, Inc., etc., Plaintiff-Appellant, -against- Walter Lester, D.C. et al., Defendants-Respondents. Index 650074/10

Kornstein Veisz Wexler & Pollard, LLP, New York (Joel Howard Rosner of counsel), for appellant.

Itkowitz & Harwood, New York (Donald A. Harwood of counsel), for respondents.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 29, 2010, which, upon granting plaintiff's motion pursuant to Judiciary Law § 470 to strike the answer, denied plaintiff's motion for entry of judgment in its favor, with leave to renew after proper service of an answer, and granted defendants' cross motion seeking an order compelling plaintiff to accept their answer, unanimously affirmed, with costs.

Judiciary Law § 470 requires an attorney admitted to practice in New York who is not a New York resident to maintain an office in this state for the practice of law (*see Kinder Morgan Energy Partners, LP v Ace Am. Ins. Co.*, 51 AD3d 580 [2008]; *Lichtenstein v Emerson*, 251 AD2d 64 [1998]). Failure of counsel to maintain a local office requires striking of a pleading served by such attorney, without prejudice (*see Kinder Morgan*, 51 AD3d at 580; *Neal v Energy Transp. Group*, 296 AD2d 339

[2002]). Thus the court was correct in striking defendants' answer.

The court also properly granted defendants' cross motion pursuant to CPLR 3012(d) for an extension of time to answer (*Nason v Fisher*, 309 AD2d 526 [2003]). Plaintiff's contention that Judiciary Law § 470 barred the motion court from extending defendant's time to answer is incorrect, since the striking of a pleading under that statute is without prejudice (*see Kinder Morgan*, 51 AD3d at 580; *Neal v Energy Transp. Group*, 296 AD2d at 339). Defendants' delay in serving a proper answer was short and the defect in the original answer was attributable to law office failure by defendants' original attorney. Plaintiff was not prejudiced by any delay because the original defective answer was timely served (*see Gazes v Bennett*, 70 AD3d 579 [2010]). Defendants were not required to demonstrate a meritorious defense in order to be granted relief under CPLR 3012(d) (*see Nason*, 309 AD2d at 526; *DeMarco v Wyndham Intl.*, 299 AD2d 209 [2002]; *Mufalli v Ford Motor Co.*, 105 AD2d 642 [1984]).

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4360-4360A In re Donald Faggen, etc., Index 2412/80

Celia Faggen,
Deceased.

Donald Faggen,
Petitioner-Appellant,

-against-

JP Morgan Chase, N.A. et al.,
Respondent-Respondent.

Neil B. Hirschfeld, New York, for appellant.

Blank Rome LLP, New York (Leonard D. Steinman of counsel), for respondents.

Orders, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about October 7, 2009 and November 9, 2009, which granted the motion by the executors of the estate of Rose Faggen to dismiss the petition to compel an accounting of the estate of Celia Faggen, unanimously affirmed, without costs.

Petitioner seeks to compel an accounting of the estate of Celia Faggen, who died in 1980, by co-fiduciaries of the estate of decedent Rose Faggen. Rose Faggen was the executrix of decedent Harold Faggen who, in turn, was the executor of Celia Faggen's estate. A compelled accounting by fiduciaries thrice removed from the subject estate is not authorized by the

Surrogate's Court Procedure Act (*see* SCPA 2207; *Matter of Griffin*, 170 Misc 1066 [1939] [construing predecessor to SCPA 2207]).

In view of the foregoing, the issue of petitioner's concession during colloquy in the Surrogate's Court is moot.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4361 Ronald Jacobus, Index 113894/08
Plaintiff-Appellant,

-against-

Battery Park Hotel Management, LLC,
Defendant-Respondent.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant

Kane Kessler, P.C., New York (Lois M. Traub of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered March 5, 2009, which, in an action alleging employment discrimination, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(5), unanimously affirmed, without costs.

The record establishes that plaintiff knowingly and voluntarily executed an agreement explicitly releasing any employment discrimination claims against defendant. Plaintiff admits that he signed the release and raises no valid defense to its enforcement (*see Toledo v West Farms Neighborhood Hous. Dev. Fund Co., Inc.*, 34 AD3d 228, 229 [2006]; *Goode v Drew Bldg. Supply*, 266 AD2d 925 [1999]).

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

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4363 148 Magnolia, LLC, et al., Index 111200/07
Plaintiffs-Respondents,

-against-

Merrimack Mutual Fire Insurance Company, et al.,
Defendants,

RAL Services, Inc.,
Defendant-Appellant.

_____

Morrison Mahoney LLP, New York (Kevin A. Hickman of counsel), for appellant.

Law Office of Craig A. Blumberg, New York (Craig A. Blumberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered March 9, 2010, which, inter alia, denied defendant RAL Services, Inc.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

In this action alleging negligence and breach of contract against an insurance broker for failure to obtain adequate and appropriate insurance coverage, issues of fact exist whether defendant broker breached its duty to plaintiffs (*see Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]; *Cosmos, Queens Ltd. v Matthias Saechang Im Agency*, 74 AD3d 682, 683 [2010], *lv denied* 15 NY3d 711 [2010]). Plaintiffs' witnesses testified that defendant was aware of their intention to renovate the subject premises and that they relied on defendant's expertise as an insurance broker to obtain the appropriate policy. Defendant's witnesses

admittedly were aware that the premises would be renovated. There is also record evidence that a builders' risk policy was the appropriate policy under the circumstances.

We reject defendant's argument that plaintiffs' failure to comply with a protective safeguards notice provision in their current policy was the proximate cause of their loss. Had defendant obtained the appropriate policy, plaintiffs' loss would have been covered even if the policy had no restrictive protective safeguards endorsement. Thus, we cannot conclude, as a matter of law, that defendant's failure to obtain the appropriate policy was not a proximate cause of plaintiffs' loss.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4366 The People of the State of New York, Ind. 164/07
Respondent,

-against-

David Jones,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about September 10, 2008.

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: FEBRUARY 24, 2011

CLERK

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

Andrias, J.P., Catterson, Moskowitz, Román, JJ.

4367-
4367A Scott Petersen, etc.,
Plaintiff-Appellant,

-against-

Metropolitan Life Insurance Co.,
Defendant-Respondent.

Index 602901/09

Lynch Daskal Emery LLP, New York (Jason Kaufman of counsel), and Miller Schirger, LLC, Kansas City, MO (John J. Schirger of the Bar of the State of Missouri admitted pro hace vice, of counsel), for appellant.

SNR Denton US LLP, New York (Reid L. Ashinoff of counsel), for respondent.

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered May 12, 2009, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered April 9, 2010, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court correctly determined that plaintiff's proposed reading of the Cost of Term Insurance section of the policy he purchased would fail to give full meaning to the section and the required force and effect to every sentence contained therein (*see Laba v Carey*, 29 NY2d 302, 308 [1971]). The cost of term insurance is plainly set by reference to all the policy cost factors, including mortality, persistency and expenses.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: FEBRUARY 24, 2011

CLERK

Mazzarelli, J.P., Andrias, Catterson, Moskowitz, Román, JJ.

4369-
4369A The People of the State of New York,
Respondent,

-against-

Elizabeth Holloman,
Defendant-Appellant.

Ind. 4649/09
5194/09

_____

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

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

_____

Judgments, Supreme Court, New York County (Michael J. Obus, J.), rendered March 25, 2010, convicting defendant, upon her pleas of guilty, of two counts of attempted robbery in the second degree, and sentencing her, as a persistent violent felony offender, to concurrent terms of 12 years to life, unanimously affirmed.

The procedure by which defendant was adjudicated a persistent violent felony offender is constitutional (*People v Bell*, __NY3d__, 2010 NY Slip Op 09158 [2010]).

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

ENTERED: FEBRUARY 24, 2011

CLERK