

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**MAY 5, 2011**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Richter, Manzanet-Daniels, JJ.

3679 Douglas Elliman LLC, etc, Index 601185/09  
Plaintiff-Appellant-Respondent,

-against-

Franklin Tretter, et al.,  
Defendants-Respondents-Appellants.

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Cascone, Cole & Collyer, New York (Michael S. Cole of counsel),  
for appellant-respondent.

Gallet Dreyer & Berkey, LLP, New York (Randy J. Heller of  
counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Marcy S. Friedman,  
J.), entered April 6, 2010, which denied plaintiff's and  
defendants' motions for summary judgment, modified, on the law,  
to grant plaintiff's motion, and otherwise affirmed, without  
costs.

On July 22, 2008, the defendants, Franklin and Sheila  
Tretter, retained plaintiff Douglas Elliman Real Estate to sell  
their cooperative apartment, 785 Park Avenue, #11C. Ms. Barbara  
Lockwood was the Douglas Elliman broker in charge of the

exclusive agency listing. The brokerage agreement contained an asking price of \$1.65 million and provided for a 6% commission due to Douglas Elliman from the proceeds of the sale. Ms. Lockwood arranged for a photo shoot and preparation of the floor plan, and she began to show the Tretters' apartment at open houses and by appointment. On November 3, 2008, an individual who ultimately would not purchase the apartment made an oral offer of \$1.5 million, which was acceptable to the Tretters, subject to the co-op board's approval. This deal fell through on November 20, 2008 because the prospective purchaser's father, the would-be guarantor, refused to provide the requisite financial information to the co-op board. Meanwhile, on November 7, 2008, Ms. Lockwood met Taurie Zeitzer at an open house in the Tretters' apartment. Throughout November, while the initial bidder was providing all the information necessary for the board package, Lockwood communicated with Ms. Zeitzer and her husband via e-mail, offering to show them additional apartments, including another apartment at 785 Park Avenue. In total, Lockwood showed Ms. Zeitzer and her husband five other properties. However, within a week after the deal with the initial bidder fell through, Lockwood revisited apartment 11C with them, and Ms. Zeitzer and her husband began negotiations for the purchase of that

residence. Before November 26, 2008, Ms. Zeitzer and her husband made an offer of \$1.4 million. As this offer was \$100,000 less than the previous bidder's offer, Mr. Tretter asked to meet with Ms. Lockwood. This meeting apparently took place on December 1, 2008. On December 9, 2008, Lockwood sent Mr. Tretter the deal sheet, which listed a reduced \$70,000 commission (5% of \$1.4 million). On December 16, 2008, two days before the contract was signed, Douglas Elliman confirmed in writing its agreement to reduce its commission from 6% to 5%.

On December 18, 2008, the Tretters entered into a contract with Ms. Zeitzer and her husband to sell their apartment for \$1.4 million. The contract listed Ms. Lockwood as the broker, and it explicitly stated that the sellers were responsible for paying the broker's commission. The buyers were represented by counsel on the contract, and Mr. Tretter, an attorney, represented himself and his wife. The contract explicitly provides a purchase price of \$1.4 million (para. 1.16), and states that the sellers are solely responsible for the broker's commission (para. 12.2). After signing the contract, Ms. Zeitzer's father assisted in securing co-op board approval and negotiating unresolved board issues directly with the Tretters. On February 27, 2009, Douglas Elliman sent a letter to the buyers' attorney, asking that the

commission either be paid to it or held in escrow pending the resolution of any dispute with the Tretters. The closing took place on March 6, 2009.

On April 20, 2009, Douglas Elliman commenced this action for its \$70,000 commission. In their answer, the Tretters asserted that the firm was not entitled to a commission because Lockwood breached her fiduciary duties to them. The parties moved and cross-moved for summary judgment. The court denied both motions, finding issues of fact whether Lockwood acted as a dual agent. Both parties appeal.

We find as a matter of law that Ms. Lockwood did not act as a dual agent. A real estate broker is deemed to have earned his or her commission when he or she produces a buyer who is ready, willing and able to purchase the property, and who is in fact capable of doing so (*Rusciano Realty Servs. v Griffler*, 62 NY2d 696 [1984]; *Halstead Brooklyn, LLC v 96-98 Baltic, LLC*, 49 AD3d 602 [2008]). During the process of facilitating a real estate transaction, the broker owes a duty of undivided loyalty to its principal (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]). If this duty is breached, the broker forfeits his or her right to a commission, regardless of whether damages were incurred (*Wendt v Fischer*, 243 NY 439 [1926]).

It is undisputed that Lockwood was the Tretters' agent. The Tretters' contend that Ms. Lockwood breached her duty of loyalty to them, by assuming, through her actions and statements, the role of agent for Ms. Zeitzer and her husband in the purchase of the Tretter apartment. Were this so, Lockwood would be considered a dual agent, with a duty to disclose her divided loyalties and obtain the parties' consent thereto (see *Matter of Goldstein v Department of State, Div. of Licensing Servs.*, 144 AD2d 463 [1988]; *Queens Structure Corp. v Jay Lawrence Assoc.*, 304 AD2d 736, 737 [2003]).

In our view, there are no issues of fact material to the question of dual agency. Douglas Elliman met its burden on its motion by submitting: (1) the executed contract for the sale of the Tretters' apartment, signed by both Mr. Tretter, acting as counsel for the sellers, and an independent attorney for the buyers, explicitly stating that Lockwood was the broker who facilitated the transaction and that the sellers assumed responsibility for paying her commission; (2) Douglas Elliman's agreement with the Tretters to reduce its contractually negotiated commission from 6% to 5% if the deal between the Tretters and Ms. Zeitzer and her husband went through; and (3) deposition testimony and affidavits detailing the events leading

up to and following the closing on the sale.

In opposition, the Tretters failed to present facts supporting their contention that Ms. Lockwood also acted as agent for Ms. Zeitzer and her husband for the purchase of their apartment (see *Sonnenschein v Douglas Elliman-Gibbons & Ives*, 96 NY2d 369, 374-375 [2001]). Ms. Lockwood had a signed exclusive agency agreement with the Tretters. She had no similar agreement with Ms. Zeitzer and her husband, and she received no remuneration from them. Ms. Lockwood's actions indicate that she wanted this transaction to close, and Douglas Elliman's submissions support the conclusion that she ultimately obtained permission to reduce her own commission to bring the parties to an agreement. The negotiated contract was signed by both sellers and buyers, it listed Ms. Lockwood as the agent, and it explicitly stated that the sellers were exclusively responsible for her fee.

The Tretters point to the fact that, unbeknownst to them, Ms. Lockwood showed Ms. Zeitzer and her husband a number of other apartments. However, absent an agreement with the Tretters to the contrary, Ms. Lockwood owed them no duty to refrain from doing so (see *Sonnenschein*, 96 NY2d at 375-376). Moreover, Ms. Lockwood testified that she showed Ms. Zeitzer and her husband

Apt. 10C in the Tretters' building because it needed substantial work and would demonstrate that 11C was better suited to their needs. Thereafter, between November 7 and November 25, 2008, Lockwood communicated with the buyers about other properties, and showed them some of those apartments. However, the vast majority of these efforts were conducted during a period of time when there was an accepted offer on apartment 11C by another individual, and within a week after that deal fell through, Ms. Lockwood revisited apartment 11C with Ms. Zeitzer and her husband, and they began negotiating to purchase that residence.

The Tretters also cite Ms. Lockwood's deposition testimony that, in viewing other properties, she was the "agent for the buyers." However, this statement alone is insufficient to demonstrate that Lockwood acted as a dual agent in negotiating the sale of the Tretters' apartment (see *TD Waterhouse Inv. Servs., Inc. v Integrated Fund Servs., Inc.*, 2003 WL 42013, \*14, 2003 US Dist LEXIS 70, \*40-41 [SD NY 2003]).

The dissent points to statements made by Ms. Lockwood, to the buyers' attorney, that there was a "problem" with the deal, and, in the same conversation, that Ms. Zeitzer and her husband were her "customers." It also notes the fact that Ms. Lockwood showed Zeitzer and her husband another apartment in the building

over Mrs. Tretter's alleged "strenuous" objection, and Ms. Zeitzer's father's opinion that problems with the consummation of the transaction stemmed from the fact that Lockwood was a dual agent. Viewed collectively, these facts fail to raise a material issue of fact as to dual agency.

It is uncontested that Lockwood found buyers who were ready, willing and able to purchase their apartment, who were capable of doing so (with the assistance of a guarantor), and whose offer matured into a signed contract, co-op board approval, and a closing transferring ownership of the apartment to them. Thus, Douglas Elliman is entitled to the reduced 5% commission negotiated by the parties to this transaction in a letter agreement as a matter of law (*Halstead Brooklyn, supra*). Accordingly, we grant the firm's motion for summary judgment.

All concur except Manzanet-Daniels, J.  
who dissents in a memorandum as follows:

MANZANET-DANIELS, J. (dissenting)

It is elementary that a real estate broker is a fiduciary with a duty of loyalty to act in the best interests of the principal. Where a broker's interests or loyalties are divided by reason of a personal stake in the transaction or the representation of multiple parties, the broker must disclose to the principal the material facts illuminating the broker's divided loyalties. Plaintiff, as a real estate broker for defendant sellers, had an affirmative duty not to act for the buyers unless defendant sellers had full knowledge of the facts and consented to the dual agency (*see Matter of Goldstein v Department of State, Div. of Licensing Servs.*, 144 AD2d 463 [1988]; *Queens Structure Corp. v Jay Lawrence Assoc., Inc.*, 304 AD2d 736, 737 [2003]).

The record evidence in this case reveals the existence of a triable issue of fact as to whether the broker was also representing the buyers in the transaction. Barbara Lockwood, the broker involved, acknowledged at deposition that she was the buyers' agent. She acknowledged showing the buyers a newly-renovated apartment in the same line as the sellers', over Sheila Tretter's strenuous objection. The sellers submitted affidavits stating "[w]e continuously disclosed to Lockwood, confidentially

we thought, our negotiating stances and financial objectives in the sale of our Apartment." The record supports the motion court's conclusion that the broker, frustrated with negotiations over her commission, may have attempted to frustrate the completion of the transaction and may have notified the buyers' attorney that "the deal was off." The broker admitted to calling the attorney in Mrs. Tretter's presence and informing him that there was a "problem." She evidently referred to Zeitzer, one of the buyers, as her "customer" during this conversation.

In February 2009, Zeitzer's father, Zeitzer and her husband's guarantor and an attorney himself, called the sellers and told them that the transaction was "precarious" due to poor communication. He asserted that the problem lay in the fact that the sellers and the buyers both had the same broker, namely, Lockwood. The sellers maintain that this was the first time they learned that the buyers had the same broker. Zeitzer's father thereafter negotiated directly with the sellers, and the closing took place on March 6, 2009. Lockwood did not attend.

There is no evidence that the broker disclosed the dual agency relationship to the sellers; a fortiori, there is no evidence that the sellers consented to the dual agency (see *Matter of Goldstein*, 144 AD2d at 464). If a real estate broker

breaches the fiduciary duty of loyalty, the broker forfeits his or her right to a commission from the seller (see e.g. *John J. Reynolds, Inc. v Snow*, 11 AD2d 653 [1960], *affd* 9 NY2d 785 [1961])).

The fact that the broker is listed in the contract as the broker for the sellers, relied on by the majority in reaching its decision that the broker is entitled to her commission as a matter of law, while relevant to the buyers' knowledge, is not probative of the issue of whether the sellers were aware that the broker was also potentially representing the buyers. Similarly, whether or not the broker was compensated by the buyers is not dispositive as to the existence of an agency relation between them. Under New York law, proof of damages is not required to invoke the dual agency doctrine (see *Wendt v Fischer*, 243 NY 439 [1926]). The fact that the broker agreed to a reduction in her commission, in the economic climate then prevailing, simply indicates that she wanted the sale to close and hardly constitutes proof that she was not a dual agent. The sellers' evidence, including the fact that the broker herself testified that she was agent for the buyers, that Zeitzer's father, the guarantor and an attorney himself, referred to the broker as a dual agent and identified the dual agency as interfering with

consummation of the transaction, as well as the fact that the broker may have attempted to frustrate the transaction, calling the buyers' attorney and informing him that "the deal was off," viewed collectively, more than adequately raise a triable issue of fact as to whether the broker was acting as a dual agent. I would accordingly affirm the order appealed from and allow the matter to proceed to trial.

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

ENTERED: MAY 5, 2011

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Gonzalez, P.J., Tom, Andrias, Acosta, Abdus-Salaam, JJ.

4242 Felicito Ramirez, Index 122538/00  
Plaintiff-Appellant,

-against-

Willow Ridge Country Club, Inc., et al.,  
Defendants-Respondents.

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Friedman, Friedman, Chiaravalloti & Giannini, New York (Alan M. Friedman of counsel), for appellant.

Cozen O'Connor, New York (John M. McDonough of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 22, 2009, dismissing the complaint after a jury trial, and bringing up for review an order, same court and Justice, entered February 2, 2009, which denied plaintiff's motion for judgment notwithstanding the verdict, unanimously affirmed, without costs.

Plaintiff testified he was injured while performing demolition work on the second-story deck of a building owned by defendant Willow Ridge Country Club, Inc. Plaintiff testified that, while removing wooden posts with a crow bar, he fell off the deck through a space where its railing had been removed. In contrast, the foreman for plaintiff's employer testified that

plaintiff's accident occurred while plaintiff was straddling between an A-frame ladder leaning against the deck railing and an extension ladder affixed to the adjacent wall of the building, and pulling a gutter down from under the roof. The foreman testified that he admonished plaintiff to stop, but the gutter gave way, causing plaintiff to lose balance and fall to the ground below. The jury found that defendants had violated Labor Law § 240(1), but that the statutory violation was not a substantial factor in causing the accident.

A fair inference is that the jury determined that a statutory violation existed with respect to the guardrail of the deck, but that it accepted the foreman's version of the event and found that the violation was not a proximate cause of the accident. The jury was not instructed on the recalcitrant worker defense, but was instructed, without objection, that it should find for defendants if it concluded that plaintiff's actions were the only substantial factor in bringing about the accident (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 291 n 11 [2003]). Consistent with the jury charge, the jury was entitled to resolve the issues as it did, and we perceive no ground upon which its verdict should be disturbed (see *Pavlou v City of New York*, 21 AD3d 74 [2005], *affd* 8 NY3d 961 [2007];

*Weiss v City of New York*, 306 AD2d 64 [2003]; *King v Perrotte*, 50 AD3d 1266 [2008]). To the extent plaintiff asserts the verdict was inconsistent, the argument is unpreserved since it was not raised before the jury was discharged (see *Barry v Manglass*, 55 NY2d 803 [1981]).

Plaintiff's claim that the court improperly charged the jury pursuant to PJI 1:76 that an inference could be drawn from plaintiff's refusal to waive his attorney-client privilege and allow a former paralegal at the firm which represented plaintiff in his Worker's Compensation claim to testify for the defense is without merit (*Matter of Commissioner of Social Servs. v Philip De G.*, 59 NY2d 137, 141 [1983] ["it is now established that in civil proceedings an inference may be drawn against the witness because of his failure to testify or because he exercises his privilege to prevent another from testifying, whether the privilege is constitutional . . . or statutory"]).

Plaintiff also asserts that the court erred in precluding plaintiff's use of the EBT transcript of defendant's witness Alexander Jack - plaintiff's foreman - during cross-examination on the grounds that plaintiff failed to show that he complied with CPLR 3116. Specifically, CPLR 3116(a) provides that a deposition shall be submitted to the witness who can make

changes. The witness must then sign the deposition under oath. If the witness fails to sign and return the deposition within 60 days, it may be used as fully as though signed. A failure to comply with 3116(a) results in a party being unable to use the transcript pursuant to CPLR 3117 (see *Santos v Intown Assoc.*, 17 AD3d 564 [2005]; *Lalli v Abe*, 234 AD2d 346 [1996]). It is the burden of the party proffering the deposition transcript to establish compliance with CPLR 3116(a) (*Pina v Flik Intl. Corp.*, 25 AD3d 772, 773 [2006]).

Here, the court properly precluded the use of Jack's unsigned deposition transcript during Jack's cross-examination inasmuch as plaintiff failed to establish that the transcript was sent to Jack and that he failed to return it within 60 days. Although at one point in his testimony Jack seems to state that he signed the deposition at his lawyer's office, upon further questioning, it appears that he was confused and was actually referring to taking an oath on the date the deposition was taken (see CPLR 3113[b]), rather than on a separate date when the transcript was sent to him for changes and signing pursuant to CPL 3116.

Although there is no time frame as to when a party should send a deposition transcript to a witness for compliance with

CPLR 3116(a), a trial court need not adjourn a trial during the cross-examination of a witness so the that the party cross-examining the witness may comply with the section. In any event, since plaintiff does not specify any parts of the deposition that he would have used, any error would appear to be harmless.

Nor has plaintiff demonstrated that any of his other claims regarding the conduct of the trial court were so prejudicial as to deprive him of a fair trial. The rulings on admissibility of evidence were proper and, in any event, any error was harmless.

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

ENTERED: MAY 5, 2011

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

3920           Spirits of St. Louis Basketball           Index 600096/09  
              Club, L.P.,  
              Plaintiff-Appellant,

-against-

Denver Nuggets, Inc., etc., et al.,  
Defendants-Respondents.

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Dechert LLP, New York (Robert J. Jossen of counsel), for  
appellant.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Jeffrey A.  
Mishkin of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara R. Kapnick,  
J.), entered October 19, 2009, that granted defendants' motion to  
dismiss the complaint, unanimously affirmed, with costs.

Litigation involving the American Basketball Association  
(ABA), the National Basketball Association (NBA) and some of  
their teams has a history dating from the 1970s. The various  
parties in that era resolved their differences via two  
agreements: the "ABA Agreement" and the "NBA Agreement," both  
dated July 26, 1976.

By the terms of the ABA Agreement, certain teams that sought  
to leave the ABA and join the NBA (the Teams) agreed to direct  
the NBA to pay plaintiff Spirits of St. Louis Basketball Club,

L.P. a portion of revenues from certain telecasts of NBA games for as long as the NBA existed (the TV revenues). The ABA Agreement contained a clause designating the United States District Court for the Southern District of New York (the Southern District) as the exclusive forum to enforce the ABA Agreement:

"The parties agree that this Agreement shall be filed in the Lawsuit in the United States District Court, Southern District of New York, as a stipulation of settlement of the Spirits' Amended Cross-Claim, and the parties shall request the Court to issue an Order decreeing that this Agreement shall have the effect of a Judgment therein pursuant to which the Court *shall* retain jurisdiction over the parties to enforce the terms of this Agreement and the Judgment" (emphasis added).

In conjunction with the ABA Agreement, the parties also executed a "Consent Judgment." The Consent Judgment provided for "this Court," the Southern District, to retain "exclusive jurisdiction to enforce the terms of this Judgment and of the [ABA] Agreement."

Pursuant to the NBA Agreement, the Teams authorized the NBA to pay plaintiff directly for plaintiff's share of the TV revenues. The NBA Agreement did not contain a forum selection clause. However, in 1983, a dispute arose between plaintiff and various creditors of plaintiff who had made conflicting demands

to the NBA for plaintiff's share of the TV revenues. Caught in the middle, the NBA commenced an interpleader action in the Southern District. On November 20, 1985, the parties to the interpleader action settled their dispute via the "Interpleader Agreement." The Interpleader Agreement contained the following forum selection clause:

"Each of the defendants in the interpleader action and the NBA agree that any action or proceeding relating to entitlement to future Spirits' T.V. Revenues shall be brought in the United States District Court, Southern District of New York."

On January 11, 2009, plaintiff brought this action alleging that the NBA and the Teams failed to calculate and pay plaintiff its share of the TV revenues from certain NBA games telecast internationally. The first cause of action alleges breach of the NBA Agreement against all defendants. The second cause of action alleges breach of the ABA Agreement against the Teams. The third cause of action alleges breach of the covenant of good faith and fair dealing against all defendants. The fourth cause of action asks for an accounting.

The motion court correctly granted the motion to dismiss this case because of the forum selection clauses in the ABA Agreement, the Consent Judgment and the Interpleader Agreement (see generally *Boss v American Express Fin. Advisors, Inc.*, 6

NY3d 242, 245-246 [2006]). First, the claims under the ABA Agreement (second cause of action) belong in federal court. By utilizing the word "shall," the ABA Agreement makes the forum mandatory, as does the Consent Judgment decreeing that the Southern District "retains exclusive jurisdiction to enforce the terms of this Judgment and of the [ABA] Agreement" (see *Micro Balanced Prods. Corp. v Hlavin Indus.*, 238 AD2d 284 [1997]).

With respect to the claims under the NBA Agreement (first cause of action), plaintiff alleges that it has not received its fair share of the TV revenues from certain international broadcasts. Thus, it is a claim "relating to entitlement to future Spirits' T.V. Revenues" and belongs in the Southern District pursuant to the forum selection clause in the Interpleader Agreement.

Emphasizing the word "Spirits" in the Interpleader Agreement's forum selection clause, plaintiff argues that this clause applies only to a *third party's* entitlement to monies that rightfully belong to plaintiff. Plaintiff argues that the clause does not apply to this dispute where plaintiff seeks its own "basic right to its share of TV revenues from the NBA." However, the forum selection clause applies to disputes about "entitlement to *future Spirits' T.V. Revenues*" and therefore encompasses TV

revenues that plaintiff itself has not yet received. Nothing in the Interpleader Agreement evinces an intent to exempt direct claims on plaintiff's part. As a signatory, certainly plaintiff could have insisted on language to that effect had it been the parties' intention to leave out plaintiff's direct claims.

Because we find that plaintiff's claims for breach of the NBA Agreement belong in the Southern District, we need not address defendants' contentions that the Southern District would have ancillary enforcement jurisdiction over plaintiff's claims under the NBA Agreement or that the NBA Agreement is "inextricably intertwined" with the ABA Agreement.

Plaintiff argues that no agreement can vest the federal courts with jurisdiction absent an independent basis for federal subject matter jurisdiction. While this is a correct statement, the Southern District should resolve issues regarding its own jurisdiction (see *Purcell v Town of Cape Vincent*, 281 F Supp 2d 469, 475 [ND NY 2003] ["it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgement"]).

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: MAY 5, 2011.

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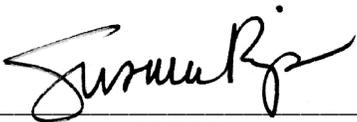


from a purely commercial space to an almost exclusively residential space (except as to the ground floor which remained commercial). Because the purpose of the exemption from rent stabilization based on the substantial rehabilitation of a building is to encourage landlords to renovate buildings and add new residential units to the housing stock (see *Matter of Eastern Pork Prods. Co. v New York State Div. of Hous. & Community Renewal*, 187 AD2d 320, 324 [1992]; *Wilson v One Ten Duane St. Realty Co.*, 123 AD2d 198, 201 [1987]), the conversion of a purely commercial space into an almost purely residential space, creating 23 residential units when none existed, is a substantial rehabilitation so as to exempt the building from rent stabilization (*cf. Wilson*, 123 AD2d at 201; see *Jordan Mfg. Corp. v Lledos*, 153 Misc2d 296, 301 [1992]). That the building was subject to rent stabilization during the period it received J-51 tax benefits, which ended in 1992, does not change the status of the penthouse because it was owner occupied during the entire J-51 period (see Rent Stabilization Code [9 NYCRR] §§ 2520.6[i], 2520.11[i]).

We have considered defendants-appellants' other arguments and find them unavailing.

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

ENTERED: MAY 5, 2011

  
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dismissing the complaint on the ground that plaintiff raised issues of fact as to actual notice of the misleveling elevator. We now reverse.

A property owner has a nondelegable duty to passengers to maintain its building's elevator in a reasonably safe manner (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973]; *Dykes v Starrett City, Inc.*, 74 AD3d 1015 [2010]) and may be liable for elevator malfunctions or defects causing injury to a plaintiff about which it has constructive or actual notice (see *Levine v City of New York*, 67 AD3d 510 [2009]), or where, despite having an exclusive maintenance and repair contract with an elevator company, it fails to notify the elevator company about a known defect (see *Oxenfeldt v 22 N. Forest Ave. Corp.*, 30 AD3d 391, 392 [2006]). "An elevator company which agrees to maintain an elevator in safe operating condition may be liable to a passenger for failure to correct conditions of which it has knowledge or failure to use reasonable care to discover and correct a condition which it ought to have found" (*Rogers v Dorchester Assoc.*, 32 NY2d at 559; see *Cilinger v Arditi Realty Corp.*, 77 AD3d 880, 882-883 [2010]).

Defendants demonstrated their prima facie entitlement to summary judgment by showing that they did not have actual or

constructive notice of an ongoing misleveling condition and did not fail to use reasonable care to correct a condition of which they should have been aware (see *Gjonaj v Otis El. Co.*, 38 AD3d 384, 385 [2007]; *Santoni v Bertelsmann Prop. Inc.*, 21 AD3d 712, 713 [2005]). A representative of Chestnut testified at his deposition that in 2005 he did not observe any visible signs of damage to the elevators during his personal inspections and did not receive any complaints from tenants or building staff about misleveling; that no one had been injured in a building elevator prior to plaintiff's accident; that major repairs were performed on the building's elevators in July and August, which encompassed the work recommended in Advantage's proposal of April 25, 2005; and that the elevators had been inspected by the Department of Buildings on October 26, 2005, about a week before the accident, and passed inspection. Advantage's mechanic testified at his deposition that on the several occasions that he inspected the elevator while performing monthly maintenance, he never observed a misleveling condition and that he was not aware of any such complaints. When the mechanic inspected the elevator after the accident on November 3, 2005, he found it was leveling properly on every floor, which meant there was nothing wrong with it.

In opposition, plaintiff failed to produce evidence of a

prior problem with the elevator that would have provided notice of the specific defect that allegedly caused the elevator to mislevel on the date of her accident (see *Meza v 509 Owners LLC*, \_\_ AD3d \_\_, 2011 NY Slip Op 1576 [2011]; *Karian v G & L Realty, LLC*, 32 AD3d 261 [2004]), or offer any expert evidence that Advantage could have discovered the defect through the exercise of reasonable care (see *Lee v City of New York*, 40 AD3d 1048, 1049 [2007]).

The reference to the replacement of magnets for proper stopping in the April 26, 2005 proposal from Advantage does not establish notice. Plaintiff failed to submit expert testimony or other evidence to show that the alleged misleveling on the date of her accident was related to the magnets. Further, Chestnut's representative testified at his deposition that the work suggested by the proposal was performed. While plaintiff produced a report indicating that the building's elevators did not pass inspection in August and September 2005, there is no indication that this was due to misleveling. In any event, the elevators passed inspection on October 26, 2005 and plaintiff failed to raise an issue of fact as to whether defendants had actual or constructive notice of any defective condition concerning misleveling during the days after the inspection, but

before the accident (see *Carrasco v Millar El. Indus.*, 305 AD2d 353 [2003]). Nor is actual or constructive notice established by the mere fact that modernization proposals of BP Elevator of March 18, 2005 and April 11, 2005 included replacement of the elevator's leveling device (see *Karian v G & L Realty, LLC*, 32 AD3d at 263). While plaintiff's son submitted an affidavit generally averring that misleveling was a well-known problem in the building, he admittedly did not complain about the alleged condition to defendants (see *Narvaez v New York City Hous. Auth.*, 62 AD3d 419 [2009], *lv denied* 13 NY3d 703 [2009]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 5, 2011

  
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hierarchy of the drug sale operation in which he was involved”  
(*People v Burgos*, 44 AD3d 387, 387 [2007], lv dismissed 9 NY3d  
990 [2007]). The seriousness of defendant’s conduct outweighs  
the mitigating factors he cites.

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

ENTERED: MAY 5, 2011

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Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4959 Gladys Madera, Index 7516/05  
Plaintiff-Appellant,

-against-

Heidi A. Gressey, et al.,  
Defendants-Respondents.

Michael Camanione  
Defendant.

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Raymond Schwartzberg & Associates, PLLC., New York (Raymond B. Schwartzberg of counsel), for appellant.

Law Office of Steven I. Lubowitz, Scarsdale (Susan I. Lubowitz of counsel), for Heidi A. Gressey, respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for David Perez, respondent.

Mead, Hecht, Conklin & Gallagher, LLP., Mamaroneck (Elizabeth M. Hecht of counsel), for Juan Cerda, respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered December 29, 2009, which granted the motion of defendant David Perez, and the cross-motions of defendants Juan Cerda and Heidi Gressey, for summary judgment dismissing plaintiff's complaint based on the failure to establish a serious injury under Insurance Law § 5102, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law. Defendants submitted, inter alia, the affirmed

reports of a neurologist, a radiologist and an orthopedist, who, based upon examinations of plaintiff and her medical records, all concluded that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

In opposition, plaintiff failed to raise a triable issue of fact. There was no objective medical proof of injury to the lumbar spine and right shoulder. Notwithstanding the arguably positive MRI report for the cervical spine, there were no objective findings to demonstrate any initial range-of-motion restrictions on plaintiff's cervical and lumbar spine or her shoulder, or any explanation for their omission (see *Thompson v Abbasi*, 15 AD3d 95, 98 [2005]). Plaintiff provided conflicting explanations for the four-year cessation of treatment.

Plaintiff's serious injury claim based on an alleged inability to engage in substantially all her daily activities for 90 of the first 180 days post-accident was refuted by her own testimony and bill of particulars. Plaintiff testified that she was only confined to bed for four days, and her bill of particulars alleged "several days" of confinement (see *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]). Plaintiff

further testified that she was thereafter capable of doing all of her "things."

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

ENTERED: MAY 5, 2011

  
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CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4960- Alice Berger, Index 102418/09  
4960A Plaintiff-Respondent,

-against-

292 Pater Inc. doing business as Rice,  
Defendant,

Raymon Elozua, etc.,  
Defendant-Appellant.

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Gannon, Lawrence & Rosenfarb, New York (Jason B. Rosenfarb of  
counsel), for appellant.

Katz & Katz, New York (Andrea Katz-Ritscher of counsel), for  
respondent.

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Order, Supreme Court, New York County (Paul G. Feinman, J.),  
entered September 15, 2010, which, to the extent appealed from,  
denied so much of the motion of defendant-appellant Raymon Elozua  
d/b/a 292 Elizabeth St. Realty as sought summary judgment  
dismissing the complaint, and order, same court and Justice,  
entered January 10, 2011, which denied without prejudice so much  
of Elozua's motion as sought summary judgment on its cross claim  
for contractual indemnification against defendant 292 Pater Inc.  
d/b/a Rice, unanimously affirmed, without costs.

In this personal injury action, plaintiff alleges that she  
was injured when she tripped and fell on a piece of metal

protruding from a vault step in front of premises owned by Elozua and leased by 292 Pater.

Paragraph R3 of the rider to the lease provided that 292 Pater would replace the vault step in accordance with Landmark Regulations within 180 days of lease commencement. It is undisputed that the step was never replaced.

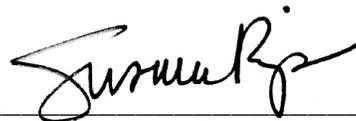
Paragraph R7 of the rider provided that 292 Pater would indemnify Elozua from claims arising from or in connection with the use or occupancy of the premises. Paragraph R8 of the rider provided that 292 Pater would obtain insurance naming Elozua as an additional insured.

The court properly denied that branch of Elozua's motion for summary judgment dismissing the complaint. Elozua failed to meet his initial burden of establishing prima facie entitlement to judgment as a matter of law. Plaintiff's testimony and the photographs of the defect, which Elozua submitted in support of his motion, raise triable issues of fact concerning the existence of the defect and whether it was trivial. Further, the lease provision requiring replacement of the vault step raises a triable issue of fact with respect to notice. Accordingly, the burden never shifted to plaintiff (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The court properly denied without prejudice that branch of Elozua's motion for summary judgment on its cross claim for contractual indemnification against 292 Pater. Although General Obligations Law § 5-321 does not preclude indemnification of a landlord for its own negligence where the lease was negotiated at arm's length by two sophisticated parties who "use insurance to allocate the risk of liability to third parties between themselves" (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]), it cannot be determined on this record whether the statute precludes Elozua from obtaining contractual indemnification from 292 Pater. Indeed, the record is devoid of evidence concerning the parties' sophistication and whether the negotiations were at arm's length.

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

ENTERED: MAY 5, 2011

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CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4965- In re Tyvan B.,  
4965A

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

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

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Orders of disposition, Family Court, Bronx County (Monica  
Drinane, J.), entered on or about May 20, 2010, which adjudicated  
appellant a juvenile delinquent upon his admission that he had  
committed acts that, if committed by an adult, would constitute  
the crimes of possession of graffiti instruments and criminal  
possession of marihuana in the fifth degree, and imposed a  
conditional discharge for a period of 12 months, unanimously  
reversed, as an exercise of discretion in the interest of  
justice, without costs, the delinquency finding and conditional  
discharge vacated, and the matter remanded to Family Court with  
the direction to order a supervised adjournment in contemplation  
of dismissal pursuant to Family Court Act § 315.3(1).

The court improvidently exercised its discretion when it

imposed a juvenile delinquency adjudication with a conditional discharge. This was not "the least restrictive available alternative" (Family Ct Act § 352.2[2][a]). Instead, a supervised adjournment in contemplation of dismissal (ACD) would adequately serve the needs of appellant and society (see e.g. *Matter of Joel J.*, 33 AD3d 344 [2006]).

Appellant was 13 years old at the time of the adjudication. The underlying offenses were minor and were appellant's first offenses. They occurred over a short period of time when, through no fault of his own, appellant was not receiving his psychiatric medication. Appellant's mother was actively involved in his home and school life, and she recognized and addressed her son's need for psychiatric treatment prior to any intervention from the court. At time of the dispositional hearing appellant was receiving appropriate medication and therapy. There is no

reason to believe appellant needs any court-imposed supervision beyond the supervision that can be provided under an ACD.

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

ENTERED: MAY 5, 2011

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CLERK



substantial issue as to the constitutionality of the lineup that could only be resolved through the victim's testimony (see *People v Abrew*, 95 NY2d 806, 808 [2000]; *People v Chipp*, 75 NY2d 327, 337-338 [1990], *cert denied* 498 US 833 [1990]).

Initially, we note that the hearing court credited the testimony of the officer who conducted the lineup that he was unaware that a chain had been stolen during the robbery. During the lineup, defendant was wearing a chain that the victim later identified as the one that had been taken from him. None of the other lineup participants were wearing chains. Defendant argues that the identification could have been influenced by that fact, and that the victim's testimony was necessary to determine whether he noticed the chain.

When a defendant, even unbeknownst to the police, is the only lineup participant wearing an article that a witness associates with the crime, the lineup may be unconstitutionally suggestive *Raheem v Kelly*, 257 F3d 122, 137 [2d Cir 2001], *cert denied sub nom. Donnelly v Raheem*, 534 US 1118 [2002]). Here, however, the record, including the lineup photographs, supports the hearing court's finding that the chain was barely visible, if at all, during the lineup because it was almost completely covered by defendant's shirt. Furthermore, the record

establishes that the victim's chain was a large chain with a cross. The hearing court accurately observed that so little of the chain was visible at the lineup, it is highly unlikely that the victim would have recognized the chain as his own. This inference is strongly supported by the officer's conversation with the victim after the lineup. At that time, the victim listed property that had been taken during the robbery and mentioned a chain. However, the victim said nothing about having seen the chain during the lineup. Had the victim noticed the chain at that time, it would have been natural for him to advise the officer that defendant was wearing the stolen chain. Based on this record, the court properly concluded that the victim's testimony was not necessary at the hearing. Finally, defendant had a full opportunity to examine the victim on this issue at trial (*see Chipp*, 75 NY2d at 338-39).

The court properly imposed consecutive sentences for the robbery and assault convictions (*see generally* Penal Law § 70.25[2]; *People v Frazier*, 16 NY3d 36, 40-41 [2010]). Defendant threatened to cut the victim with a knife in order to compel him to hand over his property. The crime of first-degree robbery was completed when the victim complied with that demand. Defendant then walked away, but moments later turned back and slashed the

victim with the knife. This constituted the distinct crime of second-degree assault, committed with a new criminal intent unrelated to the robbery (see *People v Murray*, 299 AD2d 22 [2002], *lv denied* 99 NY2d 631 [2003]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 5, 2011

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CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4968 Erickson Air-Crane Incorporated, Index 600325/09  
Plaintiff-Appellant,

-against-

EAC Holdings, L.L.C.,  
Defendant-Respondent.

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Cartusciello & Associates, P.C., New York (Neil S. Cartusciello  
of counsel), for appellant.

Proskauer Rose LLP, New York (Sarah S. Gold of counsel), for  
respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer,  
J.), entered September 1, 2010, which granted defendant's motion  
to dismiss the complaint, unanimously affirmed, with costs.

The relationship of the parties was controlled by a stock  
purchase agreement, which provided that the exclusive remedy of  
either party alleging a breach of warranty would be  
indemnification. The procedure set forth in Article 9 of the  
stock purchase agreement makes any demand for indemnification for  
payment made on third-party claims "contingent" upon the  
demanding party's compliance with the notice and consent to  
settlement provisions therein. These provisions give the  
potential indemnifying party the right to receive timely notice  
of the third-party claim, to participate in the settlement

negotiations or assume the defense of the claim, and to consent to a settlement of the claim. Plaintiff's conceded failure to comply with these express conditions when it unilaterally settled certain third-party claims is fatal to its demand for indemnification (see *MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] ["Express conditions must be literally performed"]; see e.g. *Merchants Bank of N.Y. v Israel Discount Bank of N.Y.*, 200 AD2d 540 [1994]; see also *Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572, 573 [2010]).

Contrary to plaintiff's argument, the contested language of Article 9 is susceptible to only one reasonable interpretation (see *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [2008], *affd* 13 NY3d 398 [2009] ["clear contractual language does not become ambiguous simply because the parties ... argue different interpretations"]). We also reject plaintiff's argument that defendant was required to show it was prejudiced by plaintiff's failure to provide notice of the asserted third-party claims; the cited provision of Article 9 refers to prejudice

arising from late notice, not the absence of any notice  
whatsoever.

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

ENTERED: MAY 5, 2011

  
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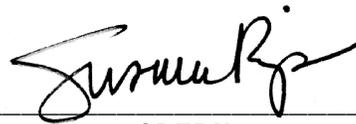




postrelease supervision, and we perceive no basis for granting such relief.

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

ENTERED: MAY 5, 2011

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CLERK

Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4975-	In re Godwin Ajala,	File. 3314/02
4976-	Deceased.	3668/05
4977-	- - - - -	3669/05
4978-		3670/05
4979-	In re Uchechukwu Ajala,	
4980	and others.	

Mabel Udu Ajala, et al.,  
Appellants.

Victoria Ajala,  
Respondent.

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Nnebe & Associates, P.C., Williamsburg (O. Valentine Nnebe of  
counsel), for appellants.

Fatai O. Lawal, Jamaica, for respondent.

Summerfield M. Baldwin, New York, attorney for the children.

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Order, Surrogate's Court, New York County (Kristen Booth  
Glen, S.), entered on or about April 22, 2010, which vacated its  
prior decree of May 2, 2006 appointing appellants Mabel Udu Ajala  
and Sebastian O. Ibezim as co-guardians of the property of the  
subject infants and dismissed appellant Mabel Ajala's petition  
for the release to her, on behalf of the infants, of certain  
funds awarded decedent's estate by the September 11<sup>th</sup> Victims  
Compensation Fund (VCF), unanimously affirmed, without costs.  
Order, same court and Surrogate, entered September 8, 2010,  
which, to the extent appealable, denied appellants' motion

seeking: the court's recusal; vacatur of the court's April 22, 2010 order; leave to renew and/or reconsider the court's April 22, 2010 order; and a determination of the aforementioned petition for the release of VCF funds awarded decedent's estate, unanimously affirmed, without costs.

We find the court did not abuse its discretion or violate appellants' due process rights by sua sponte vacating its May 2, 2006 decree granting appellants Letters of Guardianship. Pursuant to the Surrogate's Court Procedure Act § 707(1)(c), Mabel Ajala, as a nonresident alien, was ineligible to serve with Sebastian, a nonresident of the State of New York, as sole co-fiduciary (see *Matter of Makowski*, 13 AD3d 1210 [2004]). Contrary to appellants' argument that Mabel Ajala fell within an exception to SCPA 707(1)(c) for an ancillary foreign guardian under SCPA 1716(4), there is no record evidence that Mabel Ajala applied for such ancillary letters of guardianship, or submitted the documents required for such application.

Hence, the court properly dismissed appellant Mabel Ajala's petition to release the subject funds because Mabel Ajala lacked standing. Moreover, the petition did not constitute a prior act in Ajala's capacity as fiduciary within the meaning of SCPA 720 (compare *Matter of Grillo*, 26 AD3d 376 [2006]).

In addition, contrary to appellants' arguments, the record does not reflect any conduct demonstrating that the court's impartiality might reasonably be questioned or that the court has a personal bias or prejudice concerning a party (see 22 NYCRR 100.3(E)(1)(a)(i); *Matter of Petkovsek v Snyder*, 251 AD2d 1086 [1998]; compare *Matter of Murphy*, 82 NY2d 491 [1993]).

Finally, to the extent that appellants sought leave to renew the court's April 21, 2010 order, even assuming such motion was properly made pursuant to CPLR 2221(a), appellants failed to demonstrate the existence of new facts not offered on the prior motion or material changes in circumstances which warranted the grant of such relief in the interest of justice (compare *Strong v Brookhaven Mem. Hosp. Med. Ctr.*, 240 AD2d 726 [1997]).

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

ENTERED: MAY 5, 2011

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*denied* 8 NY3d 879 [2007]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The record, viewed as a whole, demonstrates that the court considered defendant's long pattern of violating the conditions of his plea agreement, and that the new arrest was simply the proverbial last straw. Over a period of years between the plea and sentencing, defendant repeatedly made temporary progress toward rehabilitation followed by relapses into drug use, despite several warnings from the court not to expect further leniency.

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

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

ENTERED: MAY 5, 2011

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Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4982 In re Michael F.,

A Person Alleged to  
be a Juvenile Delinquent,  
Appellant.

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Presentment Agency

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about April 8, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute criminal possession of a weapon in the second degree, and placed him on probation for a period of 24 months, unanimously reversed, on the law and the facts, without costs, appellant's suppression motion granted, and the petition dismissed.

Other than stating that it was late at night (a night that happened to be New Year's Eve) and that the neighborhood was a high-crime area, the testifying officer did not provide any basis for the police to stop their car and approach a group of young

men, including appellant, that was congregating on a street corner. These circumstances did not provide an objective credible reason for a level one request for information (see generally *People v McIntosh*, 96 NY2d 521 [2001]; *People v Mobley*, 48 AD3d 374 [2008]). When two uniformed officers got out of the marked car and approached appellant, he turned around, walked quickly away and looked back several times over the course of two minutes. This did not justify the subsequent level one encounter, in which the testifying officer followed appellant in his police car, stopped the car, asked appellant to stop and asked him what he was doing. Appellant's conduct was ambiguous, and, in the circumstances presented, was no more than an exercise of his "right to be let alone" in response to the initial approach of the other officers, rather than flight (*People v Moore*, 6 NY3d 496, 500-501 [2006]; *People v Holmes*, 81 NY2d 1056 [1993]; *People v Howard*, 50 NY2d 583 [1980]). While the officer subsequently made observations that led to the recovery of a

loaded revolver from appellant's jacket, those observations were the result of the unauthorized encounter.

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

ENTERED: MAY 5, 2011

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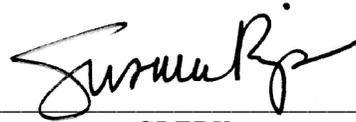


Supreme Court abused its discretion in refusing to vacate its prior order granting a permanent stay of arbitration of respondents Rogers and Westwater's uninsured motorist claim, which was granted upon their failure to appear at the petition hearing or to submit papers in opposition. Vacatur should have been granted on the ground of "fraud, misrepresentation, or other misconduct of an adverse party" (CPLR 5015[a][3]). A review of the record in this case reveals several potential instances of intentional and material misrepresentations of fact by petitioner, which, at least in part, may have formed the basis of Supreme Court's decision and order to permanently stay arbitration. Hence, it was an abuse of discretion to conclude that the failure to proffer a reasonable excuse precluded relief pursuant to CPLR 5015(a)(3), since that section does not require such a showing (*cf.* CPLR 5015 [a] [1]; see *Shouse v Lyons*, 4 AD3d 821, 822 [2004]). To the extent that some of respondents' allegations of fraud, misrepresentation or other misconduct are not conclusively established by the evidence in the record, they present issues of fact which should not be determined without

holding a hearing (*Readick v Readick*, 80 AD3d 512, 513 [2011];  
see also *Tonawonda Sch. Emples. Fed. Credit Union v Zack*, 242  
AD2d 894, 894-95 [1997]).

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

ENTERED: MAY 5, 2011

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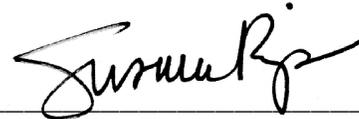


*Phoenix Garden Rest. v Chu*, 234 AD2d 233 [1996], and *Zimmer-Masiello, Inc. v Zimmer, Inc.*, 164 AD2d 845, 846-847 [1990]).

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

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

ENTERED: MAY 5, 2011

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complaints or otherwise been notified of such a defect (see *Metling v Punia & Marx*, 303 AD2d 386, 387 [2003] [defendants met initial burden as to notice by relying on sworn statements of plaintiff and building manager]).

Because the alleged defect was not visible and apparent, it could not give rise to constructive notice (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). Further, constructive notice could not be established on a "recurrent condition" theory based on plaintiff's testimony that she had observed between twenty and twenty-five "loose stairs" in the building's staircases during her five years of residency but could not say whether any of them were in the area where she fell. The recurring condition must occur in the area of the accident to give rise to the inference of constructive notice that the condition existed at the time of the accident (see e.g. *Colbourn v ISS Intl. Serv. Sys.*, 304 AD2d 369 [2003] [issue of fact regarding constructive notice where there was evidence of recurrent leaky ceiling that dripped water where plaintiff fell]; *Piaquadio v Recine Realty Corp.*, 84 NY2d 967 [1994] ["'general awareness' that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused plaintiff's fall"]).

As the trial court concluded, the opinion letter submitted by plaintiff's expert, an engineer, based only on review of plaintiff's affidavit and bill of particulars, as well as photographs of the stairway allegedly taken after it was repaired, did not raise triable issues of fact (*see Reed v Piran Realty Corp.*, 30 AD3d 319 [2006], *lv denied* 8 NY3d 801 [2007]).

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

ENTERED: MAY 5, 2011

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it was sole beneficial owner of the real property at issue (Properties) to the extent of declaring that the recorded instrument of acknowledgment is valid and enforceable, and notwithstanding that record ownership to the Properties is in the names of petitioners, all beneficial right, title and interest to the Properties belongs to the Trust, not petitioners, and denied the Trust's request for sanctions, unanimously affirmed, with costs.

Petitioners failed to rebut the "presumption of due execution" raised by the instrument of acknowledgment (*John Deere Ins. Co. v GBE/Alasia Corp.*, 57 AD3d 620, 621-622 [2008]). The notary's testimony was inconclusive, and the only other proof offered tending to show that the notarization was faulty was the testimony of interested witnesses, namely, petitioners. The alteration of the notary stamp in 2007 does not negate petitioners' execution of the document in 2005. Because the proof was not so clear and convincing as to amount to "a moral certainty" (*Albany County Sav. Bank v McCarty*, 149 NY 71, 80 [1896]; see also *Matter of Goodman*, 2 AD2d 558 [1956]; *John Deere*, 57 AD3d at 622), the court properly awarded summary judgment to the Trust on its first counterclaim for a declaratory judgment.

Petitioners failed to make a prima facie showing that Elana has an "independent" legal right to the Properties. The instrument of acknowledgment provides that the money used to purchase the Properties belonged to the Trust and that the money was given with the understanding that the Properties would be conveyed to the Trust. Elana's assertion that she does not remember signing the instrument of acknowledgment does not rebut the "heavy presumption that a deliberately prepared and executed written instrument manifested the true intention of the parties" (*George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 219 [1978]).

Petitioners' assertion that Sagi owns the Properties because the money used to purchase the Properties was a trust distribution to Sagi is belied by the documentary evidence, including an email from Sagi to his accountant wherein Sagi admitted that the Trust owned the Properties. Petitioners' assertion that this email pertained to a different trust is unsupported by the record.

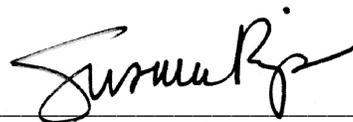
Triable issues of fact exist as to the status and number of the mortgages encumbering the Properties. Accordingly, the court properly declined to dismiss the Trust's fraud and unjust enrichment counterclaims (*see generally Alvarez v Prospect Hosp.*,

68 NY2d 320, 325 [1986]).

Although the court did not address the Trust's request for sanctions, such a request may be deemed denied where, as here, it was not specifically granted (see *Kaplan v Einy*, 209 AD2d 248, 251 [1994]). Given that the Trust requested sanctions for the first time at oral argument and that the petition was not frivolous, the court providently exercised its discretion in denying the request (see *Freedman v Zeigler*, 75 AD3d 419 [2010]).

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

ENTERED: MAY 5, 2011

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CLERK

Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4989- In re Megan Victoria C-S., and Others,  
4989A-  
4989B- Dependent Children Under  
4989C the Age of Eighteen Years, etc.,

Maria Esther S.,  
Respondent-Appellant.

-against-  
Abbott House,  
Petitioner-Respondent,

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Frederic P. Schneider, New York, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for respondent.

Steven N. Feinman, White Plains, attorney for the children.

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Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about April 3, 2009, which, to the extent appealed from as limited by the briefs, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject children and committed their custody to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence of respondent's failure to plan for the children's future, notwithstanding the petitioning agency's

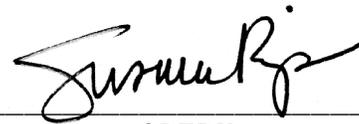
diligent efforts (Social Services Law § 384-b[7][a]; see *Matter of Sheila G.*, 61 NY2d 368 [1984]). The agency's diligent efforts were demonstrated by, inter alia, the development of a service plan; the scheduling of visitation; repeated attempts to encourage the mother's compliance with the service plan requirements and provision of referrals for services (see *Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). The agency's duty to exercise diligent efforts is subject to reason and does not require that the agency "guarantee that the parent succeed in overcoming his or her predicaments" (*Sheila G.*, 61 NY2d at 385). The mother, who did not complete a drug treatment program despite several referrals and stopped attending mental health therapy, failed to plan for the children's future by failing to avail herself of the requisite services (see *Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]).

The court properly addressed the agency's motion to suspend the mother's visitation with the children. Moreover, this issue was raised for the first time on appeal, and, in any event,

there is no evidence of any prejudice to the mother in connection with that motion.

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

ENTERED: MAY 5, 2011

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", is written above a horizontal line.

CLERK



Tom, J.P., Mazzairelli, Acosta, DeGrasse, Román, JJ.

4994- The People of the State of New York, Ind. 1921/99  
4994A- Respondent,  
4994B

-against-

Joesun King,  
Defendant-Appellant.

---

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

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

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Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered September 25, 2008, resentencing defendant to a term of 9 years, with 5 years' postrelease supervision, unanimously reversed, on the law, the resentence vacated, and the original sentence without postrelease supervision reinstated. Appeals from orders (same court and Justice), entered on or about January 12, 2009, which denied defendant's motion to vacate the judgment of resentence, and on or about June 24, 2010, which denied defendant's CPL 440.20 motion to set aside the resentence, unanimously dismissed, without costs, as academic.

Defendant is entitled to relief under *People v Williams* (14 NY3d 198 [2010]), which invalidates the imposition of postrelease

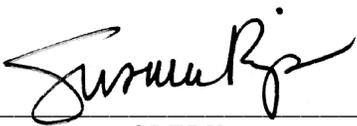
supervision upon resentencing of defendants who have been released after completing their terms of imprisonment. The original sentencing record does not support the People's assertion, and the resentencing court's conclusion, that PRS was already part of the original sentence. That record reveals that, in a colloquy with defendant regarding a plea withdrawal issue, the court made a casual remark that apparently referred to PRS. This fell far short of being the formal pronouncement of sentence required by statute (CPL 380.50[1]) and by *People v Sparber* (10 NY3d 454 [2010]). Instead, the formal pronouncement of sentence was limited to a prison term.

We have considered and rejected the People's procedural arguments. The action taken on September 25, 2008, regardless of how denominated by the court, was a judgment of resentence that added PRS to the existing sentence. Defendant has the right to appeal that judgment, and it brings up for review the court's determination - which we find erroneous - that it had already imposed PRS. In any event, were we not dismissing as academic the appeal from the June 24, 2010 order which denied relief under

CPL 440.20, we would reverse that order as well, for the reasons stated above.

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

ENTERED: MAY 5, 2011

  
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Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4995 Cynthia DiBartolo, et al., Index 603576/06  
Plaintiff-Respondents-Appellants,

-against-

Battery Place Associates, etc., et al.,  
Defendants-Appellants-Respondents.

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Constantine Cannon LLP, New York (Stanley N. Alpert of counsel),  
for appellants-respondents.

Melvyn R. Leventhal, New York, for respondents-appellants.

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Order, Supreme Court, New York County (Paul G. Feinman, J.),  
entered October 4, 2010, which, to the extent appealed from,  
denied defendants' motion for summary judgment dismissing the  
complaint, unanimously modified, on the law, to grant the motion  
as to the first cause of action for specific performance, and  
otherwise affirmed, without costs.

Plaintiffs Cynthia DiBartolo and John E. Purpura entered  
into a contract for the purchase of a condominium unit from  
defendant Battery Place Associates, now doing business as Battery  
Place Associates LLC (BPA). In connection therewith, plaintiffs  
made a downpayment, which was held in an escrow account under  
defendant Robert R. Lewis's control. The closing on the unit was  
originally noticed by BPA for July 22, 1991 and thereafter

adjourned on multiple occasions. In a prior action, brought against BPA and others, plaintiffs sought rescission of the contract and obtained an interim stay of the March 1992 closing date. Thereafter, the parties to the prior action stipulated to a stay of the closing and in January 1993 the action was dismissed, which dismissal was not on the merits.

In October 2006, plaintiffs commenced this action seeking specific performance and damages arising out of the contract, and relief and damages against both defendants in connection with the handling of the escrow account. By order, entered March 11, 2008, the court (Barbara R. Kapnick, J.), granted defendants' pre-answer motion to dismiss the complaint, to the extent of dismissing as time-barred the portions of the second and third causes of action that sought, or could be deemed to seek, a return of the down payment, and dismissing those portions of the fourth cause of action, for breach of contract and fiduciary duty, which alleged statutory and regulatory violations.

The court properly found that the adjourned closing dates, which failed to identify a time or place for the closing, were not "time of the essence" dates. Thus, plaintiffs were required to show only that they were "ready, willing and able" to close within a reasonable time (*Gindi v Intertrade Internationale Ltd.*,

50 AD3d 575, 575 [2008]). The record is devoid of evidence that plaintiffs tried to protect their rights or enforce the contract between the January 1993 dismissal of the prior action and July 1999, when DiBartolo discussed her demand for rescission with Lewis. As a matter of law (see *Hegeman v Bedford*, 5 AD3d 632 [2004]), this unexplained delay in tendering performance is unreasonable and, in the absence of a timely tender of performance or readiness and willingness to go forward with the closing, the claim for specific performance should have been dismissed (see *Contro v White*, 176 AD2d 1052 [1991]).

Plaintiffs' unequivocal demand for rescission, which persisted until plaintiffs requested a closing in November 2000, negates a finding of willingness and ability to close on the original or adjourned closing dates or a reasonable time thereafter (see *Kabro PM, LLC v WGB Main St., LLC*, 52 AD3d 659 [2008]), *lv denied* 12 NY3d 701 [2009]; *Stadtmauer v Brel Assoc. IV*, 270 AD2d 59 [2000]).

The court properly denied defendants' motion to the extent that they sought dismissal of the remaining portions of the fourth cause of action alleging breaches of contract and fiduciary duty in connection with the handling of the escrow account. As the court found, and defendants do not dispute,

triable issues of fact exist with respect to those claims. However, to the extent that the order appealed from can be construed to limit plaintiffs' right to relief on the cause of action to equitable relief, such limitation would be unwarranted. Where, as here, a suit alleging breach of fiduciary duty seeks both equitable relief and money damages, a six-year statute of limitations applies (*see generally Kaufman v Cohen*, 307 AD2d 113, 118 [2003] ["where suits alleging a breach of fiduciary duty seek *only money damages . . .* a three-year statute of limitations applies" (emphasis added)]). Accordingly, plaintiffs' claim for monetary relief was timely. In any event, even if a three-year statute of limitations applies to the monetary facet of plaintiff's fourth cause of action, given the absence of a clear repudiation, defendants have failed to make a prima facie showing that the statute of limitations has begun to run (*see Matter of Barabash*, 31 NY2d 76, 81 [1972]), or that they were not equitably estopped from evoking the statute of limitations (*cf. Kaufman*, 307 AD2d at 122).

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

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

ENTERED: MAY 5, 2011

  
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Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

4996- Patrick Noel Foley, Index 17226/04  
4997 Plaintiff-Respondent-Appellant, 84862/05

-against-

Consolidated Edison Company  
of New York, Inc.,  
Defendant-Respondent,

-and-

Tech-Tronics Inc., et al.,  
Defendants,

John Deere Consumer Products, Inc., et al.,  
Defendants-Appellants-Respondents.

- - - - -

John Deere Consumer Products, Inc., et al.,  
Third-Party Plaintiffs-Appellants,

-against-

Roadway Contracting, Inc.,  
Third-Party Defendant-Respondent.

[And a Second Third-Party Action]

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Gallagher, Walker, Bianco & Plastaras, Mineola (Robert J. Walker  
of counsel), for appellants-respondents/appellants.

O'Dwyer & Bernstien, LLP., New York (Steven Aripotch of counsel),  
for respondent-appellant.

Kenney Shelton Liptak & Nowak, LLP, New York (Michael L. Stonberg  
of counsel), for Consolidated Edison Company of New York, Inc.,  
respondent.

Camacho Mauro Mulholland, LLP, New York (Kathleen Mulholland of  
counsel), for Roadway Contracting, Inc., respondent.

Order, Supreme Court, Bronx County (John A. Barone, J.), entered October 6, 2010, which granted defendant Consolidated Edison's (Con Edison) motion for summary judgment dismissing the complaint and any cross claims against it, granted third-party defendant Roadway Contracting, Inc.'s (Roadway) motion for summary judgment dismissing defendant John Deere Consumer Products, Inc., Homelite, Inc., Homelite Consumer Products Holding, Inc., and Ryobi Technologies, Inc.'s (John Deere) third-party action against it, and denied John Deere's motion to strike the complaint and Roadway's third-party answer as spoliation sanctions, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for burn injuries he sustained while excavating a trench in lower Manhattan for his employer Roadway, which was a subcontractor for Con Edison. Plaintiff was burned when a hand-held saw manufactured by John Deere caught on fire as he was attempting to cut through a pipe.

The record evidence demonstrated that Con Edison did not control the method and means of plaintiff's work and at most exercised general supervisory powers over plaintiff, which cannot form a basis for the imposition of liability (see *Goodwin v Comcast Corp.*, 42 AD3d 322 [2007]). In particular, while Con

Edison directed Roadway crews to excavate certain sites, Roadway controlled the methods and means of such excavation. Further, and most significant to the claims in this action, Roadway furnished its own tools and equipment to complete its work, including the saw which caught on fire, and Con Edison had no control over the equipment used by plaintiff to enable it to avoid or correct the alleged unsafe condition of the saw (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

Although it is true that Con Edison inspectors were always on site, the mere presence of Con Edison's personnel on site is insufficient to infer supervisory control (see *Matter of New York City Asbestos Litig.*, 25 AD3d 374 [2006]). Nor is a triable issue presented by the fact that Con Edison employees may have inspected the excavations and admonished Roadway employees to hurry the work (see *Haider v Davis*, 35 AD3d 363 [2006]). Moreover, there is no evidence that Con Edison "gave anything more than general instructions on what needed to be done, not how to do it, and monitoring and oversight of the timing and quality of the work is not enough to impose liability under [Labor Law] section 200" (*Dalanna v City of New York*, 308 AD2d 400, 400 [2003]). Finally, the fact that Con Edison had the authority to stop work for safety reasons is insufficient to raise a triable

issue of fact with respect to whether it exercised the requisite degree of supervision and control over the work being performed to sustain a claim under Labor Law § 200 or for common-law negligence (see *Hughes v Tishman Constr. Corp.*, 40 AD3d 305 [2007]).

Contrary to John Deere's contention, the contract between Con Edison and Roadway does not evidence that Con Edison had a contractual right of control sufficient to establish that it exercised control or supervision over plaintiff's work. The contractual terms relied on by John Deere merely establish that Con Edison had general supervisory authority and do not establish that Con Edison controlled how plaintiff performed the injury-producing work.

We further find that Supreme Court properly dismissed the Labor Law § 241(6) claim against Con Edison. Plaintiff failed to plead any specific Industrial Code violations, and did not address the issue in opposition to Con Edison's motion. Thus, plaintiff has indicated an intention to abandon this theory of liability (see *Brown v Christopher St. Owners Corp.*, 2 AD3d 172 [2003], *lv dismissed* 1 NY3d 622 [2004]). Assuming, without deciding, that John Deere has a basis to assert violations of Industrial Code sections in support of its cross claim against

Con Edison, we find that the sections cited by John Deere - 12 NYCRR 12-1.7, 12 NYCRR 23-9.2(a), and 12 NYCRR 23-10.3 - are inapplicable to this case.

Supreme Court properly granted Roadway's motion for summary judgment dismissing John Deere's third-party action. The written contract in evidence containing an indemnification clause was between Con Ed and Roadway and thus John Deere cannot claim indemnification based on that agreement. Further, Roadway established that it could not be liable for contribution or indemnification on the ground that plaintiff sustained a "grave injury" as defined in Workers' Compensation Law § 11. In particular, Roadway established that there was no evidence that plaintiff sustained permanent or severe facial disfigurement as a result of his burns.

Supreme Court providently exercised its discretion in denying John Deere's motion to dismiss the complaint and Roadway's third-party answer as sanctions for spoliation of evidence and in granting John Deere leave to seek an adverse inference charge at trial (see *Ortega v City of New York*, 9 NY3d 69, 76 [2007]). There was no evidence that plaintiff had control of the saw following the accident, and once he was released from the hospital nearly a month following the accident, he attempted

to locate and preserve the saw from his employer to no avail. We also find no basis to preclude Roadway from moving for summary judgment based on the Workers' Compensation Law.

Plaintiff and John Deere are equally affected by the loss of the saw; neither party has reaped an unfair advantage in the litigation as neither party can inspect the saw (see *De Los Santos v Polanco*, 21 AD3d 397, 398 [2005]). Further, because plaintiff's action is based on design defect and failure to warn claims, the unavailability of this particular saw does not prejudice John Deere's ability to defend itself in this action, as the same alleged defect would appear in other products of the same design (see *Rodriguez v Pelham Plumbing & Heating Corp.*, 20 AD3d 314, 315-16 [2005]).

We have considered appellants' remaining claims and find them unavailing.

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

ENTERED: MAY 5, 2011



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including its evaluation of inconsistencies in testimony (see *People v Prochilo*, 41 NY2d 759, 761 [1977]). Evidence credited by the court established a lawful car stop, followed by a lawful seizure of drugs.

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

ENTERED: MAY 5, 2011

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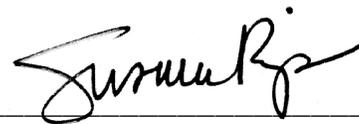
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plaintiff's motion to the extent indicated. Considering that plaintiff was not represented by counsel and has no other record of missed court dates we accept his excuses for his default (see *Gass v Gass*, 42 AD3d 393, 396 [2007]). In addition, plaintiff presented a meritorious defense insofar as he contends that the court (Gesmer, J.) improperly imputed additional income and set amounts he cannot afford to pay (see *Hunter v Annexstein*, 141 AD2d 449, 451 [1988]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 5, 2011

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Tom, J.P., Mazzarelli, Acosta, DeGrasse, Román, JJ.

5001-           Fiserve Solutions, Inc., etc., et al.,   Index 601096/09  
5002            Plaintiffs-Respondents,                                 601217/09

-against-

XL Specialty Insurance Company.,  
Defendant-Appellant.

And another action

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Steptoe & Johnson LLP., New York (Christopher T. Lutz of the bar of the District of Columbia admitted pro hac vice of counsel), for appellant.

Reed Smith LLP., New York (Wendy H. Schwartz of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 7, 2010, which denied defendant's motion to compel discovery, unanimously reversed, on the law and the facts, without costs and the motion granted. Appeal from order, same court and Justice, entered September 21, 2010, which denied defendant's motion for leave to renew, unanimously dismissed, without costs, as academic.

We find that defendant seeks not to engage in improper post-claim underwriting (*see Banks v Paul Revere Life Ins. Co.*, 31 F Supp 2d 82, 85 n 5 [1998]) but to determine the scope of coverage

under the insurance policy. Thus, the disclosure defendant requested is material and necessary in the defense of this action (CPLR 3101).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 5, 2011

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