SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 17, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4759- James L. Melcher, Index 604047/03
4760- Plaintiff-Respondent,
4761-
4762- -against-
4763-
4764- Apollo Medical Fund Management L.L.C., et al.,
Defendants-Appellants.

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Greenberg Traurig, LLP, New York (Leslie D. Corwin of counsel), for appellants.

Jeffrey A. Jannuzzo, New York, for respondent.

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Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered February 2, 2010, insofar as appealed from, awarding plaintiff damages on the third cause of action, granting him judgment on the sixth cause of action, and dismissing defendants' counterclaim for breach of contract, unanimously affirmed, with costs. Appeals from orders, same court and Justice, entered September 23, 2009 and January 7, 2010, and from order, same court (Donna Mills, J.), entered September 8, 2009, unanimously dismissed, with costs, as subsumed in the appeal from the judgment.

Defendants failed to preserve their argument that plaintiff's expert should have been precluded because compliance with custom and practice is irrelevant to whether a party complied with a fiduciary duty under Delaware law (*see In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 741 [Del Ch 2005], *affd* 906 A2d 27 [Del 2006]). In any event, the evidence was relevant to the claims of violation of the fiduciary duty of good faith and/or loyalty (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]).

Defendants contend that the evidence of breach of fiduciary duty was insufficient because plaintiff failed to submit any evidence concerning the fiduciary duties generally owed between managers and members in a limited liability company organized under Delaware law. However, defendants failed to object to the court's instruction to the jury that the manager of an LLC owes a fiduciary duty of due care, good faith and loyalty to the members of the LLC (*Peguero v 601 Realty Corp.*, 58 AD3d 556, 559 [2009]). In any event, the jury instruction was correct. Apollo Management's operating agreement contains no provision contrary to the principle that "the manager of an LLC owes the traditional fiduciary duties of loyalty and care to the members of the LLC" (*Bay Ctr. Apts. Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451,

*8, 2009 Del Ch LEXIS 54, *26 [Apr. 20, 2009]). Nor does it contain a provision "explicitly disclaiming the applicability of default principles of fiduciary duty [pursuant to which] "LLC members . . . ow[e] each other the traditional fiduciary duties that directors owe a corporation" (2009 WL 1124451 at *8 n 33, 2009 Del Ch LEXIS 54 at *27 n 33). Directors owe a corporation the fiduciary duties of "due care, good faith, and loyalty" (*Malone v Brincat*, 722 A2d 5, 10 [Del 1998]).

Defendants concede that they failed to preserve their claim that the court should have instructed the jury that plaintiff was required to prove causation. In any event, the causal connection is self-evident. If it was a breach of fiduciary duty for defendant Brandon Fradd to keep all the incentive fees from Apollo Offshore instead of sharing them with plaintiff, then plaintiff was injured by Fradd's failure to share the fees. Similarly, if it was a breach of fiduciary duty for Fradd to divert investors from Apollo Partners to Apollo Offshore, then plaintiff was injured by being deprived of the fees he would have received from the diverted investors.

Defendants contend that the court's charge erroneously included claims not pleaded by plaintiff. However, paragraph 30 of the second amended complaint alleges that, because Apollo

Offshore was managed by a company other than Apollo Management, plaintiff was deprived by Fradd of the earnings he would have and should have received if Apollo Management had managed Apollo Offshore's assets. Paragraph 31 refers to a statement of the amount plaintiff would have earned if the assets Fradd placed in Apollo Offshore had been managed by Apollo Management. Thus, the complaint gave defendants notice that plaintiff was seeking incentive fees on all Apollo Offshore's assets.

Defendants failed to preserve their argument that the use of "and/or" in an interrogatory to the jury was improper, and we decline to reach the issue in the interest of justice (*see Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 223-224 [1996]).

The court properly declared that Fradd was not entitled to indemnification from Apollo Management. On a prior appeal, we found that, although the fraud cause of action against Fradd was dismissed, plaintiff made sufficient allegations of bad faith on Fradd's part to raise an issue of fact whether the "limitations" exception in the indemnification clause was applicable (25 AD3d 482, 484 [2006]). In light of the allegations and evidence in this case, the jury's verdict that Fradd breached his fiduciary duty can only mean that the jury found that Fradd acted in bad

faith or disloyally (or both), not that he breached his duty of due care.

Defendants failed to preserve their argument that there was insufficient evidence that they waived their counterclaim for breach of contract. Were we to reach this argument, we would find that a rational jury could have found waiver from Fradd's testimony that he realized in 1998 that plaintiff was not performing his duties as a manager of Apollo Management but that he paid plaintiff anyway (for several more years) because he was being generous.

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

ENTERED: MAY 17, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Acosta, Manzanet-Daniels, JJ.

4929 The People of the State of New York, Ind. 1397/05
Respondent,

-against-

Carlos Barrientos,
Defendant-Appellant.

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Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered April 4, 2006, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the first degree, and sentencing him, as a second felony drug offender, to a term of 18 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The evidence establishes that defendant was sitting behind the wheel of an illegally parked car, and there was no indication that he was lawfully loading or unloading passengers or property. Defendant concedes that the police had the right to ask him to move the car, but argues that they had no basis for asking to see his driver's license. However, the police were entitled to

ascertain if defendant, or another occupant, was a licensed driver who could legally move the car (*see People v Thomas*, 19 AD3d 32 [2005], *lv denied* 5 NY3d 795 [2005]). After the police determined that neither occupant had a license, ensuing events led them to make a plain-view observation of contraband, followed by a lawful arrest.

The court's *Sandoval* ruling, which permitted only limited inquiry into defendant's extensive criminal record, balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Pavao*, 59 NY2d 282, 292 [1983]).

The evidentiary rulings challenged on appeal, with the notable exception of the ruling as to a hammer attached to a stick found in the trunk of the car, were proper exercises of the trial court's discretion. The hammer was not connected with the crimes charged in the indictment in any respect that would make it relevant to an issue in the case (*see People v Mirenda* 23 NY2d 439, 453 [1969]; *People v Baker*, 103 AD2d 749, 750 [1984]). Nevertheless, any error in these rulings, or in the prosecutor's summation comments on these matters, were harmless in light of the overwhelming evidence of defendant's guilt and the fact that

there was no significant probability that the defendant would have been acquitted if the hammer had been excluded (*see People v Crimmins*, 36 NY2d 230, 242 [1975]; *People v Parker*, 125 AD2d 340, 341 [1986], *lv denied* 69 NY2d 884 [1987]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Sweeny, Catterson, McGuire, Román, JJ.

3156 The People of the State of New York, Ind. 3811/95
Respondent,

-against-

Hector Martinez,
Defendant-Appellant.

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Gersten Savage LLP, New York (Barry S. Zone of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered December 5, 1995, convicting defendant, after a jury trial, of murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 22½ years to life, 2⅓ to 7 years and 5 to 15 years, respectively, affirmed.

Eyewitness testimony at a suppression hearing and subsequently at trial adduced the following: On May 3, 1991, defendant Hector Martinez was approached by Lavert Lee on West 151st Street in Manhattan. Lee asked defendant to sell him $8 worth of crack. Defendant insisted that Lee wait for another buyer to come along because he did not want to retrieve such a small amount of drugs from his supply. When Lee persisted,

defendant threw his $8 on the ground and a fight broke out. During the fight, defendant left to retrieve a semiautomatic gun from an adjacent building while defendant's associate resumed the fight with Lee. When defendant returned with the pistol, Lee fled into the lobby of a nearby apartment building, located at 528 West 151st Street.

Bystander Anthony Ovando and building resident Rhonda Miles both testified that they were in the process of trying to unlock the interior door leading in from the lobby when Lee ran into the lobby, bleeding and upset, and asked them to hurry. Moments later, defendant approached the entrance to 528 West 151st Street, stood outside the exterior door of the building, pointed his weapon through a missing windowpane in the door, and fired four rounds into the lobby, and then immediately fled the scene.

Miles escaped unharmed, Ovando suffered a non-lethal gunshot wound to the waist, and Lee died in the hospital as a result of one bullet penetrating his torso. Miles testified that the lobby was well-lit and she could clearly identify defendant's upper body and face. Four spent .25 caliber shells were recovered from the building lobby.

After an initial investigation, detectives were unable to locate defendant for several years. The case was reopened on

April 9, 1995, when a former neighborhood resident was arrested for shoplifting. He indicated that he had witnessed a shooting a few years prior on West 151st Street. With his assistance, the detectives located defendant in April 1995.

Defendant was charged with, inter alia, twin counts of both intentional and depraved indifference murder. He was acquitted of intentional murder and convicted of one count of depraved indifference murder.

On appeal, defendant argues that the only reasonable view of the evidence supports a finding that the "execution-style" killing was clearly intentional, and that there is no set of facts that would indicate that the defendant committed the crime with "reckless disregard." He further asserts that, pursuant to the law at the time as enunciated in *People v Gonzalez* (160 AD2d 502 [1990], *lv denied* 76 NY2d 857 [1990]), he objected to the trial court's submission to the jury of the depraved indifference count together with the intentional murder count, and that the refusal of the court to withhold the depraved indifference count from the jury deprived him of his state and federal constitutional rights to a fair trial. Hence, defendant argues that the depraved indifference murder count must be dismissed and his conviction reversed.

As a threshold matter, defendant preserved only his general claim that the trial evidence supported a verdict of intentional murder and not a finding that he committed a crime with "reckless disregard." He did not voice any objection to the court's instructions to the jury on the elements of the crime of depraved indifference murder, and he raises the constitutional aspects of his claim for the first time on appeal. Nor did he assert that depraved indifference is a culpable mental state which is the currently applicable law. Hence, his claim as to the insufficiency of evidence supporting a finding of depraved indifference murder must be evaluated according to the court's charge as given without objection (*see People v Sala*, 95 NY2d 254, 260 [2000]; *see also People v Johnson*, 67 AD3d 448, 449 [2009], *affd* 14 NY3d 917 [2010]).

This well-established precedent notwithstanding, the dissent contends that defendant need not object to the instructions given to the jury since "[l]ogically, a defendant's objection to the submission of an offense to the jury encompasses any instructions given to the panel to enable it to consider such offense." Of course, the dissent does not cite to any legal authority for this proposition since none exists. However, as recently as last month, three judges of the Court of Appeals rejected an

indistinguishable preservation argument (*People v Prindle*, __ NY3d __, 2011 NY Slip Op 1320 [February 11, 2011, Piggott, J., dissenting]).[1]

Consequently, the *Register* standard, which was the basis of the jury charge in this case, informs our sufficiency analysis and conclusion that the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

According to Penal Law § 125.25(2), a person commits depraved indifference murder when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." The Penal Law further states that one acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk"

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[1]The Court split 4:3 in this decision as to the sufficiency of evidence under the standard enunciated in *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), with the majority reducing the conviction. The majority resolved the appeal, without ruling on the preservation argument and conducted the sufficiency analysis, as did the dissenters, in accordance with the principle that any such analysis is informed by the "jury charge given without objection or exception." This even though defendant argued that his trial order of dismissal motion "adequately anticipated and preserved his argument that the evidence at trial was legally insufficient under *Feingold*" (*Prindle* at *3).

(Penal Law § 15.05[3]).

The jury was instructed in light of then-applicable law pursuant to *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984], *supra*) that the People were required to prove (1) that defendant shot a pistol at the victim thereby creating a grave risk of death to another person; (2) that defendant was aware of this substantial and unjustifiable risk; (3) that defendant consciously disregarded the risk that death would result; (4) that defendant's conscious disregard of this risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; and (5) that the circumstances surrounding defendant's reckless conduct were so brutal, callous, extremely dangerous and inhumane as to demonstrate an attitude of total and utter disregard for the life of endangered persons.

We find that the People met their burden. Defendant is responsible for killing one victim, Lee, as a result of one of the four bullets penetrating his torso, and injuring another with a second bullet after shooting into a confined space occupied by three people. As the People correctly assert, this is a quintessential example of depraved indifference murder. The evidence supports the reasonable view that, either defendant shot

into a group of people not aiming at any one individual in particular (*see People v Jean-Baptiste*, 38 AD3d 418 [2007], *lv denied* 9 NY3d 877 [2007] [depraved indifference murder conviction upheld when defendant fatally shot victim during brawl involving others]), or that he aimed at one individual in an area where others were present (*see People v Johnson*, 67 AD3d at 449-450 [depraved indifference murder conviction upheld when defendant shot brother in an area where children were present]; *see also People v Summerville*, 22 AD3d 692 [2005], *lv denied* 6 NY3d 759 [2005] [upholding depraved indifference conviction where defendant fired a gun on a public street in the direction of at least two individuals, and in close proximity to several others]).

In this case, the People established that two of defendant's four shots ended up lodged in the wall, and the record indicates that the shots were fired in an erratic and indiscriminate manner which denotes anything but an "execution-style killing." Thus, defendant's reckless conduct of firing rounds into a small vestibule occupied by three people rises to the level of depraved indifference. The fact that one of the bystanders was shot supports the conclusion that defendant was not acting with intent to cause the victim's death but with a total and utter disregard

for the life of either of the bystanders trapped in the vestibule with the intended target, Lee.

Indeed, the testimony suggests that when defendant fired he could have easily singled out his alleged victim in the small vestibule area. Evidence at trial established that the exterior door was not locked and was missing its glass windowpane. Defendant could easily have moved in much closer and taken better aim at a body part that would ensure achieving his intention of killing Lee. Lee was unarmed as were the two bystanders, and defendant could have ordered Ovando and Miles to get out of the way. Defendant did not do so.

Moreover, defendant could have chosen not to fire the gun when Lee pulled Ovando in front of him as a shield, or, as reasoned above, he could have moved in closer for a better shot and ordered Ovando to get out of the way. Instead he discharged the gun without any regard as to whom he was shooting. In other words, he appeared indifferent as to whom he might kill.

While it is clear that Lee was the object of his anger and of defendant's pursuit, the jury heard no evidence that defendant intended to kill Lee. The record does not reflect that defendant said anything to that effect or that he declared any intention to kill the victim rather than merely to frighten him off or to make

a showing of his control over the situation. Nor did he enter the vestibule after the shooting to make sure that Lee was dead.

Finally, in direct contraindication of an intentional killing, this is not a case where the killing was done in a one-on-one fashion, at point-blank range (*see e.g. People v Payne*, 3 NY3d 266 [2004]), or a case in which the defendant shot the victim once in the chest, approached to within an arms length and shot the victim in the face, then shot the victim twice in the back and six more times in the head from six inches away (*see People v Gonzalez*, 1 NY3d 464, 465-466 [2004]). This type of deliberate and repetitive action is in stark contrast to defendant's action in this case. Hence, nothing on the record warrants setting aside the jury's conclusion that defendant acted with depraved indifference rather than intentionally.

We have considered the remaining issues raised by the defendant, and find them also to be without merit. The court properly denied defendant's motion to dismiss the indictment, made on the ground of pre-arrest and pre-indictment delay (*see People v Decker*, 13 NY3d 12 [2009]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). The delay was satisfactorily explained as the product of investigative difficulties, specifically that the defendant left the jurisdiction after the shootings. Moreover,

the defendant did not establish prejudice.

The court also properly exercised its discretion in granting the People's request for a brief delay in disclosing the existence of a newly discovered witness who made a photographic identification of defendant shortly before opening statements (*see* CPL 240.50[2]; 710.30[2]). The witness articulated a fear of the defendant and his family which justified a delay so that she could be relocated before her identity was disclosed (*see People v Boyd*, 164 AD2d 800, 802 [1990], *lv denied* 77 NY2d 904 [1991]; *see also People v Frost*, 100 NY2d 129 [2003]). Again, the defendant was not prejudiced by the delay, which amounted to a single day. He received a mid-trial *Wade* hearing, and his claim that the disclosure delay adversely impacted his trial strategy is unsubstantiated.

None of defendant's remaining contentions warrants reversal. The court properly denied defendant's motion to suppress his statement to the police. There is no basis for disturbing the court's credibility determinations, which are supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]). Defendant did not preserve his claim that a detective engaged in the functional equivalent of pre-*Miranda* interrogation, or any of his challenges to the People's summation, and we decline to

review them in the interest of justice. Defendant's ineffective assistance of counsel claim is unreviewable on the present, unexpanded record.

Finally, we perceive no basis for reducing the sentences.

All concur except Tom, J.P. who dissents in a memorandum as follows:

TOM, J.P. (dissenting)

On December 5, 1995, defendant was convicted of the death of Lavert Lee, whom he chased into the vestibule of an apartment building and shot at close range. Applying the analysis espoused in *People v Sanchez* (98 NY2d 373 [2002]), which adhered to the rationale of *People v Register* (60 NY2d 270 [1983], *cert denied* 466 US 953 [1984]), a case that has since been overruled (*People v Feingold*, 7 NY3d 288, 296 [2006]), the majority concludes that the judgment convicting defendant of second-degree murder is sustainable under the theory that Lee's death was the consequence of depraved indifference. This conclusion presumes that the law developed under *Register* and *Sanchez* is the appropriate standard of review. Whether the law as charged to the jury under *Register* and *Sanchez* or the law as it currently stands should be applied depends entirely on whether defendant adequately preserved the issue sought to be raised on appeal — that the circumstances of the crime are consistent only with an intentional killing (*see Policano v Herbert*, 7 NY3d 588, 598 [2006]; *People v Payne*, 3 NY3d 266, 273 [2004]; *People v Gonzalez*, 1 NY3d 464, 466 [2004]). The majority's application of the preservation doctrine effectively bars any and all such challenges to a murder conviction predicated on depraved indifference, irrespective of

the specificity of the defendant's objection.

After Lavert Lee tendered $8 to defendant for crack cocaine, he was told to wait until another buyer made a purchase because it was not worthwhile for defendant to go to his stash for such a small sale. When Lee became impatient, defendant threw the money on the ground and slapped Lee in the face. As the two men fought, defendant's associate, identified only as Juan, hit Lee over the head with a bottle. While Lee was engaged in fighting Juan, defendant went to a nearby building and returned with a gun. Defendant chased Lee into the vestibule of an apartment building at 528 West 158th Street, where Anthony Ovando was attempting to open the lock to the inner door while another tenant waited. Despite Lee's frantic urging, Ovando was unable to open the door. When defendant pointed his gun through an open window in the outer door, Lee pulled Ovando in front of him as a shield. Defendant fired, and Ovando was grazed in the torso and fell to the floor. Ovando then heard defendant fire several more rounds, one of which struck Lee in the chest. Lee was taken to the hospital, where he died later that morning. Four shell casings from a .25 caliber, semi-automatic pistol were recovered from the vestibule, which was described by witnesses as being well lit.

On the principal count of murder in the second degree, defendant was convicted on a theory of depraved indifference murder and acquitted of intentional murder. The jury also found him guilty of assault in the second degree and criminal possession of a weapon in the second degree. Defendant was sentenced to 22½ years to life on the murder count, 2⅓ to 7 years on the assault count and 5 to 15 years on the weapons count.

Since defendant was convicted, the Court of Appeals has restricted the scope of *Register* and *Sanchez*, in a series of decisions limiting the circumstances supporting conviction for depraved indifference murder (*see People v Suarez*, 6 NY3d 202 [2005]; *People v Payne*, 3 NY3d 266 [2004], *supra*; *People v Gonzalez*, 1 NY3d 464 [2004], *supra*; *People v Hafeez*, 100 NY2d 253 [2003]), ultimately overruling *Register* and construing depraved indifference as "an additional requirement of the crime" (*Suarez*, 6 NY3d at 214) comprising its mens rea (*Feingold*, 7 NY3d at 296). Although the Court declined to apply its rulings retroactively (*Policano v Herbert*, 7 NY3d 588, 603-604 [2006], *supra*) and did not identify the date when the *Register*/*Sanchez* standard ceased to apply to final convictions (*id.* at 603), defendant herein filed a timely notice of appeal, and this Court granted him an

enlargement of time to perfect his appeal. Thus, the judgment is nonfinal, and review is not confined to the law in effect on the date of conviction (*cf. People v Baptiste*, 51 AD3d 184 [2008], *lv denied* 10 NY3d 932 [2008]).

The People assert that defendant derives no benefit from the change in the law after his conviction. While conceding that defendant timely objected to the submission of the depraved indifference murder count to the jury, the People argue that his failure to later object to the trial court's charge as to that count requires this Court to review the verdict on the basis of those instructions given to the jury without exception (*see People v Gray*, 86 NY2d 10, 24 [1995]; *People v Dekle*, 56 NY2d 835, 837 [1982]). Since the trial court charged the jury under the then applicable *Register/Sanchez* standard, the People contend that it provides the proper standard on appeal.

The preservation rule was developed under Court of Appeals jurisprudence as a matter of necessity due to its circumscribed jurisdiction, generally confining the scope of its review to questions of law (*see People v Gray*, 86 NY2d at 20). To preserve a claim of error in a jury charge or the admission of evidence requires that the defendant bring the claim to the trial court's attention so as to afford the court an opportunity for timely

cure (*id.* at 20-21). Under the preservation rule, the particular issue sought to be reviewed must have been specifically raised before the trial court in order to present a question of law amenable to review by the Court of Appeals (*see People v Cona*, 49 NY2d 26, 33 n 2 [1979]). Simply stated, it is the defendant's obligation to "make his or her position known to the court" (*see Gray*, 86 NY2d at 19), a mandate that is not fulfilled by a general motion (*id.* at 20).

At the outset, there is no merit to the People's contention that defendant's objection to the submission of depraved-mind murder to the jury is ineffective because he did not raise any objection to the instructions given to the jury. By statute, "a party who without success has either expressly or impliedly sought or requested a particular ruling or instruction, is deemed to have thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition or failure regardless of whether any actual protest thereto was registered" (CPL 470.05[2]). In the present case, the basis for defense counsel’s challenge to the submission of the depraved indifference count to the jury could not have been clearer, the trial court clearly understood the basis of the legal sufficiency

challenge, and it clearly rejected it. Logically, a defendant's objection to the submission of an offense to the jury encompasses any instructions given to the panel to enable it to consider such offense. The operative question is not whether defendant objected to the court's submission of depraved indifference murder, as the People concede he did, but whether defendant sufficiently apprised the trial court of the issue that he now submits to this Court as a basis for reversal.

At the close of evidence, defense counsel noted that "the Court reserved my right to make motions." At that time, the court limited argument to the dismissal of the second-degree assault count. As counsel stated, "The court has indicated in our off the record discussion after reviewing all the evidence, the court is not going to dismiss any of the other charges."

On the following trial date, prior to summations, the court concluded proceedings relating to its charge. The following colloquy ensued:

> "[COUNSEL:] It's a little late. I am going to indicate for the record, although I understand the Court will not omit it, that even the second murder count should be omitted to the jury; that is the reckless disregard. I think the evidence as presented by the People is straightforward. Either the jury will believe that this defendant not only intentionally went and got a gun, but

> shot and killed Lavert Lee, in so doing also whether intentional or not caused injury to Anthony Ovando.
>
> "Or if he didn't, then they're going to say that none of this is true.
>
> "I don't think there's any set of facts the People have pointed to that would indicate that the defendant committed the crime with reckless disregard. It's been the People's contention throughout that he intended to do this crime, acted to do this crime and then committed the crime.
>
> "THE COURT: All right. Well, I'm going to deny that application. While the issue may be motive, but, the facts in evidence are certainly consistent with a charge of reckless disregard.
>
> "The defendant is accused of taking a gun and firing it in a very confined area where two people were visibly present and therefore, I am going to leave that in."

After the verdict was returned, counsel took advantage of the court's invitation to reserve any motions for sentencing, at which time he took the opportunity "to supplement the motion as to the conviction which was returned." Citing to this Court's decision in *People v Gonzalez* (160 AD2d 502 [1990], *lv denied* 76 NY2d 857 [1990] [victim killed by hail of bullets fired from approximately 10 feet away]), which counsel maintained involved "almost identical" facts, he argued:

> "The People clearly established, if all the witnesses were believed and the statement by the defendant was believed, that the defendant intended to shoot and did shoot Lavert Lee. There is an accidental shooting of Anthony Avondo, and clearly that wouldn't apply here.
>
> "But as to Lavert Lee, the facts are clear if believed by the jury and as presented by the People, that the defendant chased Mr. Lee, had a dispute with him just prior thereto, an argument, fought with him. Got a gun for the sole purpose of shooting him; chased him and shot him. The defendant's own statement shows an intentional act. There was no self-defense justification offered by the defendant at any time. Nor was there any evidence whatsoever of any shooting other than directly at Lavert Lee . . .
>
> "The bottom line, Your Honor, is that the People did, I believe, according to the People's argument, establish the intentional murder, murder two. The jury found that they did not; found him not guilty of that.
>
> "I don't believe that there was any evidence introduced as depraved indifference from which the jury could render a verdict on it."

Counsel asked the court "to find that, in fact, the People have not established depraved indifference." After hearing extensive argument from both sides, the court held that "there is sufficient evidence to support the jury's verdict of guilty of murder by depraved indifference. All motions are denied."

The record establishes that counsel, both at the close of evidence, during the charge conference, and after the return of the verdict, clearly articulated his objection that the evidence supporting the depraved indifference murder count was insufficient because the only reasonable conclusion, in fact the only theory presented by the People, was that defendant retrieved a gun for the purpose of shooting Lee, intentionally pursued and shot the victim, causing his death.

"[T]he preservation requirement compels that the argument be 'specifically directed' at the alleged error" (*People v Gray*, 86 NY2d at 19 [general objection to sufficiency did not alert court to the lack of evidence proving the defendant had knowledge of the weight of a controlled substance]). As stated in *People v Hines* (97 NY2d 56, 62 [2001]), "[A]n indictment may be dismissed due to insufficient evidence only where the sufficiency issues pursued on appeal were preserved by a motion to dismiss at trial." It is clear that the trial court entertained and decided a defense motion to dismiss the count of depraved indifference murder, explicitly stating that it was "going to deny that application." Contrary to the People's intimation, there is no requirement that a defendant continually register a protest to the court's ruling. Here, as in *People v Rosen* (81

NY2d 237, 245 [1993]), "defendant's specific application and the court's equally specific ruling were sufficient to preserve the issue for appeal."

It is equally clear that the court heard and disposed of a post-verdict motion to dismiss the depraved indifference murder count as unsupported by the evidence. On the motion, the defense specifically reminded the court of its position that the evidence was consistent only with an intentional killing. The court heard argument, considered the question and disposed of the motion. Defendant "thereby protested the court's ultimate disposition of the matter or failure to rule or instruct accordingly sufficiently to raise a question of law with respect to such disposition" (CPL 470.05[2]).

The majority equates non-preservation with the defendant's failure to, additionally, challenge "the charge as given." In support, the majority relies on *People v Sala* (95 NY2d 254 [2000]) and *People v Johnson* (67 AD3d 448 [1st Dept. 2009], *affd* 14 NY3d 917 [2010])). In *Sala*, a larceny and fraud case, defendants on appeal challenged the legal sufficiency of certain larceny counts on the basis that a mere omission of material fact does not constitute a false statement to support larceny by false pretenses, but no objection was made to the court's instruction

that a false statement may consist of either an affirmative misrepresentation or an omission of material facts. Although the Court of Appeals rejected preservation since defendants had not protested "the charge as given," the decision also reflects that defendants' appellate claim was not asserted in dismissal motions. Hence, *Sala* is distinguishable and does not apply to the present context.

In *Johnson*, defendant's challenge to the verdict, under a weight of the evidence review, was rejected with respect to depraved indifference murder. This Court's analysis noted that defendant conceded having failed to preserve any legal sufficiency challenge with respect to mens rea, since he failed to alert the trial court to his appellate claim in his motion for a trial order of dismissal and, indeed, failed to assert any legal sufficiency challenge therein. It was also noted therein that as a result, review was governed by the charge as given, to which the defendant also failed to object. *Johnson*, too, does not compel the conclusion that present defendant, having emphatically advocated for dismissal of the depraved indifference count on the basis of the People's evidence, and the court's adverse ruling encompassed the claims presently raised on appeal, somehow failed to preserve the claim simply because he did not

also engage in the futile exercise of also challenging the manner in which the court articulated the alternative theories of murder for the jury.

Finally, a finding of non-preservation by a dissent, by definition, would not constrain our analysis, so that the majority's citation, in that regard, to the dissent in *People v Pringle* (__ NY3d __, 2011 NY Slip Op 1320 [2011]) is inapplicable. Notably, the Appellate Division's memorandum decision did not even address preservation.

The Court of Appeals has decided cases where, as here, the defendant "argued that the evidence was consistent only with an intentional killing, and thus there was no reasonable view of the evidence under which he could have been found guilty of causing [the victim's] death recklessly (the requisite mens rea for depraved indifference murder), rather than intentionally" (*Policano v Herbert*, 7 NY3d at 598). Likewise, the Court has undertaken review were, as here, "defendant moved for a trial order of dismissal, arguing that the evidence was legally insufficient to establish his guilt of depraved indifference, as opposed to intentional, murder" (*People v Gonzalez*, 1 NY3d at 466).

The majority's conclusion on the preservation issue, reached

without undertaking even a cursory analysis, dictates its disposition of the sufficiency of the evidence issue. Having decided that defendant's objection to the trial court's submission of depraved indifference murder to the jury fails to preserve objection to any instruction that the court may have given in regard to that offense, the majority has necessarily determined that this matter must be reviewed under the *Register/Sanchez* standard in effect at the time of defendant's conviction (*see e.g. People v Sala*, supra at 95 NY2d 261). Given the factual similarity to *People v Sanchez* (98 NY2d 373 [2002], *supra*), the majority's conclusion that defendant's shooting of Lee constitutes depraved indifference murder under the *Register/Sanchez* standard is a foregone conclusion (*see e.g. People v Johnson*, 67 AD3d 448 [2009], *affd* 14 NY3d 917 [2010], supra).

Since I conclude that defendant fully preserved the issue of whether the evidence is sufficient to support conviction of depraved indifference murder, my analysis proceeds to a contrary result under the standard governing depraved indifference murder that has since evolved under *Hafeez*, *Gonzalez*, *Payne*, *Suarez*, and *Feingold*. *Hafeez* resolved that where the crime "focused on first isolating, and then intentionally injuring, the victim," the

heightened risk of death to bystanders required under *Register* was absent (100 NY2d at 259). *Gonzalez* emphasized the inherent mutual exclusivity of the mens rea for intentional and depraved-mind murder, stating that "a person cannot act both intentionally and recklessly with respect to the same result. 'The act is either intended or not intended; it cannot simultaneously be both'" (1 NY3d at 468, quoting *People v Gallagher*, 69 NY2d 525, 529 [1987]). *Payne* established that where there is a manifest intent to kill, the use of a weapon cannot result in depraved indifference murder (3 NY3d at 271), so that "the more the defendant shoots (or stabs or bludgeons) the victim, the more clearly intentional is the homicide" (*id.* at 272). As in *Payne*, the present case involved a point-blank shooting, not withstanding the majority's characterization to the contrary. *Suarez* drew a clear distinction between intent and depravity, to "make clear that depraved indifference is best understood as an utter disregard for the value of human life — a willingness to act not because one intends harm, but because one simply doesn't care whether grievous harm results or not" (6 NY3d at 214). Finally, *Feingold* established that depraved indifference is a culpable mental state that "can, like any other mens rea, be proved by circumstantial evidence" (7 NY3d at 296).

Dispositive of this appeal are *Hafeez*, *Payne* and *Suarez*. Like the victim in *Hafeez*, Lee was not a random or inadvertent target, but was pursued by an attacker armed with a deadly weapon, isolated from persons on the street in a confined area and shot in the chest (*cf. People v Johnson*, 10 NY3d 875 [2008] [victim shot on street from thirty feet away]). As in *Gonzalez*, "[W]hen defendant shot his victim at close range, he was not recklessly creating a grave risk of death, but was creating a virtual certainty of death born of an intent to kill (*Gonzalez* at 468)." "It was a quintessentially intentional attack directed solely at the victim" (*Hafeez*, 100 NY2d at 258). That an unintended victim was grazed by a bullet does not detract from the intentional nature of the attack, and intent is the antithesis of indifference (*Gonzalez*, 1 NY3d at 468). The majority is persuaded by the lack of evidence that defendant did not declare his intention to kill Lee. Leaving aside the observations that murderers may not typically telegraph their murderous intent, in this case evidence of intent is manifest in the record. Defendant's purposeful assault on the victim with a handgun is apparent from his altercation with Lee on the street. His diversion to obtain the weapon from a nearby building, and his pursuit of the victim and the firing of shots at close range

are all indicative of intent (*Payne*, 3 NY3d at 271-272), not indifference (*Suarez*, 6 NY3d at 214; *cf. People v Callender*, 304 AD2d 426 [2003], *lv denied* 100 NY2d 641 [2003] [firing into a crowd from 15th-floor balcony]). The majority's suggestion that defendant's failure to enter the vestibule to ascertain whether he needed to finish the job somehow vitiates the intentionality of the killing, is contrary to human nature; I would counter with the suggestion that the expected impulse would be for the shooter to quickly flee and thereby hope to avoid an identification. The majority also speculates that if defendant intended to shoot Lee, he would have refrained from shooting when Lee pulled Ovando in front of him; since he failed to do so, as that purported theory goes, defendant acted with depraved indifference rather than intentionally. However, I cannot see how this follows. For me, the more persuasive fact is that defendant fired four shots at close range in a confined location. After Ovando fell from a gun shot wound, several more shots were fired, striking the intended victim, Lee, once in his chest. As *Gonzalez* found, the multiplicity of shots lends itself much more to a finding of an intentional killing rather than an indifferent killing. Because indifference, which is an essential component of the crime, is

negated by intent, there is no reasonable view of the evidence that will support conviction for depraved indifference murder.

Accordingly, the judgment insofar as it convicted defendant of depraved indifference murder should be reversed.

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

ENTERED: MAY 17, 2011

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3702 Fantasia Massey, Index 107380/07
Plaintiff-Respondent,

-against-

Newburgh W. Realty, Inc.,
Defendant-Appellant.

_____

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Jessica F. Napoli of counsel), for appellant.

Weiss & Rosenbloom, P.C., New York (Erik L. Gray of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered February 3, 2010, which denied defendant's motion for summary judgment, affirmed, without costs.

This action involves injuries allegedly sustained by plaintiff on March 14, 2007 when she slipped and fell on a sheet of ice on the sidewalk in front of defendant's premises, a convenience store in Newburgh, New York. Plaintiff testified that it was not raining or snowing on the date of the accident. At approximately 9:30 p.m., plaintiff's boyfriend, Michael Valerie, drove her to the store. When they reached the store, plaintiff stepped out of the car; she did not recall seeing any ice, salt or sand on the ground where the car was parked. While walking toward the store's entrance, plaintiff slipped and fell.

Plaintiff testified that she felt something slippery under both her feet, that her right foot slipped out from under her, and she was "just on the floor." While on the ground, plaintiff observed ice underneath her. The ice extended approximately seven to eight feet to her left and approximately two to three feet to her right. At deposition, plaintiff identified the general location of the accident using a black-and-white facsimile image of a photograph of the accident location.[1]

By notice dated April 20, 2009, defendant moved for summary judgment dismissing the complaint, relying upon the certified climatological records and the affidavit of its expert meteorologist, Thomas E. Downs, V. Downs noted, inter alia, that no snow, sleet, freezing rain or other precipitation had been recorded at any of the three weather stations in the area (i.e., Stewart International Airport, Duchess County Airport and Orange

[1]Color and black-and-white copies of the photograph were authenticated by both plaintiff and Valerie. In an affidavit submitted in opposition to the motion for summary judgment, plaintiff averred that the photograph had been taken by Valerie within two hours of the subject accident and "fairly and accurately depict[ed] the ice as it appeared at the time and location of the accident." Defendant alleges that the photograph ought to have been disregarded by the lower court in light of the supposedly conflicting representations by Valerie regarding the provenance of the photograph. This Court ordinarily does not weigh the credibility of affiants on a motion for summary judgment and declines to do so here.

County Airport) in the seven days prior to the accident; that the only precipitation of any kind in the seven days prior to the accident was light rainfall on March 10th-11th; that no precipitation was observed after 3:00 a.m. on March 11th, three days prior to the accident; that high temperatures registered in the 50s and 60s in the two days prior to the accident; that at 1:00 a.m. on March 14, 2007, the date of the accident, the three weather stations recorded temperatures of 41 degrees, 39 degrees and 34 degrees, respectively; and that the weather conditions in the days preceding the accident, namely, light rainfall on March 10-11, and mostly sunny skies in the prior week, would have melted any residual snow or ice remaining on the ground by March 12, 2007.

Plaintiff opposed the motion for summary judgment, contending, first, that defendant failed to make a prima facie case. Plaintiff asserted that the affidavit of defendant's expert meteorologist, Thomas E. Downs, was speculative insofar as it did not take into account the relevant testimonial and photographic evidence in the case in concluding that there was no snow or ice on the ground.

Plaintiff asserted, in any event, that she had raised a triable issue of fact. Plaintiff relied on her deposition

testimony and affidavit submitted in opposition to the motion, in which she averred that the ice she had slipped on was "hard, dry and approximately one inch thick."

Plaintiff relied, in addition, on certified meteorological records from the Walden 1ESE weather station which indicated that in the 14 days prior to and including March 14th, the date of the subject accident, the temperature fell below freezing on each and every day.

By order entered February 3, 2010, the court denied defendant's motion for summary judgment, stating that "[i]n light of plaintiff's sworn statements as to the size, thickness and dryness of the ice patch, Valerie's sworn and corroborating eye-witness statements, and the photograph clearly depicting a large, thick patch of ice, this court cannot determine as a matter of law that it would have been impossible for ice to be present on the sidewalk where plaintiff fell." The court found Downs's affidavit not dispositive on the subject of whether it would have been impossible for ice to be present at the time and location of plaintiff's accident. The court noted that defendant's expert did "not conclude that the presence of ice would have been 'impossible' under the [meteorological] circumstances, and does not address specifically whether an area of ice approximately

seven feet by three feet, and one inch thick, could be present under such circumstances."

Finally, the court found that defendant had not met its burden as to constructive notice, since it failed to produce an affidavit, deposition testimony, or any other competent proof from an employee of its convenience store.

Summary judgment in a snow or ice case is proper where a defendant demonstrates, through climatological data and expert opinion, that the weather conditions would preclude the existence of snow or ice at the time of the accident (*see Perez v Canale*, 50 AD3d 437 [2008]). CPLR 4528 provides that "any record of the observations of the weather taken under the direction of the United States Weather Bureau, is prima facie evidence of the facts stated."

Defendant argues that the motion court erred in finding that it had not established prima facie entitlement to summary judgment. However, defendant's expert opinion was arguably speculative insofar as it failed to take into account plaintiff's testimony concerning the nature of the ice, nor did it address plaintiff's photograph showing ice at the accident location (*see Neidert v Austin S. Edgar, Inc.*, 204 AD2d 1030, 1031 [1994] [stating that "[t]he meteorologist's opinion that the weather

conditions prevailing in the region could produce areas of black ice supports only speculation about actual conditions at the accident scene"]).

Further, as noted by the motion court, defendant did not satisfy its burden of establishing lack of constructive notice as a matter of law since it failed to submit an affidavit, deposition testimony or other competent evidence from a store employee establishing that any employees regularly inspected the sidewalk (*see Strange v Colgate Design Corp.*, 6 AD3d 422 [2004]).

Even if we assume that defendant's meteorological data established prima facie entitlement to summary judgment, plaintiff's testimony, together with the meteorological data and photographic evidence of the alleged hazard, was sufficient to establish an issue of fact as to whether defendant had constructive notice of the alleged hazard.

Plaintiff testified that she felt something slippery under both her feet and that after she had fallen she observed ice on the ground beneath her. She identified the location of the ice on photographs of the scene, and described the ice as approximately one inch thick and extending seven to eight feet to the left and approximately two to three feet to the right. In addition, weather data submitted by plaintiff established that

the temperature fell below freezing every day prior to March 14, 2007, the date of plaintiff's accident. This evidence concerning the nature of the ice and the climactic conditions is sufficient, at this stage, to raise a triable issue of fact (*see Ralat v New York City Hous. Auth.*, 265 AD2d 185 [1999] [first-hand observations of icy condition, in addition to weather data establishing residual accumulation from earlier storms, constituted sufficient evidence from which a jury could infer that plaintiff's fall was caused by pre-existing ice]; *Tubens v New York City Hous. Authority*, 248 AD2d 291, 292 [1998] [weather data, in addition to plaintiff's first-hand observation of the condition of the steps at the time of her fall, namely, that they were covered with hard ice that was thick, old and dirty, provided sufficient evidence from which a jury could infer that her fall was caused by the pre-existing ice]; *Candelier v City of New York*, 129 AD2d 145 [1987] [jury could reasonably infer from plaintiff's testimony concerning ice on which he slipped, which he described as 1 or 2 inches thick, hard, slippery, bumpy and uneven, that ice had existed for a period of at least seven days, and had not developed solely as a result of snowfall on the days immediately preceding the accident]; *see also Rivas v New York City Hous. Auth.*, 261 AD2d 148 [1999] [weather conditions,

including temperatures consistently around freezing for the three-day period before plaintiff's accident, supported conclusion that plaintiff fell on pre-existing ice, not fresh snow]).

In this case, unlike storm-in-progress cases such as *Candelier*, we are not presented with the difficulty of determining whether a fall was attributable to old ice, as opposed to freshly accumulating snow. In this case, the only evidence in the record is that plaintiff fell on an extensive ice plate, described as one inch thick and extending seven feet across. The evidence supports a reasonable inference, given the freezing temperatures in the month of February in upstate New York, that plaintiff fell on an old accumulation of ice (*see Sprague v Profoods Rest. Supply, LLC*, 77 AD3d 585 [2010]; *Walters v Costco Wholesale Corp.*, 51 AD3d 785 [2008] [testimony that icy condition was visible immediately after plaintiff's fall, together with evidence that there was precipitation and intermittently freezing temperatures on the days prior to plaintiff's fall, raised a triable issue of fact]).

The dissent asserts that plaintiff failed to establish the origin of the ice patch on which she slipped, citing to *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288 [2008].[2] However, it may reasonably be inferred from plaintiff's description of the ice, the photo, and the climatological data showing freezing temperatures that the ice was attributable to a prior winter storm. We accordingly find, at this stage, that plaintiff has sufficiently raised a triable issue of fact.

All concur except Catterson and Román, JJ. who dissent in a memorandum by Román, J. as follows:

[2]*Lenti*, as well as *Bernstein v City of New York*, 69 NY2d 1020 [1987], cited by the dissent, were also storm-in-progress cases in which it was incumbent on the plaintiffs to demonstrate that they slipped on old accumulations of ice, as opposed to on freshly fallen snow, since the defendant would not be liable if the plaintiff had fallen during a storm-in-progress. It is logical, in this context, that a court would speak in terms of the origins of the patch of ice in question. Here, the condition of the ice itself gives rise to an inference that it was of longstanding duration.

ROMÁN, J. (dissenting)

Because I believe that defendant established prima facie entitlement to summary judgment and that plaintiff failed to raise a triable issue of fact on the issue of notice, defendant is entitled to summary judgment, and therefore I dissent.

The instant action is for personal injuries allegedly sustained by plaintiff when she slipped and fell on ice on the sidewalk abutting premises owned and maintained by the defendant. Defendant moved for summary judgment and the motion court, both rejecting defendant's expert evidence and finding that defendant did not establish an absence of constructive notice, denied defendant's motion, concluding that defendant failed to establish prima facie entitlement to summary judgment.

In support of its motion for summary judgment, defendant submitted plaintiff's deposition testimony that on Wednesday, March 14, 2007, at 9:30 P.M., she slipped and fell on ice while traversing the sidewalk abutting premises located at 193 Broadway, Newburgh, NY. Plaintiff, a resident of New York City, was in Newburgh visiting her boyfriend. She had been in Newburgh since March 11, 2007, the preceding Sunday, and had remained indoors until shortly before the instant accident. Plaintiff did not see the ice before her fall, but based on post-fall

observations described the patch as large and spanning several feet. She had no idea when it had last snowed and saw no other ice or snow prior to her fall. Defendant also submitted two affidavits from a meteorologist, who rendered an opinion based on his review of climatological records chronicling the weather in the area where plaintiff alleges to have slipped. Defendant's meteorologist opined that based on the unusually high temperatures existing on March 14, 75 degrees at 3 P.M. and 57 degrees at 9:30 P.M., the conditions were not conducive to ice existing at the location of this accident. Thus, the meteorologist concluded that on March 14 at 9:30 P.M., there was no ice or snow on the ground at the location of this accident. The meteorologist further stated that in the seven days preceding this accident, there had been no wintry precipitation; the only precipitation consisted of light rainfall on March 10-11, which ceased after 3 P.M. on the 11th. Thereafter on March 10-13, the temperatures were in the 50s and 60s, thus any residual snow would have melted by March 12.

In opposition to defendant's motion, plaintiff submitted an affidavit, wherein she stated that a photograph annexed thereto was a fair and accurate representation of the patch of ice upon which she fell, and that the ice was hard, dry, and an inch

thick. Plaintiff also submitted an affidavit from her boyfriend, wherein he states that he took the photograph. He likewise stated it was a fair and accurate representation of the patch of ice upon which plaintiff fell, describing in the same was as plaintiff. Lastly, plaintiff submitted climatological records evincing that in the days prior to her fall the temperatures had dipped below freezing.

The mere presence of an ice patch, by itself, does not cast a defendant in negligence thereby making him or her liable for an accident (*Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288, 289 [2008]). Instead, to establish liability for an icy condition, it must be proven that a defendant had either actual or constructive notice of the icy condition (*Simmons v Metropolitan Life Ins. Co.*, 84 NY2d 972, 973-974 [1994]; *Slates v New York City Hous. Auth.*, 79 AD3d 435, 435 [2010]; *Grillo v New York City Trans. Auth.*, 214 AD2d 648, 648-649 [1995], *lv denied* 87 NY2d 801 [1995]). With respect to notice, the salient inquiry is whether there is "evidence from which it may be inferred that the ice on which he [a plaintiff] slipped was present on the sidewalk for a long enough period of time before the accident that the party responsible for the sidewalk would have had time to discover and remedy the dangerous condition" (*Lenti* at 289). Liability hinges

upon a defendant's remedial actions, if any, once it knows or should have known of an icy condition's existence. Therefore, when it is alleged that an icy condition existed for a protracted period of time because it is the direct result of prior precipitation or storm, a plaintiff must conclusively establish that the icy condition originated therefrom (*Bernstein v City of New York*, 69 NY2d 1020, 1022 [1987]; *Simmons* at 973-974; *Steo v New York Univ.*, 285 AD2d 420, 421 [2001]; *Fuks v New York City Trans. Auth.*, 243 AD2d 678, 678-679 [1997]; *Grillo* at 649). This is particularly true when the sole basis for notice is the length of time between an accident and a prior storm rather than actual notice of the condition by the defendant or prior observation of the condition such that constructive notice can be inferred.

Here, contrary to the motion court's decision and the assertions by the majority, defendant established prima facie entitlement to summary judgment. Defendant's meteorologist, based upon his review of pertinent climatological records, also submitted with defendant's motion, opined that given the weather conditions existing at the time of plaintiff's accident and in the seven days preceding it, there was no ice existing on the sidewalk where plaintiff alleges to have fallen. By establishing the absence of any ice at this location for at least two days

prior to plaintiff's fall, defendant not only controverts the existence of any ice, but as relevant here, negates actual and constructive notice and thus establishes prima facie entitlement to summary judgment (*Perez v Canale*, 50 AD3d 437, 437 [2008] [climatological data tendered by defendant and relied upon by their expert established prima facie entitlement to summary judgment when the same evinced that it would have been impossible for there to have been an icy condition in the area of plaintiff's fall]; *Bonney v City of New York*, 41 AD3d 404, 404 [2007]).

Any contention that the meteorologist's opinion was speculative is meritless since it was based on facts both in the record and personally known to him, e.g., the climatological reports (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]). The meteorologist's opinion was not wrought with bare allegations or conclusions, factually unsupported by the evidence and not personally known to him, such that it should have been disregarded (*Amatulli v Delhi Const. Corp.*, 77 NY2d 525, 533 [1991]; *Wright v New York City Hous. Auth.*, 208 AD2d 327, 331 [1995]. That the meteorologist did not review and comment on some of the evidence offered by the plaintiff, namely her testimony and a photograph of the condition does not alter my

holding because his opinion is undergirded by the aforementioned climatological reports (*Perez* at 437). The majority's reliance on *Neidert v Austin S. Edgar, Inc.* (204 AD2d 1030 [1994]) is misplaced, since in that case the record indicates that the meteorologist opined "[b]ased upon his understanding of those general [weather] conditions" (*id.* at 1031), rather than based upon admissible climatological reports, as is the case here.

Additionally, any contention that defendant failed to negate constructive notice is similarly unavailing. Because defendant tendered climatological evidence negating the existence of the icy condition alleged, it was not necessary, as concluded by the motion court, to also establish the absence of constructive notice. Indeed under these circumstances, where the salient argument is that the condition alleged did not exist, the absence of any notice is necessarily inferred. Nevertheless, plaintiff's deposition testimony, tendered by the defendant, wherein she testified to not having seen the icy condition until after she fell, establishes the absence of constructive notice as a matter of law (*Pomahac v TrizecHahn 1065 Ave. of Ams., LLC*, 65 AD3d 462, 467-468 [2009]; *Anderson v Central Val. Realty*, 300 AD2d 422, 422-423 [2002], *lv denied* 99 NY2d 509 [2003]; *McDuffie v Fleet Fin. Group,* 269 AD2d 575, 575 [2000]; *Scirica v Ariola Pastry*

Shop, 171 AD2d 859, 859 [1991]).

Defendant having demonstrated prima facie entitlement to summary judgment, it then became incumbent upon plaintiff to raise a triable issue of fact by establishing the existence of the condition alleged and that defendant had prior notice of the same. While plaintiff's evidence established the existence of the icy condition, she failed to establish that defendant had any notice. Certainly nothing offered or argued by plaintiff establishes constructive notice. Moreover, contrary to her assertion, neither the photograph depicting the icy condition nor her and her boyfriend's affidavits describing the patch as hard, dry and an inch thick, mere descriptions of the condition of the ice and not its duration, are sufficient to raise an issue of fact as to constructive notice.

It is settled law that the mere presence of ice is insufficient to establish constructive notice of the same (*Lenti* at 289; *Steo* at 420-421). Moreover, neither the condition or appearance of an icy condition, by itself, is dispositive on the issue of notice (*Cosaro v Stop & Shop,* 287 AD2d 678, 678 [2001] [brown and muddy ice, standing alone, insufficient to establish constructive notice]). In fact, the very same cases plaintiff cites in support of her contention that the description and

condition of an icy condition is dispositive on the issue of constructive notice demonstrate the opposite. For example, in *Gonzalez v American Oil Co.* (42 AD3d 253 [2007]), the condition of the ice, namely large, dry, hard, and transparent, was not dispositive on the issue of constructive notice. Instead, notice was established and summary judgment denied because the ice in that case was covered with snow which climatological records showed had fallen no less than three hours prior to plaintiff's fall (*id.*). Thus, we concluded that under those circumstances the ice had existed for at least three hours and that defendant had constructive notice of it (*id.*). *Scott v Redl* (43 AD3d 1031 [2007]), another case cited by the plaintiff, is also at odds with plaintiff's assertion, since in that case constructive notice was premised not on the condition or appearance of the ice but on "an affidavit from an expert meteorologist who, after analyzing the weather conditions on the day of the accident and on the days preceding [it], concluded that the ice upon which the plaintiff allegedly slipped would have formed no later than 4:00 P.M. on the day before the accident, or 18 1/2 hours earlier" (*id.* at 1033). Similarly, the litany of cases cited by the majority does not alter the above-cited and well settled law and instead supports my conclusion. For example, in *Ralat v New York*

City Hous. Auth. (265 AD2d 185 [1999]), the condition of the ice was not, as the majority represents, dispositive of the issue of notice. Instead, we held that plaintiff established constructive notice because

> "[witnesses] . . . also stated that the icy 'problem' on the sidewalk *existed for at least a week prior* to plaintiff's accident . . . [t]hese first-hand observations of an icy condition in existence *well prior* to plaintiff's accident, in addition to the weather data establishing residual accumulation from earlier storms, constitute sufficient evidence from which a jury could infer that plaintiff's fall was caused by the pre-existing ice, and not the light snowfall on the day of the accident" (*id.* at 186 [emphasis added]).

Thus, in *Ralat*, as in *Gonzalez* and *Scott,* the condition of the ice played no salient role in determining notice.

Plaintiff, in a final attempt at establishing constructive notice seeks to link the icy condition to a prior storm or a period of prior precipitation. While this is of course one way to establish the origin of an icy condition thereby establishing constructive notice (*see Bernstein* at 1022; *Simmons* at 973-974; *Steo* at 421; *Grillo* at 649), plaintiff fails to meet her burden since the evidence tendered must in fact link the condition to a prior storm (*id.*). Here, plaintiff simply submits climatological records and merely asserts that dips in the temperature, to below

freezing, confirm the patch's existence. There is no specific attempt, by an expert or anyone else for that matter, to particularize the weather pattern from which it can be inferred that the ice upon which plaintiff fell originated from prior precipitation or a previous storm. Here, in light of a continuously evolving weather pattern where the temperature rose well above freezing on several occasions, plaintiff's conclusory assertion fails to link the ice to a period of prior precipitation or a prior storm. Accordingly, I believe that plaintiff fails to raise an issue of fact sufficient to preclude summary judgment in defendant's favor.

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

ENTERED: MAY 17, 2011

CLERK

Saxe, J.P., Friedman, Acosta, DeGrasse, Richter, JJ.

4481 The People of the State of New York, Ind. 963/09
Respondent,

-against-

Maurice Evans,
Defendant-Appellant.

_____

Richard L. Giampá, Bronx, for appellant.

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

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at suppression hearing; Rena K. Uviller, J., at speedy trial motion, plea and sentencing), rendered April 28, 2010, convicting defendant of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of 2 years, unanimously reversed, on the law and the facts, the motion to suppress physical evidence granted, and the indictment dismissed. The matter is remitted to the trial court for the purpose of entering an order in favor of the accused pursuant to CPL 160.50, not less than 30 days after service of this order upon the respondent, with leave during this 30 day period to respondent to move and seek any further stay of the implementation of CPL 160.50 as in the interest of justice is required.

On August 6, 2008, at about 7:40 p.m., Officers Chambers and Gonzalez, who were part of the Street Narcotics Enforcement Unit (SNEU), were in plainclothes in a police van heading south on Paladino Avenue near the FDR Drive when they saw defendant and two companions, on a footbridge. Chambers suspected they were smoking marijuana, as he saw puffs of smoke and the three passing a cigarette.

At the same time, Officers Ruiz and Dikonilos, who were also part of SNEU, were on bicycles in plainclothes heading north on the path along the FDR Drive, when they saw defendant and his companions. Ruiz knew they were smoking marijuana because he smelled the distinct odor of marijuana and saw a cigarette with a "blunt" wrapper. Ruiz also saw defendant hand Perez the cigarette.

Chambers and Gonzalez parked the van at the foot of the bridge and proceeded up the ramp to the overpass. Meanwhile, Chambers saw one of the individuals throw the cigarette away. While on the bridge, and about 100 feet away from the group, he smelled marijuana. Ruiz pedaled up the ramp on the other side of the bridge upon seeing Chambers and Gonzalez approach the group. Chambers and Gonzalez identified themselves as police officers and asked the three, "You guys were smoking?," to which defendant

and one of his friends responded, "We just finished." The officers then arrested the three for smoking marijuana in plain view.

During the arrest, Chambers removed a black backpack from defendant's back and handed the bag to Ruiz, who was about two or three feet away. Ruiz opened the bag, after defendant was handcuffed, and recovered 11 bags of marijuana, a pair of brass knuckles, a nine millimeter Smith and Wesson gun, and two magazines of ammunition. The gun and magazines were wrapped in socks. The three individuals were transported to the 23rd Precinct. No burnt cigarette was recovered from the scene.

Defendant moved to suppress the contents of the bag as well as two statements, one made at the precinct and a latter one made at the district attorney's office, where he essentially stated that he got the gun from a friend for the purpose of disposing of it.

To justify the presumptively unreasonable warrantless search of defendant's closed backpack incident to his arrest, the People were required to establish the presence of exigent circumstances in the first instance (*People v Gokey*, 60 NY2d 309 [1983]). Exigent circumstances that may justify the warrantless search of property within a suspect's immediate control or "grabbable area"

are limited to two situations, when there is a threat to the general public and/or to the arresting officer, or when there is a reason to protect evidence from concealment or destruction (*id.* at 312). Neither exception was applicable here. There was no indication that the officers feared for their safety. Indeed, defendant was arrested simply for smoking marijuana in public. Neither Ruiz nor Chambers testified about a fear for his safety or a belief that the backpack contained contraband, and defendant and his friends at no time behaved in an aggressive or hostile manner. In fact, there is no evidence in the record that defendant or his friends did anything other than cooperate with the police. Moreover, the backpack was under the complete control of Officer Ruiz when it was searched, and defendant and his two friends were in handcuffs, surrounded by four police officers, enclosed by a 12-foot-high metal fence. Additionally, there was no evidence as to how defendant could have gained access to the contents of the bag for the purpose of destroying it after he was handcuffed. Given the absence of exigent

circumstances, the evidence unlawfully obtained during a warrantless search of defendant's backpack should have been suppressed (*People v Julio*, 245 AD2d 158 [1997], *lv denied* 91 NY2d 942 [1998]).

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, DeGrasse, Freedman, Abdus-Salaam, JJ.

4738 Richard J. Schwartz, et al., Index 601006/06
Plaintiffs-Respondents,

-against-

JPMorgan Chase Bank, N.A.,
Defendant-Appellant.

_____

Levi Lubarsky & Feigenbaum LLP, New York (Steven B. Feigenbaum of counsel), for appellant.

Lynn, Gartner & Dunne, LLP, Mineola (John W. Dunne of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 9, 2010, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in defendant's favor dismissing the complaint.

In 1979, plaintiffs' mother, the decedent, opened an investment management account with Chase Manhattan Bank, predecessor to defendant JPMorgan Chase (Chase). There is no claim of negligence or breach of duty with respect to Chase's handling of that account. Plaintiffs' claim relates to a completely separate dividend reinvestment account (DRA), one of six such accounts opened in the name of plaintiffs' decedent,

each of which contained shares of stock in an individual company. Each of these DRAs was maintained by the transfer agents for the company that issued that account's stocks. The shares of stock in these DRAs were never transferred to Chase, and Chase had neither the right nor the obligation to manage these assets.

The claims in this matter relate to the DRA that contained shares of a pharmaceutical company called Warner-Lambert Co. at the time the account was opened; the company is now Pfizer, Inc. Other shares issued by the same company were also contained in the Chase investment management account (IMA).

From about the mid-1980s until shortly before this action was commenced in March 2006, quarterly notices and annual 1099 tax forms relating to the DRAs were sent to defendant Chase. As it was instructed upon inquiring of plaintiffs' decedent when it first received such a notice, Chase forwarded each of these notices to the decedent's accountant as an accommodation to its client.

Plaintiff Richard Schwartz began handling his mother's financial concerns after he and his sister, plaintiff Lois Zenkel, were granted power of attorney on November 21, 1996. Despite the listing in his mother's yearly tax returns of dividends from a Warner-Lambert/Pfizer dividend investment

account, separate and distinct from the listing for the dividends from the Chase IMA, he did not become aware of the existence of the Warner-Lambert/Pfizer DRA or the other DRAs until January 12, 2006, at a meeting with several Chase bankers who handled plaintiffs' various Chase accounts. Upon learning that Chase had been forwarding the DRAs notices to his accountant rather than to him, he transferred all his mother's assets out of Chase and to another investment company. He also sold the stock in the DRAs, including the Pfizer stock in the DRA for $6,893,684, resulting in a capital gain of $5,837,395.

Plaintiffs base their claims against Chase on its failure to forward the DRA notices and forms to plaintiffs, or to apprise Richard Schwartz of the existence of that DRA. They claim that this deprived them of the ability to manage the assets.

The record presents no issues of fact as to whether Chase breached any duty owed to plaintiffs. The duty Chase owed to plaintiffs encompassed the handling of those accounts held by Chase. It did not extend to unrelated dividend reinvestment accounts with other financial agents. The fact that Chase received unsolicited notices and forms from other financial agents regarding separate DRAs created no duty on Chase's part as to those DRAs. The act of voluntarily forwarding those notices

and forms to plaintiffs' accountant, as plaintiffs' decedent originally requested, does not create any such duty. Chase was not obligated to ensure that plaintiffs were informed of the existence of an account, which it did not control and over which it had no responsibility, merely because it undertook the ministerial duty of forwarding the notices sent to the investor in care of Chase to the investor's accountant, at the investor's request (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 11 NY3d 146, 157 [2008]).

Moreover, the record conclusively establishes that plaintiffs had constructive notice of the existence of that account. The decedent's tax return for each of the years from 1997 through 2005 contained a Schedule B setting forth separately the dividends paid to her through Chase's IMA and the dividends paid to her through the other provider in connection with the DRA. Richard Schwartz assumed responsibility for the decedent's finances in November 1996, reviewed her tax returns every year, and began signing the returns as her attorney-in-fact possibly as early as 1997, but certainly in 2001, and is therefore deemed to have constructive knowledge of its contents (*see Hayman v Commissioner*, 992 F2d 1256, 1262 [2d Cir 1993]). He even conceded at his deposition that a person reviewing those

schedules would understand that the DRA dividends were distinct from the IMA dividends and were related to shares of stock held outside of defendant. Moreover, in signing the tax returns as attorney-in-fact, plaintiff affirmatively declared that he had examined the returns and their schedules and that they were "true, correct and complete." Therefore, plaintiffs cannot be permitted to claim a right of recovery against Chase for any loss they claim as a result of lack of knowledge of the DRA (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415, 422 [2009]; *see also Zemel v Horowitz*, 11 Misc 3d 1058[A], 2006 NY Slip Op 50276[U] [2006]). Schwartz's assertion, in papers submitted in opposition to defendant's motion, that he would not have understood the import of the schedules even if he had reviewed them, contradicts his deposition testimony and raises only a feigned issue of fact as to his constructive knowledge of the DRA (*see Joe v Orbit*

Indus., 269 AD2d 121, 122 [2000]).

Defendant's motion for summary judgment should therefore have been granted.

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5014 Edwin Bourdon, Index 102359/07
Plaintiff, 590593/07

-against-

40 Flatbush Realty Associates, L.L.C., et al.,
Defendants.
- - - - - -
40 Flatbush Realty Associates, L.L.C., et al.,
Third-Party Plaintiffs-Appellants,

-against-

A&C Heating Services, Inc., et al.,
Third-Party Defendants-Respondents,

Advanced Chimney, Inc.,
Third-Party Defendant.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Richard F. Braun, J.), entered on or about November 17, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed April 28, 2011,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5072 The People of the State of New York, Ind. 5916/08
Respondent,

-against-

Efrain Lopez,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered March 3, 2010, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Here, the court's inquiry consisted of according defendant a full opportunity to present his claims both in writing and orally, and the circumstances did not warrant any further inquiry. The record establishes that the

plea was knowing, intelligent and voluntary. Both the plea minutes and the court's recollection of the plea proceedings contradict defendant's assertion that medication affected his ability to understand the proceedings (*see People v Alexander*, 97 NY2d 482 [2002]). While there is evidence that defendant was taking medication for his physical illnesses, there is no evidence that it affected his comprehension. Defendant's conclusory claims of innocence and coercion were likewise meritless and contradicted by the record.

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5073 Bobby Jones, Index 108629/08
Plaintiff-Respondent,

-against-

Pinnacle Dunbar Manor, LLC,
Defendant-Appellant.

_____

Fiedelman & McGaw, Jericho (Dawn C. DeSimone of counsel), for appellant.

Berson & Budashewitz, LLP, New York (Jeffrey A. Berson of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 27, 2010, which, in an action for personal injuries, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant's motion for summary judgment was properly denied as untimely (*see Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Defendant's excuse that it failed to timely file its motion due to the misplacement of a necessary affidavit does not demonstrate "good cause" within the meaning of CPLR 3212(a) (*see Perini Corp.*

v City of New York [Department of Envtl. Protection], 16 AD3d 37, 40 [2005]). Even if we were to excuse defendant's tardiness, we would still be constrained to deny the motion, due to the presence of numerous issues of fact precluding summary judgment.

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5074 Allen J. Dennis, Index 22454/02
Plaintiff-Appellant,

-against-

New York City Transit Authority, et al.,
Defendants-Respondents.

_____

Gregory Peck, New York (Philip J. Hoffman of counsel), for appellant.

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered January 15, 2010, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied, except as to plaintiff's 90/180-day claim, and otherwise affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury as a result of the accident. Defendants submitted affirmed reports of an orthopedist and neurologist reporting normal ranges of motion in all tested body areas, specifying the objective tests they used to arrive at the measurements, and concluding that plaintiff's injuries were

resolved (*see DeJesus v Paulino*, 61 AD3d 605 [2009]; *Christian v Waite*, 61 AD3d 581 [2009]).

In opposition, plaintiff raised a triable issue of fact. He submitted affirmed reports of a radiologist who found bulging discs in the cervical and lumbar spine and a herniated disc in the cervical spine, as well as medical findings of limitations in range of motion of the cervical and lumbar spine, both recently and contemporaneous with his accident (*see Rivera v Super Star Leasing, Inc.*, 57 AD3d 288 [2008]; *see also Simpson v Montag*, 81 AD3d 547, 548 [2011]). The affirmations "under penalties of perjury" sufficiently complied with the requirements of CPLR 2106 (*see generally Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1994]). Furthermore, plaintiff adequately explained that he ceased physical therapy when his no-fault benefits were no longer available (*see Jacobs v Rolon*, 76 AD3d 905, 906 [2010]).

However, plaintiff's deposition and bill of particulars, in which he admitted that he was not confined to bed or home, refute

his 90/180-day claim (*see Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [2010]).

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5075 Credit Suisse First Boston, Index 601123/04
Plaintiff-Respondent,

-against-

Utrecht-America Finance Co., et al.,
Defendants-Appellants.

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Ferber Chan Essner & Coller, LLP, New York (Robert N. Chan of counsel), for appellants.

Richards Kibbe & Orbe LLP, New York (H. Rowan Gaither IV of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 15, 2010, which, in this action for damages for defendant Utrecht-America Finance Co.'s (UAFC) termination of an agreement to sell $15 million of distressed debt, denied defendants' motion for partial summary judgment dismissing the complaint to the extent plaintiff sought damages in excess of the difference between the contract price that plaintiff agreed to pay UAFC to purchase a portion of bank debt of a nonparty investment entity and the market value of that portion of debt at the time of the alleged breach, unanimously affirmed, with costs.

Contrary to plaintiff's contention, the order appealed from, which decided a motion made on notice seeking to establish the proper legal measure of damages, clearly involves the merits of

the controversy and affects a substantial right (*see* CPLR 5701[a][2][iv], [v]) and thus is appealable (*see Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 810-811 [2003]; *Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224 [2003]).

In any event, the court properly denied defendants' motion since issues of fact exist. Where, as here, the breach in question involves the failure to deliver an asset, damages are determined by the difference between the contract price for the asset and the fair market value of the asset at the time of the breach (*see Cole v Macklowe*, 64 AD3d 480, 480-481 [2009]; *Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 11 [2008], *lv denied* 12 NY3d 715 [2009]; *Aroneck v Atkin*, 90 AD2d 966, 966 [1982], *lv denied* 59 NY2d 601 [1983]). Although the measure of damages is a question of law, the value of those damages is a factual inquiry (*see Boyce v Soundview Tech. Group, Inc.*, 464 F3d 376, 387 [2d Cir 2006]; *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 196 [2d Cir 2003]). Where, as here, that value cannot be readily discerned at the time of breach, the factfinder may determine "hypothetical market value" based on expert testimony, a recent sale price, the price at which the party offered to sell the asset, or the price offered in the contract (*see Schonfeld v Hilliard*, 218 F3d 164, 178-80, 182 [2d Cir 2000]). Thus, in

accordance with the objective that a party seeking recovery for breach of contract is entitled "to be made whole" as of the time of the breach (*Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971]), the jury should be able to make its valuation determination on all relevant elements of the case, whether dated pre-breach, on the date of breach, or "some short time period thereafter" (*Boyce*, 464 F3d at 389).

Even assuming that the Uniform Commercial Code (UCC) applies analogously to the facts of this case (*see Bache & Co. v International Controls Corp.*, 339 F Supp 341, 349 [SD NY 1972], *affd* 469 F2d 696 [2d Cir 1972]), the "cover" measure of damages set forth in UCC 2-712 is inapplicable, as there was no third-party buyer at issue here (*cf. G.A. Thompson & Co. v Wendell J. Miller Mortgage Co.*, 457 F Supp 996 [SD NY 1978]).

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5076 The People of the State of New York, Ind. 5557/05
Respondent,

-against-

Linary Infante,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered January 13, 2009, as amended January 16, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree, and sentencing him to a term of 8 years, unanimously affirmed.

The sentencing court properly exercised its discretion in denying defendant's motion to withdraw his guilty plea (*see*

People v Frederick, 45 NY2d 520 [1978]). The record establishes that defendant's plea was knowing, intelligent, and voluntary, and it contradicts defendant's claim that he did not understand the consequences of his plea.

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5077 James G. O'Callaghan, Index 150097/09
Plaintiff-Appellant,

-against-

George Brunelle, etc., et al.,
Defendants-Respondents,

Does 1 through 10,
Defendants.

_____

Ambrosio, De Pierro & Wernick, LLC, New York (Batya G. Wernick of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, New York (Robert J. Pariser of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 14, 2010, which, in an action alleging, inter alia, legal malpractice, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff was charged with violating various rules of the New York Stock Exchange (NYSE) and the Securities Exchange Commission (SEC) for engaging in prohibited conduct while working as a floor trader, by simultaneously initiating and executing transactions on behalf of a company in which he had investment discretion. He was convicted of the charges at a disciplinary proceeding and commenced this action against his attorneys for

failure to call a certain witness during the proceeding.

The documentary evidence in support of the motion, including decisions from the NYSE and SEC, refuted plaintiff's allegations that defendants' failure to call the witness, who consented to the NYSE's Hearing Panel's finding that he engaged in conduct constituting improper trading arrangements and violated various rules, constituted legal malpractice and established a defense as a matter of law warranting dismissal of the complaint (*see Minkow v Sanders*, __ AD3d __ , 2011 NY Slip Op 02120 [2011]; *see also* CPLR 3211[a][1]). Contrary to plaintiff's contention, it is apparent from the motion court's decision that it properly treated the instant motion as one to dismiss and not one for summary judgment (*compare Sokol v Leader*, 74 AD3d 1180 [2010]).

Plaintiff also failed to state a cause of action for legal malpractice, which requires that a complaint allege "the negligence of the attorney; that the negligence was the proximate cause of the loss sustained; and actual damages" (*Leder v Spiegel*, 31 AD3d 266, 267 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]; *see* CPLR 3211[a][7]). Plaintiff failed to establish defendants' negligence by showing that they did not exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession (*see*

AmBase Corp. v Davis Polk & Wardwell, 8 NY3d 428, 434 [2007]), and failed to establish proximate cause in that but for defendants' alleged malpractice, he could have prevailed on the underlying claim (*see Fenster v Smith*, 39 AD3d 231 [2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [2006], *affd* 9 NY3d 910 [2007]).

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5078-
5079 180 E. 88th St. Apartment Corp., et al., Plaintiffs-Appellants, Index 600039/09

-against-

Law Office of Robert Jay Gumenick, P.C., et al., Defendants-Respondents.

- - - - -

Law Office of Robert Jay Gumenick, P.C., et al., Counterclaim Plaintiffs-Appellants,

-against-

180 E. 88th St. Apartment Corp., et al., Counterclaim Defendants-Respondents.

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Lane Sash & Larrabee LLP, White Plains (Mitchell Berns of counsel), for 180 E. 88th St. Apartment Corp., Michael Brod, Undine Brod, Joseph T. Cunnane, Paula Ebbins, Brian Estrada, Mitchell Fagin, Sumera Patel and Steven Schwartz, appellants.

Kaufman Borgeest & Ryan LLP, New York (Jonathan Bruno of counsel), for Law Office of Robert Jay Gumenick, P.C. and Robert J. Gumenick, respondents/appellants.

Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (Steven Verveniotis of counsel), for 180 E. 88th St. Apartment Corp., Michael Brod, Paula Ebbins and Brian Estrada, respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 22, 2010, which granted defendants Law Office of Robert Jay Gumenick, P.C. and Robert J. Gumenick's

(collectively, the Law Firm) motion for summary judgment dismissing the complaint, and granted plaintiffs/counterclaim-defendants' (collectively, A-Corp) motion for summary judgment dismissing the Law Firm's counterclaims, unanimously affirmed, without costs.

Initially, the claims of plaintiff cooperative shareholders were properly dismissed, as the Law Firm, which was retained solely by the corporate plaintiff, owed a duty only to the corporate plaintiff to draft the contract of sale for A-Corp's ten-unit residential building, and not to the shareholders (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 561-562 [2009]). We find no evidentiary support for the shareholders' argument that special circumstances existed (i.e., alleged "unity-of interest") to allow the shareholders to assert a claim for legal malpractice against the Law Firm (*see generally AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 595 [2005]).

The motion court correctly found that the clear language of the parties' retainer agreement undermined A-Corp's legal malpractice claim that the Law Firm had failed to structure the contract of sale with tax implications considered, or to have at least advised them to look into the tax issues underlying the

sale. The retainer agreement provided that the Law Firm would not provide tax advice in connection with its drafting of the sale documents, but that it would be available to discuss such issue with A-Corp's tax advisor/accountant (*see generally AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428 [2007]). In any event, A-Corp's argument that "but for" the Law Firm's negligence it would not have suffered a capital gains tax loss is speculative and otherwise unsubstantiated by the record (*see generally Sarah Stackpole, M.D. v Cohen, Ehrlich & Frankel, LLP*, __ AD3d __, 2011 NY Slip Op 2137 [2011]; *compare Escape Airports (USA), Inc. v Kent, Beatty & Gordon LLP*, 79 AD3d 437 [2010]).

The motion court's dismissal of the Law Firm's counterclaims for contribution and indemnification from the corporate board and its members named as counterclaim-defendants, was proper, inasmuch as the challenged action by the board was undertaken in good faith and within its capacity as representative of the cooperative corporation and, in any event, such claims by the Law Firm may only be asserted against a culpable client by way of an

affirmative defense, as a mitigating factor in the attorney's negligence (*see Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 305 note 2 [2001]).

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5080-
5081 Coventry Real Estate Advisors, L.L.C., et al., Plaintiffs-Appellants, Index 115559/09

-against-

Developers Diversified Realty Corporation, et al., Defendants-Respondents.

_____

Gallagher, Harnett & Lagalante LLP, New York (Brian K. Gallagher of counsel), for appellants.

Jones Day, Chicago, IL (Brian J. Murray, of the Illinois Bar, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 25, 2010 (the June 2010 order), which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiffs' fifth cause of action for breach of fiduciary duty, unanimously affirmed, with costs. Order, same court and Justice, entered December 9, 2010, which granted plaintiffs' motion for reargument of the June 2010 order and, upon reargument, adhered to its prior decision, unanimously affirmed, with costs.

Pursuant to a co-investment agreement, the parties entered into a series of substantially similar limited liability company

agreements (the LLC Agreements). Each of the LLC Agreements designated plaintiff Coventry Real Estate Fund II, L.L.C. (Coventry), as the sole managing member. The LLC Agreements, in turn, provided for, but did not mandate, delegation of most day-to-day management to defendant Developers Diversified Realty Corporation (DDR).

Under Delaware law (which the parties agree applies here), absent a provision to the contrary in the governing LLC agreement, an LLC's "managers and controlling members owe the traditional fiduciary duties that directors and controlling shareholders in a corporation would (including the traditional duties of loyalty and care)" (*South Canaan Cellular Invs., LLC v Lackawaxen Telecom, Inc. [In re South Canaan Cellular Invs., LLC]*, 2010 WL 3306907, *7, 2010 US Dist LEXIS 85420, *21-22 [ED Pa 2010] [applying Delaware law]; *see Kuroda v SPJS Holdings, L.L.C.*, 2010 WL 925853, *7 n 28, 2010 Del Ch LEXIS 57, *25-26 n 28 [Del Ch 2010]). Plaintiffs' contrary contentions notwithstanding, under Delaware law, fiduciary duties are imposed "*only* on managers and those designated as controlling members of an LLC," and not on non-managing minority members, such as DDR (*South Canaan*, 2010 WL 3306907, *7, 2010 US Dist LEXIS 85420, *22; *see Kuroda*, 2010 WL 925853, *7 n 28, 2010 Del Ch LEXIS 57,

*25-26 n 28).

We reject plaintiffs' contention that, regardless of its designation under the LLC Agreements, DDR was the LLCs' de facto managing member by virtue of its control over LLC operations. Notwithstanding the extensive powers accorded to DDR under the Management Agreements, the LLC Agreements do not mandate that the LLCs enter into any Management Agreements with DDR. Instead, the decision of whether to enter into those agreements is left up to each LLC's "Investment Committee," which is not controlled by DDR. Hence, the LLC Agreement's "default setting" leaves principal management responsibility with the Managing Member, not DDR. Since DDR is not a majority or controlling member of the LLCs under the LLC Agreements, it has no fiduciary duties thereunder (*see Kuroda*, 2010 WL 925853, at *7, 2010 Del Ch LEXIS 57, *25).

Plaintiffs argue that the Management Agreements impose fiduciary duties on DDR, pointing to a provision contained in the managing and leasing agreement, entitled "Execution of Contracts," which provides that DDR, as property manager, "shall respect its fiduciary duty to Owner in the execution of such contracts or orders." It is doubtful whether a single, isolated reference to fiduciary duty amidst multiple contracts totaling

hundreds of pages in length can be said to vest DDR with broad fiduciary duties, as asserted by plaintiffs. Nor are we persuaded that plaintiffs have alleged such a relationship of "special trust" as to give rise to fiduciary duties on the part of DDR (*Forsythe v ESC Fund Mgt. Co. [U.S.], Inc.*, 2007 WL 2982247, *10, 2007 Del Ch LEXIS 140, *33 [Del Ch 2007]). Even assuming that DDR was in fact a fiduciary under the Management Agreements, however, plaintiffs' fiduciary duty claim still would not lie.

In assessing whether a contractual claim will preclude a claim of breach of fiduciary duty, the question is "whether there exists an independent basis for the fiduciary duty claims apart from the contractual claims, even if both are related to the same or similar conduct" (*PT China LLC v PT Korea LLC*, 2010 WL 761145, *7, 2010 Del Ch LEXIS 38, *26 [Del Ch 2010]). Here, plaintiffs suggest that the LLC Agreements constituted an independent source of fiduciary duties for DDR, thus rendering the fiduciary duty claim non-duplicative of the breach of contract claim under the development and managing agreements. As noted, however, the LLC Agreements do not ascribe any fiduciary duties to DDR. Since plaintiffs do not posit any other independent source of fiduciary duty for DDR, any fiduciary duty claim arising under the

Management Agreements must be dismissed as duplicative of plaintiffs' contractual claims for breach of those agreements.

Finally, plaintiffs contend that, in considering the motion to dismiss, the motion court applied an insufficiently liberal standard of review to the complaint. This contention lacks merit. In considering the motion, the court correctly considered only the allegations of the complaint, as well as the plain meaning of the documents appended to the complaint itself (the LLC Agreement and the Management Agreements) (*see Bello v Cablevision Sys. Corp.*, 185 AD2d 262, 263 [1992], *lv denied* 80 NY2d 761 [1992]).

The court also properly denied plaintiffs' motion for leave to replead. In this regard, plaintiffs point to the affidavit of Loren Henry, one of Coventry's vice presidents (the Henry affidavit), submitted in support of their request for leave to replead. The Henry affidavit, however, merely provided additional details relating to the magnitude of DDR's alleged breaches; it provided no additional support for plaintiffs' fiduciary duty claim. In particular, the Henry affidavit identified no additional language in the LLC or Management Agreements to support plaintiffs' claim of a fiduciary duty owed by DDR. As such, plaintiffs did not establish any basis for

granting their request for leave to replead (*see Sanford v Colgate Univ.*, 36 AD3d 1060, 1062 [2007]).

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

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5087 The People of the State of New York, Ind. 4097/02
Respondent,

-against-

Kevin Brown,
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 (Allen J. Vickey of counsel), for respondent.

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about January 19, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see e.g. People v Hidalgo*, 47 AD3d 455 [2008]). Defendant's criminal

history and prison disciplinary record were both very extensive and included violent conduct.

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5088 Gregory Z. Bedny, Index 112741/09
Petitioner,

-against-

New York State Division of Human Rights,
Respondent.

_____

Gregory Z. Bedny, petitioner pro se.

_____

Determination of respondent State Division of Human Rights, dated July 24, 2009, which dismissed petitioner's employment discrimination claim, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Marcy S. Friedman, J.], entered June 21, 2010), dismissed, without costs.

Substantial evidence supports the determination that petitioner was not the victim of unlawful discrimination (*see Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69 [1983]). Even assuming that petitioner met his prima facie burden of showing that he was unlawfully discriminated against on the basis of his national origin or age (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; Executive Law § 296[1][a]), respondent established a

legitimate and nondiscriminatory reason as to why the academic institution chose not to hire him. There was ample testimony showing that the successful candidate had superior references and experience tailored to the department's goals. The mere fact that the candidate had not yet attained his Ph. D. is unavailing. Petitioner's own expert testified that it is common for an academic institution to hire such candidates where, as here, the completion of a Ph. D. is imminent.

The record also supports the finding that petitioner failed to rebut these nondiscriminatory reasons and did not demonstrate that they were pretextual (*see Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 554 [2010]).

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

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5090 In re Anny A., and Another,

Children Under the Age
of Eighteen Years, etc.,

Susan A.,
Respondent-Respondent,

Administration for Children's Services,
Petitioner-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Raegan Johnston of counsel), for appellant.

The Penichet Firm, P.C., White Plains (Fred L. Shapiro of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Stern of counsel), attorney for the children.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about February 2, 2011, which, after a hearing, modified an order, same court and Justice, entered on or about December 20, 2010, denying respondent mother's application pursuant to Family Court Act § 1028 for the return of her children, and conditionally granted the application, unanimously affirmed, without costs.

Petitioner agency failed to demonstrate that the return of the children posed an imminent risk to their lives or health (*see* Family Ct Act § 1028[a]; *see also Matter of Kenneth L.*, 209 AD2d

352 [1994]). Family Court providently exercised its discretion in weighing the harm inflicted on the children by their continued placement in separate foster homes against the harm of returning them to their mother's care and placing conditions on the return, including continued individual and family therapy.

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

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5091 Havell Capital Enhanced Municipal Income Fund, L.P., Plaintiff-Appellant, Index 650201/10

-against-

Citibank, N.A., Defendant-Respondent.

_____

McCausland Keen & Buckman, New York (Glenn S. Gitomer of counsel), for appellant.

Freshfields Bruckhaus Deringer US LLP, New York (Marshall H. Fishman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 14, 2010, which granted defendant's motion for summary judgment dismissing the amended complaint, unanimously affirmed, with costs.

Plaintiff had purchased positions in municipal bonds on margin, and secured its debt to defendant with cash and the bonds pursuant to an International Swaps and Derivatives Association agreement and related agreements. When plaintiff defaulted under the governing agreements, rather than invoke its remedies upon default, defendant offered to purchase plaintiff's bond collateral. Although plaintiff's principal complained that defendant's bid purchase prices were too low, she signed the

letter "settlement agreement" that defendant proffered, which indicated the prices and the resulting shortfall in payment of the margin loan debt as a result of the declined value of the bond collateral.

Under the circumstances, the letter agreement barred plaintiff's claim for breach of obligations in the earlier agreements to act in a commercially reasonable manner and to obtain the highest obtainable prices under prevailing market conditions in liquidating plaintiff's interests. The reservation of rights in the letter agreement relied on by plaintiff did not reserve its right to challenge defendant's bond purchase prices, since such interpretation would have negated the main purpose of the letter agreement and rendered it meaningless (*see Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]).

The claim for breach of the implied covenant of good faith, which arose from the same facts and sought identical damages, was duplicative of the contract claim (*see Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [2010], *lv denied* 15 NY3d 704 [2010]). Moreover, the duty of good faith cannot imply obligations inconsistent with the express terms of the letter agreement (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]).

Similarly, the fraud claim, which arose from the same facts, sought identical damages and did not allege a breach of any duty collateral to or independent of the parties' agreements, was redundant of the contract claim (*see Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [2010]).

The fraudulent inducement claim was deficient for lack of justifiable reliance, since plaintiff, a sophisticated and experienced hedge fund dealing in municipal bonds, had access to the relevant market information, and, moreover, its principal was admittedly aware that defendant's bids were too low, yet she chose to execute the letter agreement (*see e.g. Vanderbilt Group, LLC v Dormitory Auth. of State of N.Y.*, 51 AD3d 506, 507 [2008]).

Absent a confidential or fiduciary relationship, defendant was not under a duty to disclose (*see Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [2010]) that it was holding similar bonds in its own account and was seeking a purchaser for them at the time it was negotiating the liquidation of plaintiff's bond positions. Contrary to plaintiff's contention, the instant facts do not fall within the "special facts" doctrine (*see Swersky v Dreyer & Traub*, 219 AD2d 321, 327-328 [1996]).

Furthermore, although defendant's motion for summary

judgment was brought simultaneous with service of its answer to the amended complaint, plaintiff's claimed need for discovery reflected an ineffectual "mere hope" insufficient to forestall summary judgment since the evidence that might otherwise have been obtained would not have been relevant (*see Kent v 534 E. 11th St.*, 80 AD3d 106, 114-115 [2010]).

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

ENTERED: MAY 17, 2011

CLERK

Mazzarelli, J.P., Sweeny, Acosta, Renwick, DeGrasse, JJ.

5093 Nordea Bank Finland PLC, Index 601763/09
5093A Plaintiff-Respondent,

-against-

John V. Holten,
Defendant-Appellant.

_____

Chang & Company, LLC, Pelham (Ta-Kuang Chang of counsel), for appellant.

Willkie Farr & Gallagher, LLP, New York (Roger Netzer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered April 19, 2010, awarding plaintiff $3,314,956.75, plus interest in the amount of $25,643.67 and costs in the amount of $200, for a total sum of $3,340,800.42, and order, same court and Justice, entered December 4, 2009, which, to the extent appealed from, granted plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, without costs.

Plaintiff demonstrated its entitlement to summary judgment pursuant to CPLR 3213 by establishing the existence of a put agreement that was expressly an independent, absolute and unconditional obligation to pay money only, and by submitting an affidavit of nonpayment (*see Bank of Am., N.A. v Solow*, 59 AD3d 304, 304-305 [2009], *lv dismissed* 12 NY3d 877 [2009]; *see also*

International Consol. Indus. v Norton & Co., 132 Misc 2d 606, 607 [1986]). Summary judgment pursuant to CPLR 3213 was appropriate even though the obligation was referenced by underlying agreements (*see Bank of Am.*, 59 AD3d at 305). In opposition, defendant failed to raise an issue of fact since his contentions are contradicted by the unambiguous terms of the relevant documents.

Defendant's argument, improperly raised for the first time in his reply brief, that the "put," which functioned here as a guaranty, was barred by section 16(b) of the Securities Exchange Act of 1934 (15 USC § 78p[b]), is unavailing. That section would not invalidate the agreement, but might affect defendant's liability for any profit from the put. Moreover, the section, which is triggered when an insider both purchases and sells securities within a six-month period, was never triggered here since there was, at most, only a purchase of shares by defendant.

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5095 The People of the State of New York, Ind. 1883/04
Respondent,

-against-

Anthony Robinson,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 10, 2004, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of a controlled substance in or near school grounds, and sentencing him, as a second felony offender, to concurrent terms of 4½ to 9 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, including its evaluation of inconsistencies in the undercover officer's testimony.

The portion of the prosecutor's summation that offered an explanation for certain police conduct was not unduly speculative

or prejudicial. Instead, the prosecutor responded to defense arguments by drawing a permissible inference from the evidence. Defendant's remaining challenges to the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5096 Heather McCann, Index 109534/06
Plaintiff-Appellant,

-against-

Varrick Group LLC,
Defendant-Respondent.

_____

The Odierno Law Firm, P.C., Melville (Scott F. Odierno of counsel), for appellant.

Bruno, Gerbino & Soriano, LLP, Melville (Alison M. Berdnik of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 13, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Supreme Court properly granted defendant's motion insofar as it was premised upon defendant's vicarious liability for the security guard's conduct, because the security guard was an independent contractor. The record amply supports the finding that the "degree of control exercised by the purported employer" (*Byong v Cipriani Group*, 1 NY3d 193, 198 [2003]) "not only over the results produced but also over the means used to produce the results" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006]) was insufficient to give rise to an employer-employee

relationship.

We are also not persuaded by plaintiff's argument that she submitted evidence demonstrating a question of fact as to whether the security guard was an employee. Even were we to find a question of fact as to the security guard's employment status, under the doctrine of respondeat superior, defendant was still not liable for the guard's conduct. Based on the undisputed facts, the security guard's act of lifting plaintiff onto a bar for the purpose of seeing if she could pop a balloon by sitting on it constitutes a "clear departure" from the scope of his purported employment (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]; *see Sims v Bergamo*, 3 NY2d 531, 535-536 [1957]).

We reject plaintiff's contention that a background check of the security guard would have revealed his propensity to engage in the subject conduct. In the circumstances of this case, "[a]n employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past" (*Yeboah v Snapple, Inc.*, 286 AD2d 204, 205 [2001]). The security guard's past conviction, as a minor, of accessory to kidnaping, bears no

relation to a propensity to commit the conduct which caused the injury here (*see Pinkney v City of New York*, 52 AD3d 242, 243 [2008]; *Detone v Bullit Courier Serv.*, 140 AD2d 278, 279-280 [1988], *lv denied* 73 NY2d 702 [1988]).

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5097 In re Tyreek G.,

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

_____

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

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

_____

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about December 4, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second and third degrees and criminal possession of a weapon in the fourth degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the findings as to assault in the third degree and attempted assault in the second and third degrees and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's findings were based on legally sufficient evidence and were not against the weight of the evidence. There is no basis for disturbing the court's credibility determinations, including its conclusion that appellant was wearing a brace or cast at the time of the incident.

The testimony established that appellant used his forearm, which was covered with a brace or cast, to hit the victim on the head. As a result, the victim sustained bumps on his head that were treated at an emergency room, and three days of severe headaches. The headaches caused the victim to miss football tryouts and part of one school day.

The evidence supports the inference that the cast or brace was readily capable of causing serious physical injury under the circumstances of its use (*see People v Carter*, 53 NY2d 113, 116 [1981]; *People v Davis*, 96 AD2d 680 [1983]). Accordingly, the court properly found that this object was a dangerous instrument (*see* Penal Law § 10.00[13]). The evidence also established the element of physical injury (*see People v Chiddick*, 8 NY3d 445 [2007]; *People v Guidice*, 83 NY2d 630, 636 [1994]; *People v James*, 2 AD3d 291 [2003], *lv denied* 2 NY3d 741 [2004]).

As the presentment agency concedes, the counts indicated should have been dismissed as lesser included offenses.

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5098 In re Alberto R.,

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

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Randall S. Carmel, Syosset, for appellant.

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

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 8, 2010, which adjudicated appellant a juvenile delinquent upon a finding that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and menacing in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its

evaluation of inconsistencies in testimony. The evidence established that appellant was not a bystander, but an active participant in the robbery.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation. Given the seriousness of the underlying offense, this was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Catterson, Moskowitz, Manzanet-Daniels, JJ.

5099 Morrison Cohen, LLP, Index 104100/09
Plaintiff-Appellant,

-against-

David Fink,
Defendant-Respondent.

_____

Morrison Cohen LLP, New York (Jerome Tarnoff of counsel), for appellant.

David Fink, respondent pro se.

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Appeal from order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered December 9, 2010, which conditionally granted defendant's motion to vacate a default judgment awarding plaintiff $254,023.70, unanimously dismissed, with costs.

The court conditioned the grant of vacatur of the default judgment on defendant's withdrawal of his appeal to this Court from the default judgment. This Court denied defendant's motion to withdraw his appeal after the appeal was perfected. Because

defendant failed to meet the motion court's express condition for vacatur, the grant of vacatur never became effective.

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5103-
5104-
5105 In re Naomi J., and Another,

Children Under the Age
of Eighteen Years, etc.,

Damon R.,
Respondent-Appellant,

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

_____

Michael S. Bromberg, Sag Harbor, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child Naomi J.

_____

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about June 12, 2009, which, upon a finding that respondent father neglected Naomi J., and derivatively neglected Damon R. Jr. (a/k/a Damien R.), placed Naomi J. in the custody of the Commissioner of Social Services until completion of the next permanency hearing and released Damon R. Jr. to the custody of non-respondent mother, with supervision by petitioner Administration for Children's Services until February 19, 2010, unanimously affirmed, without costs.

Appeals from order, same court and Justice, entered on or about August 5, 2008, which granted the application of respondent father and non-respondent mother for the return of Damon R. Jr. pending a final order of disposition, unanimously dismissed, without costs, as moot.

The finding of neglect is supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]) showing that respondent inflicted excessive corporal punishment upon his daughter Naomi (Family Ct Act § 1012[f][i][B]), by beating her and leaving bruises on her arm and under her eye (*see Matter of Jazmyn R. [Luceita F.]*, 67 AD3d 495 [2009]). The out-of-court statement of the child to her teacher was corroborated by the teacher's observation of the bruises on the child's arm and face (*see Matter of Nicole V.*, 71 NY2d 112, 118 [1987]; *Jazmyn R.*, 67 AD3d at 495).

Respondent's use of excessive corporal punishment against Naomi supports the finding of derivative neglect as to Damon R.

Jr. (*see* Family Ct Act § 1046[a][i]; *Matter of Deivi R. [Marcos R.]*, 68 AD3d 498, 499 [2009]).

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5116 The People of the State of New York, Ind. 695/08
Respondent,

-against-

Frederick Boykin,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams 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 (James A. Yates, J.), rendered on or about December 2, 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: MAY 17, 2011

CLERK

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

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5118 In re Paul Andruszkiewicz, Index 101593/10
Petitioner,

-against-

John J. Doherty, as Commissioner,
New York City Department of Sanitation,
Respondent.

_____

Agulnick & Gogel, LLC, New York (William A. Gogel of counsel), for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondent.

_____

Determination of respondent, dated October 9, 2009, which terminated petitioner's employment as a sanitation worker, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [O. Peter Sherwood, J.], entered on or about May 3, 2010), dismissed, without costs.

The finding that petitioner accepted a gratuity in exchange for collecting trade waste is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,* 45 NY2d 176, 181-182 [1978]). Such evidence includes a videotape made by a citizen showing petitioner and his partner loading a vast amount of debris into the sanitation truck (*see*

Matter of Cuthbert v Farrell, 305 AD2d 180 [2003]). Furthermore, the hearsay testimony of respondent's investigator, who interviewed and obtained the statement made by the woman who provided the gratuity, was "sufficiently relevant and probative" to constitute substantial evidence that petitioner accepted a gratuity (*Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990] [internal quotation marks and citations omitted]). There exists no basis to disturb the credibility determinations of the Administrative Law Judge (*Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty of termination does not shock our sense of fairness (*see Matter of Cuthbert*, 305 AD2d at 180).

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

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5119 Sandra Fernandez, Index 105858/08
Plaintiff-Appellant,

-against-

The City of New York, et al.,
Defendants-Respondents.

_____

Oshman & Mirisola, LLP, New York (David L. Kremen of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 11, 2010, which, in an action for personal injuries allegedly sustained when a desk drawer fell on plaintiff police officer's knee and foot as she worked at a desk at the precinct, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that they could not have known that the track of the drawer was not secured or that the drawer was likely to fall. The evidence demonstrated that the drawer had never fallen off before, and there was no suggestion that other desks had similarly defectively secured tracks that might cause a drawer to fall off. Thus, defendants did not have notice of any

defective or unsafe condition necessary to sustain either a General Municipal Law § 205-e claim (*cf. Lusenskas v Axelrod*, 183 AD2d 244, 248-249 [1992], *appeal dismissed* 81 NY2d 300 [1993]), or a common-law negligence claim.

In opposition, plaintiff failed to raise a triable issue of fact. The fact that the sergeant observed after the accident that the track of the drawer was "hanging off" did not establish notice, as the condition of the track mounting was only visible after the drawer fell, and there was no prior indication that the drawer was at risk of falling as might require an inspection of the tracks.

Contrary to plaintiff's contention, a triable issue of fact is not raised based upon the doctrine of res ipsa loquitur as none of the requisite elements are present under the circumstances (*see generally Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

Plaintiff has waived her claim that defendants' failure to produce "legible" photographs of the underside of the desk after the accident required an adverse inference that such photographs would have provided notice. The record shows that she was aware of the photographs yet filed a note of issue certifying that

discovery was complete (*see Escourse v City of New York*, 27 AD3d 319 [2006]). In any event, the photographs would not have been probative as to notice, since the track was not visible until after the drawer fell.

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

ENTERED: MAY 17, 2011

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5122N Diane I. Dua, et al., Index 110344/10
Plaintiffs-Appellants,

-against-

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

_____

Phillips Nizer LLP, New York (Jon Schuyler Brooks of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered December 15, 2010, which denied plaintiffs' motion for a temporary restraining order and preliminary injunction, and granted defendants' motion to vacate the existing temporary restraining order, unanimously affirmed, without costs.

Plaintiffs, artists and vendors of expressive matter -- defined as "materials or objects with expressive content, such as newspapers, books, or writings, or visual art such as paintings, prints, photography, or sculpture" (56 RCNY 1-02; 56 RCNY 1-05 [b][2]; Administrative Code § 20-473)--seek to enjoin the enforcement of revised regulations (the Revised Rules) promulgated by the New York City Department of Parks and

Recreation. The Revised Rules would limit such vending to 100 specifically designated sites or "spots" in Union Square Park, Battery Park, High Line Park and portions of Central Park. These sites would be allocated on a first come, first served basis with only one vendor allowed at each site (*see* 56 RCNY 1-05 [b][2]).

Plaintiffs failed to demonstrate "a likelihood of ultimate success on the merits" of their challenge to the subject regulations, since they failed to show that the regulations violated their rights under the New York State Constitution (*see Central Hudson Gas & Elec. Corp. v Public Serv. Commn. of N.Y.*, 447 US 557, 566 [1980]; *see also Matter of Von Wiegen*, 63 NY2d 163, 170 [1984]). The Revised Rules, although addressed to expressive matter vendors, are part of a comprehensive scheme which governs time, place, and manner rules for all vendors under the Parks Department's jurisdiction. We find that the Revised Rules are content neutral (*see Bery v City of New York*, 97 F3d 689, 697 [2d Cir 1996], *cert denied* 520 US 1251 [1997]). The City has a significant interest in preserving and promoting the scenic beauty of its parks, providing sufficient areas for recreational uses, and preventing congestion in park areas and on perimeter sidewalks (*see id.*). The Revised Rules respond to Parks Department concerns that, since 2001, expressive matter

vendors have tripled. The general restrictions applicable to all vendors were no longer sufficient to balance the vending of expressive matter with the use of parks by the general public. The Revised Rules provide open, ample alternative means of communication (*see Matter of Rogers v New York Tr. Auth.*, 89 NY2d 692, 701 [1997]), since they only apply to four parks. Expressive matter vendors may operate at any other city park, subject only to general restrictions. Thus, the Revised Rules satisfy the narrow tailoring requirement of promoting "a substantial government interest that would be achieved less effectively absent the regulation" (*Ward v Rock Against Racism*, 491 US 781, 799 [1989]; *cf. Time Square Books v City of Rochester*, 223 AD2d 270, 276 [1996]; *People ex rel. Arcara v Cloud Books*, 68 NY2d 553 [1986]).

The fact that the designated sites are limited in number does not turn the Revised Rules limitation into de facto licenses in contravention of Local Law 33. Unlike the lottery system rejected in *People v Balmuth* (178 Misc 2d 958 [1998], *affd* 189 Misc 2d 243 [2001], *lv denied* 97 NY2d 678 [2001]), the Revised Rules do not regulate who obtains any particular designated vending site on any particular day. Nor do the Revised Rules appear to run afoul of the legislative intent of Local Law 45.

While the Revised Rules allow expressive matter vending at sites and times when food or general vending is allowed, the record reveals that the Parks Department designated 68 sites for expressive matter vending in and around Central Park below 86th Street and authorized only 36 food and souvenir carts to operate in that area. Equally unavailing is plaintiffs' contention that the first come first served system of allocating designated sites is unconstitutionally vague; due process "requires only a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms" (*Foss v City of Rochester*, 65 NY2d 247, 253 [1985]; *see also Heffron v International Soc. for Krishna Consciousness, Inc.*, 452 US 640, 648-649 [1981]). Finally, the record is not sufficiently developed regarding plaintiffs' assertion that the Revised Rules violate section 8-107[4] and [9] of the City Human Rights Law and section 296[2] of the State Human Rights Law. The testimony at the preliminary injunction hearing highlights that, during the time the Revised Rules were in effect, both individuals over 40 and women were able to obtain designated spots.

Plaintiffs also failed to demonstrate that either the prospect of imminent and irreparable harm or the balance of

equities tips in their favor (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]). Any expressive matter vendor who is foreclosed from a designated site may, among other things, sell his or her artwork on public sidewalks throughout the City (*see* Administrative Code of the City of New York §§ 17-306 and §§ 20-452; *Bery*, 97 F3d at 698-699]) or sell in any part of the perimeter of Central Park north of 86th Street, any part of the interior of Central Park other than the pathways along the Central Drive and Wein and Wallach Walks, and any other park in the City, provided they comply with the general provisions of the Revised Rules (*see* 56 RCNY § 1-05 [b]).

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

ENTERED: MAY 17, 2011

CLERK