SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 4, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8190-
8191-
8191A

Index 307877/10
Claim 119343
119437

Lorraine Munroe,
Plaintiff-Appellant,

-against-

Park Ave South Management, et al.,
Defendants-Respondents.

- - - - -

Lorraine Munroe,
Claimant-Appellant,

-against-

The State of New York,
Defendant-Respondent.

_____

Lorraine Munroe, appellant pro se.

Heiberger & Associates, P.C., New York (Ricardo Vasquez of counsel), for Park Ave South Management and 3053 Hull Ave LLC, respondents.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for The State of New York, respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about June 14, 2011, which granted

defendants' motion to dismiss the complaint, and orders, Court of Claims of the State of New York (Alan C. Marin, J.), entered June 30, 2011, granting defendant's motions to dismiss the claims, unanimously affirmed, without costs.

Supreme Court properly determined that plaintiff's action, alleging that her landlord and its managing agent overcharged her and failed to provide repairs and services, is barred by res judicata and collateral estoppel (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 486 [1979]). Those claims were asserted as counterclaims in a nonpayment action and dismissed by the Housing Court, and plaintiff's new allegation of harassment by defendants should have been raised in the Housing Court.

The Court of Claims correctly determined that the claims against the Housing Court Judge and the Supreme Court Judge, based upon the aforementioned proceedings, were barred by judicial immunity. Claimant did not assert that any of the judges' acts were performed in the clear absence of jurisdiction (*see Murray v Brancato*, 290 NY 52 [1943]; *Rosenstein v State of New York*, 37 AD3d 208 [1st Dept 2007]). In addition, the Court

of Claims properly determined that the claim against the Housing Court Judge was untimely (*see* Court of Claims Act §§ 10[3], 11[a]; *Byrne v State of New York*, 104 AD2d 782 [1st Dept 1984], *lv denied* 64 NY2d 607 [1985]).

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8192-
8193 Index 101947/08

William Sanacore,
Plaintiff-Respondent,

-against-

HSBC Securities (USA), Inc.,
Defendant-Appellant.

Epstein Becker & Green, P.C., New York (Kenneth J. Kelly of counsel), for appellant.

Christopher E. Chang, New York, for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 15, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established prima facie that it terminated plaintiff not because of his disability but for the legitimate, nondiscriminatory reasons that he was insubordinate in refusing to implement certain new administrative and monitoring initiatives and that he had lied about obtaining the required pre-approval for two large transactions. In opposition, plaintiff raised an issue of fact whether defendant's proffered reasons for terminating him were pretextual (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 629-630 [1997]). He showed,

among other things, that he was rated as being in compliance with certain of the business metrics that defendant claims he resisted and that other financial advisors had violated the pre-approval requirement for large transactions without any adverse consequence.

With respect to plaintiff's claim that defendant also terminated him in retaliation for a complaint of discrimination, defendant contends that that complaint – that the bank branch manager's takeover of plaintiff's office was discriminatory – was not objectively reasonable and that therefore in making it plaintiff was not engaged in a protected activity (*see Reed v A.W. Lawrence & Co., Inc.*, 95 F3d 1170, 1178 [2d Cir 1996]). On the day that he returned to work from the first of two surgeries for his bone cancer, plaintiff learned that he had been removed from the private office he had used for three years and his files and personal belongings deposited in a workstation on the branch's open platform. We find that plaintiff could reasonably have believed that defendant's reasons for depriving him of his private office were discriminatory (*see Moyo v Gomez*, 32 F3d 1382, 1386 [9th Cir 1994], *cert denied* 513 US 1081 [1995] [assessing reasonableness of belief requires "due allowance . . .

for the limited knowledge possessed by most Title VII plaintiffs about the factual and legal bases of their claims"]).

We have reviewed defendant's remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8194 Hermitage Insurance Company, Index 102639/11
Plaintiff-Appellant,

-against-

JDG Lexington Corp., et al.,
Defendants-Respondents.

_____

Max W. Gershweir, New York, for appellant.

Warren L. Cohen, Tuckahoe, for JDG Lexington Corp., respondent.

Friedman, Hirschen & Miller, LLP, Albany (Carolyn B. George of counsel), for Barbara Post and Alfred Sniffen, respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered December 6, 2011, which denied plaintiff Hermitage Insurance Company's motion for summary judgment declaring that it had no duty to defend and indemnify defendant JDG Lexington Corp. in an underlying personal injury action, unanimously reversed, on the law, without costs, the motion granted, and it is declared that plaintiff has no such duty.

Notwithstanding the fact that the insured may have mistakenly believed, based on the lease of its commercial tenant, that it was not responsible for the area where the plaintiff in the underlying action fell, the insured had a duty to report the

possibility of a claim as soon as practicable (*see Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 239-240 [1st Dept 2002]).

Moreover, it is undisputed that the insured did not undertake any investigation of the incident, or make inquiry regarding its alleged belief that it was not responsible for the area where the accident occurred. Thus, it could not have formed a reasonable belief of non-liability (*see Great Canal Realty Corp. v Seneca Ins. Co., Inc.*, 5 NY3d 742, 743-744 [2005]; *Tower Ins. Co. of N.Y. v Jaison John Realty Corp.*, 60 AD3d 418, 418-419 [1st Dept 2009]).

A party may not seek to avoid the consequences of its failure to give notice within a reasonable period of time by asserting that it had a reasonable, good faith belief that the accident would not result in liability where, as here, the insured's principals were aware of the accident, it involved a tenant who slipped and fell on the insured's premises and the tenant had to be transported by ambulance (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 307-308 [1st Dept 2008]).

Similarly, because the injured party failed to give any notice to plaintiff, she must rely on the sufficiency of the

notice provided by the insured which, as discussed above, was untimely (*Lin Sing Long*, 50 Ad3d at 308-309).

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

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8195 The People of the State of New York, Ind. 4892/05
Respondent,

-against-

Moses Torres,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Brenda Soloff, J. at dismissal motion; Arlene D. Goldberg, J. at jury trial and sentencing), rendered May 23, 2007, as amended June 4, 2007, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to a term of 10 years, unanimously reversed, on the law, and the indictment dismissed, with leave to re-present.

The motion court erred in denying defendant's motion to dismiss the indictment pursuant to CPL 190.50. Defendant served notice on the prosecution that he wanted to testify before the grand jury at his initial arraignment on a felony complaint. A first indictment was subsequently dismissed on the ground that

defendant was not afforded an opportunity to testify before the grand jury. It is undisputed that the People were aware that defendant wanted to testify at the re-presentation of the case to the grand jury.

When a second indictment was issued following a grand jury proceeding at which defendant did not appear, defendant's counsel moved to dismiss, stating that he had never received any notice from the People concerning the date for the new grand jury presentation, written or otherwise. In response, the People stated that defense counsel had been given notice by mail of the presentation, and the prosecutor attached a copy of a letter purportedly sent to counsel, which was marked with an "/S/" in the signature line. The People, however, did not identify who mailed the notice, and did not offer any supporting information beyond submitting an unsigned copy of the letter purportedly mailed to defendant's counsel. They provided no affidavit of service and proffered not even a general explanation of their office mailing procedures.

Under these circumstances, we find that the People failed to meet their burden of showing that they provided defendant actual

notice of the scheduled grand jury proceeding (*see People v Crisp*, 246 AD2d 84, 86-87 [1st Dept 1998], *adhered to on rearg* 268 AD2d 247 [1st Dept 2000], *lv denied* 94 NY2d 946 [2000]). In the absence of any competent proof of mailing, by way of affidavit of service, proof of regular office practice, or otherwise, we find no basis upon which to presume receipt (*see e.g. Morrison Cohen Singer & Weinstein, LLP v Brophy*, 19 AD3d 161 [2005]).

We have considered and rejected the People's preservation and other procedural arguments. While the People argue that the record is insufficient to permit review, any insufficiency is the result of the People's failure to present proof of mailing in response to counsel's clearly-articulated denial of receipt.

In light of this determination, which dismisses the indictment, we find it unnecessary to address defendant's remaining arguments.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8196 In re Ramon S.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for presentment agency.

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 12, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him on probation for a period of 15 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. The evidence credited by the court established that, in the incident specified

in the petition, appellant, while acting in concert with another person, attempted to cause physical injury to the victim. We have considered and rejected appellant's challenges to the court's finding.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8197 J. Christopher Flowers, Index 651036/10
Plaintiff-Appellant,

-against-

73rd Townhouse LLC, et al.,
Defendants-Respondents.

_____

Stroock & Stroock & Lavan, New York (Kevin L. Smith of counsel), for appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 27, 2011, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

The documentary evidence submitted on the motion – namely, checks from the Law Offices of Milton S. Rinzler to certain defendants – failed to show conclusively that plaintiff's claims were time-barred. The affidavits submitted by defendants were not "documentary evidence" within the meaning of CPLR 3211(a)(1) (*see e.g. Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d 78, 85-86 [2d Dept 2010]), and without the affidavits, it cannot be concluded that defendant 73rd Townhouse LLC made distributions

that were protected by the statute of limitations in Limited Liability Company Law § 508(c).

On appeal, defendants argue only the statute of limitations. Accordingly, they have abandoned so much of their motion as was based on CPLR 3211(a)(7).

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8198 T.D. Bank, N.A., etc., Index 108640/10
Plaintiff-Appellant,

-against-

Halcyon Jets, Inc., etc.,
Defendant,

Andrew Drykerman, etc.,
Defendant-Respondent.

_____

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for appellant.

McLaughlin & Stern, LLP, New York (John Paul Robbins of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered May 13, 2011, which denied plaintiff's motion for summary judgment, and granted defendant Andrew Drykerman's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff bank seeks to hold defendant Drykerman, who opened a line of credit in his capacity as an employee of the defaulting defendant, Halcyon Jets, Inc., personally liable for the corporation's debt. It is well settled that officers or agents of a corporation are not personally liable on corporate contracts

if they do not purport to bind themselves individually (*Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1 [1964]). Here, plaintiff failed to produce the credit card agreement allegedly signed by Drykerman or any documents establishing that he assumed corporate liability (*see* General Obligations Law § 5-701[2]). Accordingly, summary judgment dismissing the complaint as against Drykerman was properly granted.

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

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8199 The People of the State of New York, Ind. 4515/08
Respondent,

-against-

Osiris Marte,
Defendant-Appellant.

Stanley Neustadter, Cardozo Appeals Clinic, New York (Peter Adelman of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered October 30, 2009, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The victim's identification of defendant as the person who shot him was corroborated by several aspects of a surveillance camera recording, including the sound of people shouting defendant's name immediately before shots were fired.

The court properly permitted the victim to testify, on

cross-examination, that he decided to provide an accurate identification of his assailant once the police showed him pictures of various people. The answer was responsive to an inquiry by defense counsel into the victim's reason for belatedly telling the truth. Although testimony about photo identifications is generally inadmissible, here "defendant opened the door to such testimony and actually elicited it during cross-examination" (*People v Hernandez*, 286 AD2d 623, 623 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001]). Accordingly, the court properly declined to interrupt the witness's answer or declare a mistrial.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8200 The People of the State of New York, Ind. 3590/08
Respondent,

-against-

Enrique Flores,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (David Stadtmauer, J.), rendered on or about May 5, 2010,

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8201 In re Sean B.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Kathy H. Chang of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 4, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of assault in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

Appellant's admission was knowingly, intelligently and voluntarily made. The admission did not become final until after the court fully advised appellant and his mother of the rights appellant would be waiving. Appellant's challenges to his admission allocution raise matters of form rather than substance. Reversal is not warranted either by the fact that the factual

inquiry preceded the advisement of rights (*see Matter of Leon T.*, 23 AD3d 256 [1st Dept 2005]) or the fact that appellant's mother's allocution incorporated her son's allocution by reference (*see Matter of Humberto R.*, 81 AD3d 471 [1st Dept 2011]).

We also find that the court sufficiently explained the right to remain silent.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8203-
8204 Index 401544/07

Doubet LLC,
Petitioner-Respondent-Appellant,

-against-

The Trustees of Columbia University
in the City of New York,
Respondent,

455 Central Park West LLC,
Respondent-Appellant-Respondent,

455 Central Park West, Inc., et al.,
Respondents.

_____

Oberdier Ressmeyer LLP, New York (Carl W. Oberdier and Kellen G. Ressmeyer of counsel), for appellant-respondent.

Stern & Zingman LLP, New York (Mitchell S. Zingman of counsel), for respondent-appellant.

_____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered July 20, 2011, which, to the extent appealed from, awarded petitioner a sum of money as against respondent 455 Central Park West, LLC (respondent) and denied petitioner's application for prejudgment interest, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 2, 2011, which, upon reargument of the application for prejudgment interest, adhered to the original determination, unanimously dismissed, without costs, as academic.

Petitioner, a judgment creditor, brought this special proceeding pursuant to CPLR article 52 to recover money damages for the violation of restraining notices served on respondent, a garnishee. At the time the notices were issued, on February 19, 2003, the judgment debtor, Douglas Palermo, entered into a written agreement with respondent for a consulting fee to be paid him upon respondent's sale of 53 condominium apartments to Columbia University. The sale closed on July 29, 2004. Notwithstanding the restraining notices, respondent paid Palermo.

Respondent argues, for the first time on appeal, that its failure to abide by the restraining notices did not damage petitioner because petitioner never could have collected on a money judgment. However, contrary to respondent's contention, the restraining notices remained in effect until Palermo filed a voluntary petition for bankruptcy, in October 2005. If respondent had still been holding the funds in December 2004-January 2005, after a court order denied Palermo's motion to vacate the default judgments, which freed petitioner to seek to enforce them, petitioner would have had nine or 10 months in which to commence its enforcement proceeding.

Equally unavailing is respondent's argument that the restraining notices were invalid because they sought to restrain

a contingent debt that was not certain ever to become due. Respondent made this argument in an untimely motion for leave to reargue. In any event, "a contingent future debt, even if not subject to levy as 'debt' under CPLR 5201(a), may be leviable as 'property' under CPLR 5201(b)" (*JPMorgan Chase Bank, N.A. v Motorola, Inc.*, 47 AD3d 293, 302 [1st Dept 2007]). Palermo's right to payment under a binding, assignable written contract with respondent was "property" at the time the notices were issued, regardless of the uncertainty of its ultimate value, because it had "potential economic value" to petitioner (*see Matter of Supreme Mdse. Co. v Chemical Bank*, 70 NY2d 344, 350 [1987]; *compare Verizon New England Inc. v Transcom Enhanced Servs., Inc.*, __ AD3d __, 2012 NY Slip Op 05269 [1st Dept 2012] [judgment debtor had no right to assignable or attachable payment where its performance depended on garnishee's prepayment for services in any given week]).

Respondent argues that the restraining notices were invalid because they were mailed to an out-of-state garnishee and sought to restrain out-of-state property. Assuming that the situs of the property at issue - respondent's contractual obligation to pay a broker's fee - was outside the State of New York, as a foreign corporation authorized to do business in New York,

respondent has consented to personal jurisdiction in New York (*see Augsbury Corp. v Petrokey Corp.*, 97 AD2d 173, 175 [3d Dept 1983]). Service of the restraining notices upon respondent restrained all "property" that was the subject of the notices (*see Koehler v Bank of Bermuda Ltd.*, 12 NY3d 533, 541 [2009]; *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 312 [2010]).

The defense of unclean hands is not available to respondent to bar petitioner from enforcing the restraining notices. Respondent has not established that petitioner's principal acted as a fiduciary to Palermo, who owed him in excess of $2,000,000, at the time he learned that Palermo was going to receive $1,564,816 in fees from the subject transaction (*see Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 316 [1956]).

Petitioner is not entitled to prejudgment interest as a matter of right under CPLR 5001(a), since the restraining notices did not confer upon it a lien or interest in the property (*see Aspen Indus. v Marine Midland Bank*, 52 NY2d 575, 579-580 [1981]). Nor is it entitled to prejudgment interest on the ground that respondent's violation of the restraining notice was willful. We agree with the motion court that petitioner improperly seeks a

punitive award rather than "compensation for the advantage received from the use of that money over a period of time" (*see Manufacturer's & Traders Trust Co. v Reliance Ins. Co.*, 8 NY3d 583, 589 [2007]).

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8205 The People of the State of New York, Respondent, Ind. 1843/09

-against-

Wander Espinal, Defendant-Appellant.

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

Wander Espinal, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at plea; Bonnie G. Wittner, J. at sentencing), rendered November 10, 2010, convicting defendant of murder in the first degree and two counts of conspiracy in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

Since defendant did not move to withdraw his plea prior to sentencing, and since there is nothing in his plea allocution that would cast doubt on his guilt or otherwise call into question the voluntariness of his plea (*see People v Toxey*, 86 NY2d 725 [1995]), the court was under no obligation to conduct a sua sponte inquiry into statements he made to the probation

officer preparing the presentence report (*see e.g. People v Pantoja*, 281 AD2d 245 [1st Dept 2001], *lv denied* 96 NY2d 905 [2001]). In any event, the statements at issue in the presentence report do not contradict defendant's plea allocution or negate any element of the crime.

Defendant's pro se ineffective assistance of counsel claim would require a CPL 440.10 motion to expand the record (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *People v Ford*, 86 NY2d 397, 404 [1995]; *Strickland v Washington*, 466 US 668 [1984]).

We have examined defendant's remaining pro se arguments, and find them to be without merit.

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8206 The People of the State of New York, Ind. 1898/10
Respondent,

-against-

Deshawn Baker,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Renee A. White, J.), rendered on or about January 11, 2011,

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8208 Diego McDonald, Index 111814/10
Plaintiff-Appellant,

-against-

Louise McBain, also known
as Louise Blouin,
Defendant-Respondent.

_____

John Harris P.C., New York (John Harris of counsel), for appellant.

Lyons McGovern, LLP, White Plains (Desmond CB Lyons of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 4, 2011, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court correctly held that plaintiff could not have justifiably relied on the alleged statements that the "Private Office of Louise Blouin Media" (LBM) was a "duly organized" entity which was "profitable," and/or that LBM was "a thriving media company, . . . which, since its inception, has been growing by leaps and bounds," because he had the means to discover the true facts by the exercise of "ordinary intelligence" or upon

"reasonable investigation" (*see Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495, 496 [1st Dept 2006]; *see also Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]).

As a sophisticated certified public accountant and the holder of an MBA, who "has previously been employed as managing director of a major multinational business corporation," plaintiff was obligated to conduct his own independent verification of defendant's alleged statements concerning the company's financial condition and profitability (*see Abrahami v UPC Constr. Co.*, 224 AD2d 231 [1st Dept 1996]). Although plaintiff asserts that he had no duty to check every possible jurisdiction where LBM might have incorporated, the complaint is devoid of an indication that he made any "reasonable investigation" whatsoever of the company's corporate status or "true nature" (*see Zanett Lombardier*, 29 AD3d at 496).

The court also properly dismissed the fraudulent inducement claim based on plaintiff's failure to plead "actual pecuniary loss." The complaint's allegation, that the fraudulent representations induced plaintiff "to become employed for a pay structure which was significantly lower than that to which he would otherwise be entitled" is speculative as a matter of law.

(*see Starr Found. v American Intl. Group, Inc.*, 76 AD3d 25, 27-29 [1st Dept 2010]; *Geary v Hunton & Williams*, 257 AD2d 482 [1st Dept 1999]).

Even assuming that LBM was not a registered company, such fact does not dictate that the agreement between plaintiff and LBM, including its arbitration provision, is not enforceable. Rather, such fact would impose personal liability on the person who signed the contract on behalf of the non-existent entity (*see Geron v Amritraj*, 82 AD3d 404, 405 [1st Dept 2011]; *Imero Fiorentino Assoc. v Green*, 85 AD2d 419, 420-21 [1st Dept 1982]).

Furthermore, the assertion that the agreement between LBM and plaintiff is invalid on account of the fact that plaintiff was fraudulently induced to enter into the agreement is not a ground to invalidate the arbitration provision, but rather presents a question for the arbitrator to determine (*see Information Sciences v Mohawk Data Science Corp.*, 43 NY2d 918, 919-920 [1978]; *see also Two Cent. Tower Food v Pelligrino*, 212 AD2d 441, 442 [1st Dept 1995]). Similarly, if, as alleged by the complaint, LBM is one of defendant's wholly controlled "shell" entities, defendant would be bound by the arbitration provision

even as a non-signatory (*see Matter of Russian-Brazilian Holdings [Saraev]*, 197 AD2d 391 [1st Dept 1993]; *Matter of Sbarro Holding [Shiaw Tien Yuan]*, 91 AD2d 613 [2d Dept 1982]). Accordingly, the court correctly held that the causes of action set forth in the complaint were subject to the arbitration provision.

Moreover, even if there were no arbitration provision, the second cause of action for wrongful termination fails for the additional reason that plaintiff explicitly agreed to a one-year term of employment with LBM "unless earlier terminated pursuant to paragraph 8 below." Paragraph 8(B) provides that plaintiff's employment could be terminated "without cause for any reason at any time."

The court correctly dismissed the cause of action under section 198 of the Labor Law. Notwithstanding plaintiff's contention, the employment agreement clearly states that he was hired as LBM's "Finance Director." Moreover, in the complaint, plaintiff states that he was recruited to be a "key employee" of LBM. Thus, "[p]laintiff's contention that he was not an executive is inconsistent with the allegations of his complaint and his title and employment contract and therefore insufficient to avoid dismissal of the cause of action" under Labor Law § 198

(*Schuit v Tree Line Mgt. Corp.*, 46 AD3d 405, 406 [1st Dept 2007]). In addition, it is uncontested that plaintiff earned in excess of $900 per week (Labor Law § 190[7]). Plaintiff's contention that his responsibilities were not executive functions is of no moment (*see Taylor v Blaylock & Partners*, 240 AD2d 289, 292 [1st Dept 1997]).

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8209 The People of the State of New York, Ind. 704/10
Respondent,

-against-

Terrell Wigfall,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about June 9, 2010, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: OCTOBER 4, 2012

CLERK

Gonzalez, P.J., Saxe, DeGrasse, Freedman, Román, JJ.

8210N- Index 603339/08
8210NA Sherry Mehta,
Plaintiff-Appellant,

-against-

Roger Chugh, etc., et al.,
Defendants-Respondents.

_____

Peter M. Agulnick, Great Neck, for appellant.

Anthony Mattesi, New Rochelle, for Chugh respondents.

Sanjay Chaubey, New York, for New Age Perfumes, Inc., respondent.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered August 22, 2011, which, to the extent appealed from as limited by the briefs, dismissed the complaint, unanimously reversed, on the law, without costs, and the dismissal vacated. Order, same court and Justice, entered March 30, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' cross motions for sanctions, pursuant to CPLR 3126, to the extent of precluding plaintiff from testifying at trial, unanimously affirmed, without costs.

The court improperly dismissed the complaint on the ground that plaintiff defied the court's order to serve and file a note of issue. Although court orders may constitute a "written

demand" to serve and file a note of issue under CPLR 3216(b)(3) (*see e.g. Basile v Chhabra*, 24 AD3d 149, 150 [1st Dept 2005]), the March 2011 order here, which directed that the note of issue be filed by April 22, 2011, did not give plaintiff the required 90 days to serve and file a note of issue, or contain a statement that failure to timely do so would serve as a basis for a motion to dismiss (*see* CPLR 3216[b][3]; *Armstrong v B.R. Fries & Assoc., Inc.*, 95 AD3d 697, 697-698 [1st Dept 2012]).

The court, however, providently exercised its discretion in precluding plaintiff from testifying at trial, given her irresponsible approach to discovery (*see Healy v ARP Cable*, 299 AD2d 152, 154 [1st Dept 2002]; *New v Scores Entertainment*, 255 AD2d 108, 108 [1st Dept 1998]). Plaintiff failed to appear for her deposition on the court-ordered date of June 8, 2010, despite defendants' attempts to confirm her availability before the deposition date; never apprised the court of her inability to be deposed that day, despite clear directives to do so in the preliminary conference order; and never explained her failure to do any of the foregoing. Plaintiff also failed to timely respond

to defendant New Age Perfumes, Inc.'s interrogatories by the discovery deadline, despite multiple requests by New Age that she do so.

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

ENTERED: OCTOBER 4, 2012

CLERK

Tom, J.P., Catterson, DeGrasse, Richter, Manzanet-Daniels, JJ.

6549-
6550 The People of State of New York,
Appellant,

-against-

Angel Cintron,
Defendant-Respondent.

Ind. 2052/00

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

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

Appeal from order, Supreme Court, Bronx County (Margaret L. Clancy, J.), entered on or about May 26, 2010, as amended on or about May 28, 2010, which granted defendant's CPL 440.20 motion to set aside a resentence of the same court and Justice to the extent that the resentence imposed a period of postrelease supervision, unanimously dismissed, as academic.

Defendant's original sentence in 2001 unlawfully omitted postrelease supervision. The sentencing court corrected that defect in 2008 by adding a period of postrelease supervision (PRS) to the sentence. At the time of the resentencing, defendant had been released from prison but was still on conditional release. The maximum expiration date of defendant's

sentence was in 2009.

On March 31, 2010, defendant moved, pursuant to CPL 440.20 (1), to vacate the term of PRS because he was not in prison, but was on conditional release, at the time of the resentencing. When the motion was made, the Court of Appeals had not decided *People v Lingle* (16 NY3d 621 [2011]). In the order on appeal, the motion court vacated the term of PRS, concluding that the resentencing violated defendant's right against double jeopardy under *People v Williams* (14 NY3d 198 [2010], *cert denied* 562 US —, 131 S Ct 125 [2010]), and then resentenced defendant without the PRS term.

The People correctly note this was error because defendant was still on conditional release at the time of the resentencing (*see Lingle*, 16 NY3d at 631 n 1). Although the People request reinstatement of the 2008 resentence, a term of PRS cannot now be added because the maximum expiration date of defendant's sentence has passed. To add this term to his sentence would violate his legitimate expectation of finality in his sentence, which has been fully served (*Williams*, 14 NY3d at 217). In *People v Velez* (— NY3d —, 2012 NY Slip Op 05198, *5 [2012]), the Court of Appeals reiterated this rule, rejecting the People's argument that a different rule should apply where the resentencing

proceeding had commenced before defendant's original sentence expired but could not be completed until after the expiration date.

Here, the People contend that because defendant's 2008 resentence, which appropriately included a term of PRS, was imposed before his maximum expiration date, we can now reimpose that sentence even though his sentence has been fully served. This argument ignores the language of both *Williams* and *Velez* that "'once the initial sentence has been served . . . an additional term of PRS may not be imposed'" (*Velez*, 2012 NY Slip Op 05198, *5, quoting *Williams*, 14 NY3d at 217).

Defendant has a reasonable expectation of finality in his sentence, and a term of PRS cannot now be added because the maximum expiration date of his sentence passed several years ago. As in *People v Allen* (88 AD3d 735, 736 [2011]), "the relief

sought by the People is beyond this Court's power to grant," and thus the appeal must be dismissed as academic.

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

ENTERED: OCTOBER 4, 2012

CLERK

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

7176 The People of the State of New York, Ind. 3041/06
Respondent,

-against-

Haron Gholam,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Fried, Frank, Harris, Shriver & Jacobson, LLP, New York (Leah C. Aden of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Timothy C. Stone of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered July 17, 2007, convicting defendant, after a jury trial, of gang assault in the second degree, and sentencing him to a term of eight years, unanimously affirmed.

We find that the trial court did not err in admitting defendant's written confession and portions of his videotaped confession by which he described his activities with his accomplices on the day of his encounter with Thomas Whitney, Jr., the victim of the crime. Notwithstanding defendant's argument, the challenged evidence did not concern the type of illegal or immoral conduct that would have deprived defendant of a fair

trial (*see e.g. People v Jenneman*, 37 AD3d 736 [2007], *lv denied* 9 NY3d 866 [2007]).

In the early morning hours of May 21, 2006, defendant and his six accomplices attacked Whitney in the street. In the course of the attack, Whitney sustained a fatal skull fracture. Defendant does not challenge the admission of the portion of the videotaped confession by which he admitted to taking a swing at Whitney during the attack. However, defendant argues that the videotape should have been redacted to eliminate his statements that he was present when his accomplices were involved in a scuffle inside of a nightclub just prior to the attack; that one of defendant's accomplices directed a racial epithet at Whitney immediately before the attack; that one of the accomplices stole Whitney's wallet and defendant stole his cell phone as he lay unconscious on the ground; that defendant's accomplices used Whitney's credit card to make illicit purchases on the morning of the attack and that defendant and his accomplices smoked marijuana on the morning of the attack. Defendant further contends that questions put to him regarding a small yellow hammer that he admitted to having carried around in the past for "protection" should have been excised from the videotape. Defendant takes the position that his admission that he swung at

Whitney and missed was the only part of his statements that constituted relevant evidence. This argument does not withstand scrutiny in light of the nature of the crime charged.

"As a general rule evidence of unconnected, uncharged criminal conduct is inadmissible if offered for no other purpose than to raise an inference that a defendant is of a criminal disposition" (*People v Vails*, 43 NY2d 364, 368 [1977] [citations omitted]). "Although any evidence of prior criminal conduct may have some prejudicial effect, when the prior activity is directly probative of the crime charged it may be deemed to outweigh that effect" (*id.* [citations omitted]). Here, defendant was tried on a charge of gang assault in the second degree (Penal Law § 120.06). The crime is defined as follows: "A person is guilty of gang assault in the second degree when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he causes serious physical injury to such person or to a third person" (*id.*). Under the statute, the People were required to prove that defendant was aided by two or more persons who were, at least, in the immediate vicinity of the assault upon Whitney and capable of rendering immediate assistance to defendant in his commission of the crime (*see People v Sanchez*, 13 NY3d 554, 564 [2009]). Evidence of

defendant's activities with his accomplices prior to and immediately after the assault was relevant to the issue of whether defendant swung at Whitney while aided by accomplices as opposed to acting alone. Evidence of uncharged crimes may be received if it helps to establish some element of the crime under consideration (*People v Alvino*, 71 NY2d 233, 241 [1987]). In this case, the statements in question can be reasonably considered to have helped establish the element of being "aided by two or more persons actually present" by showing that defendant was involved in other activities with his accomplices around the time that the assault was committed.

We find no merit in defendant's claim that he was deprived of his Sixth Amendment right to confrontation under *Crawford v Washington* (541 US 36 [2004]) on the basis of his being questioned about the thought processes of one of his accomplices. Questions themselves are not hearsay because they are not offered for their truth (*see generally People v Voymas*, 39 AD3d 1182, 1184 [2007], *lv denied* 9 NY3d 852 [2007]). Defendant's Confrontation Clause claim is otherwise unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

In all other respects, defendant's claims are subject to the

standard applicable to non-constitutional harmless error. Under that standard an error will be deemed harmless when the proof of guilt was overwhelming and there was no significant probability that the jury would have acquitted had the error not occurred (*People v Crimmins,* 36 NY2d 230, 241-242 [1975]). Turning to the record before us, defendant's undisputed admission that he swung at Whitney, the victim, while the latter was being set upon and seriously injured by defendant's accomplices, constitutes overwhelming proof of guilt of gang assault in the second degree. Contrary to defendant's assertions, there was no significant probability that the jury would have acquitted had it not heard references to the earlier scuffle, the racial slur, the carrying of the hammer (which itself is not a crime), the theft of Whitney's wallet, the illicit use of his credit card, and the marijuana smoking. In this regard it is significant that the trial court instructed the jury that it was to consider the evidence of uncharged bad acts solely for the purposes of providing background information, a complete record of defendant's videotaped admissions, evidence as to whether defendant acted in concert with others and evidence of defendant's intent at the time of the alleged crime. "Jurors are

presumed to follow the legal instructions they are given" (*People v Baker*, 14 NY3d 266, 274 [2010]). Although we affirm, we are left with a nagging sense of frustration at the trial court's refusal to answer counsel's question of whether or not it viewed the video before it was shown to the jury. Such a viewing by the court was essential in keeping with its duty to evaluate the admissibility of evidence (*see People v Ventimiglia*, 52 NY2d 350, 361-362 [1981]). Finally, defendant's sentence was not unduly harsh or severe.

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

ENTERED: OCTOBER 4, 2012

CLERK

Tom, J.P., Friedman, Catterson, Acosta, Freedman, JJ.

7473 Wayne Cleghorne, et al., Index 25415/01
Plaintiffs-Respondents,

-against-

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

Willkie Farr & Gallagher LLP, New York (Thomas H. Golden of counsel), for appellants.

Scaffidi & Associates, New York (Anthony J. Scaffidi of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 17, 2011, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action arising from a teacher's alleged exposure to allergens at school, the record reflects the following: Wayne Cleghorne was a school teacher employed by the New School for Arts and Sciences (New School). On August 28, 2000, the New School relocated to 730 Bryant Avenue in the Bronx. Shortly after the move, Cleghorne claims she developed respiratory problems while cleaning her classroom and storage area at the new

location. In November of 2000, Cleghorne was diagnosed with asthma. On November 30, 2000, her family practitioner diagnosed her with bronchitis, and she did not work for approximately a month.

Cleghorne returned to work in early January 2001, but had an asthma attack at the New School on February 2, 2001, and was hospitalized for a week. Cleghorne and her husband filed a notice of claim against the City alleging that her asthma was caused by conditions at the New School and seeking damages.

At the General Municipal Law § 50-h examination on September 26, 2001, Cleghorne stated that while cleaning her classroom and a storage room in the new building, she developed a persistent cough, and that subsequently her condition deteriorated. She described the events leading to her admission to the hospital, and stated that after discharge, she contacted a physician for asthma treatment. He referred her to an allergist. Cleghorne stated that she received weekly medical treatment following the February 1, 2001 incident, suffered many relapses, and was occasionally confined to home for "[a] few months" and bed "[m]any times."

On October 15, 2001, plaintiffs commenced this action against the Board of Education, the City of New York, and two

principals of the New School individually, for negligence, public and private nuisance, violation of OSHA regulations, and violations of the New York City Administrative Code and other statutes. On August 6, 2010, defendants moved for summary judgment dismissing the complaint. Defendants argued that Cleghorne did not develop asthma as a result of her exposure to toxins at the New School, but rather that she had an existing asthmatic condition. In support of their motion, defendants provided the expert report of Dr. Jack J. Adler, a pulmonologist who had conducted an examination of Cleghorne and reviewed her medical records. He noted that in 1994 Cleghorne experienced difficulty breathing after a fan blew cold air on her in her classroom, and that since 1995, she experienced dyspnea, or shortness of breath, on exertion, a condition commonly associated with asthma.

Dr. Adler concluded that plaintiff had developed asthma prior to moving to the new school location and that "environmental contaminants" at the school did not cause the condition. Dr. Adler explained that Cleghorne has "atopic or allergic asthma" and is "allergic to several common allergens, including tree and ragweed pollen, dust mites, dogs, cats, cockroaches ... mold spores ... and mouse and rat antigens ...

none of which are exclusive to the New School." Because these environmental contaminants "are extremely prevalent," she would likely have "similar symptoms in any other urban environment." Dr. Adler concluded that, while working at the New School, Cleghorne was simply experiencing asthmatic symptoms triggered by common allergens.

On October 4, 2010, plaintiffs cross-moved for summary judgment and sought denial of defendants' summary judgment motion. In support, plaintiffs submitted the affidavit of their expert, Dr. Hugh Cassiere, and an affidavit from Cleghorne that provided more detail concerning the conditions in the school.

In the affidavit, Cleghorne stated that when the school moved to the new location, she spent several hours a day during the week before the school opened cleaning up dust, dirt, rodent droppings and carcasses, cobwebs, dead insects, mildew and mold. Cleghorne further stated that after classes began, she cleaned her classroom twice daily. Cleghorne described her symptoms and medical treatment consistent with her § 50-h testimony.

Plaintiffs' expert, Dr. Cassiere, opined that Cleghorne did not have asthma prior to 2000, but rather suffered from a respiratory condition described as asymptomatic "airway hyper responsiveness" (AHR). Crediting Cleghorne's account of her

exposure at the school, Cassiere concluded that Cleghorne's asthma was caused in 2000 by "high-level exposure to, and daily inhalation of dust, dirt, rodents, rodent dander, mold, mildew, cockroaches, and bug carcasses."

In reply, defendants asked the motion court, inter alia, to exclude Cassiere's report on the basis that his opinion on causation and the methodology used to form that opinion was not generally accepted in the medical community. Alternatively, defendants asked the court to conduct a *Frye* hearing.

In support, defendants submitted another affidavit from Dr. Adler, which asserted that Cassiere's theory of causation and his methodology were not generally accepted in the medical community because it made a "false distinction between AHR and asthma," and that it is not possible to diagnose AHR without pulmonary testing. Defendants also asserted that Cleghorne had not shown what levels of allergens or toxins she was exposed to, much less that the alleged level of exposure was sufficient to cause asthma.

Plaintiffs, in reply submitted another affidavit from Cassiere wherein he listed studies purporting to show that it is generally accepted that AHR and asthma are separate conditions, but that AHR can develop into asthma under conditions such as

those to which Cleghorne was allegedly exposed at the school. The motion court denied both motions, finding that there were triable issues as to causation and as to the safety of Cleghorne's work environment.

For the reasons set forth below, the motion court should have dismissed the complaint in its entirety. Initially, we note that the complaint must be dismissed as against the City of New York because the City is not a proper party to this action (*see Flores v City of New York*, 62 AD3d 506 [1st Dept. 2009]). Furthermore, the action cannot proceed against the individual defendants because they were not named in the notice of claim (*see* General Municipal Law § 50-e; *Tannenbaum v City of New York*, 30 AD3d 357, 358 [1st Dept. 2006]).

Plaintiff's claims against the remaining defendant, Board of Education of the City of New York, also fail. Even if this Court were to accept that plaintiff developed asthma only after starting work at the New School in 2000, and that AHR is a separate condition, plaintiff is still obliged to show specific causation. Namely, plaintiff must at least raise a triable issue of fact as to her exposure to a specific toxin or allergen; quantify the level of exposure to some degree; and posit that such level of exposure was sufficient to produce the alleged

injuries (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 448-449 [2006]). While *Parker* recognizes that the level of exposure need not always be quantified "precisely," it is still necessary that "whatever methods an expert uses to establish causation [they be] generally accepted in the [medical] community" (*id.* at 448). Such methods include "mathematical modeling or comparing plaintiff's exposure level to those of study subjects whose exposure levels were precisely determined" (*Todman v Yoshida*, 63 AD3d 606 [1st Dept. 2009]).

Here, the only "method" plaintiffs' expert used to establish specific causation was to accept, at face value, the anecdotal allegations of plaintiff's uncorroborated affidavit that she was exposed to dust, bugs, rodent droppings and carcasses in unspecified quantities, and began experiencing asthma, purportedly for the first time, as a result.

Cleghorne stated in her affidavit -- dated more than nine years after the relevant events -- that "[t]he premises ... were replete with rodents, rodent carcasses, rodent droppings, cobwebs, cockroaches, cockroach and other bug carcasses, mildew, thick-black dust, and excessive dirt." She also stated that "numerous ceiling tiles were water-damaged and broken; there was mold on the ceiling tiles by the vents, mold on the walls, and

mold in the closets." Cleghorne further stated that once school began, "[e]very morning [she] cleaned cobwebs, bug carcasses, mildew, and mold in [her] classroom as well as wiped dust ... and dirt from the vents along the windowsills [and that] [o]n almost a daily basis, [she] wiped rodent droppings from along the vents of the classroom's windowsill."

Plaintiffs' expert, based only on this affidavit, characterized Cleghorne's exposure as "high-level." This was an insufficient basis for his theory, given that "replete" is a meaningless and vague quantifying adjective (*see e.g. Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [1st Dept. 2010] [expert's calculation of the level of exposure was based on assumptions not supported by the record]). Plaintiffs' expert did not provide any scientific measurement or employ any accepted method of extrapolating such a measurement, and plaintiffs offered no other evidence concerning the level of allergens or toxins present in the school. Although plaintiffs' expert cited six studies in support of his theory of causation, he failed to compare Cleghorne's exposure level to those of the study subjects. Nor could he have since the studies listed common

allergens, but did not differentiate between them or provide exposure levels.[1]

Nor did plaintiffs' expert posit the level of exposure necessary for the causation of injury. In *Fraser v 301-52 Townhouse Corp.* (57 AD3d 416 [1st Dept. 2008], *lv dismissed* 12 NY3d 847 [2009]), we granted defendant's motion for summary judgment dismissing plaintiff's personal injury claims because, inter alia, plaintiff failed to present any evidence supporting specific causation. We found that plaintiff failed to show that he was exposed to a level of mold sufficient to cause his alleged injury. We further found that plaintiff's expert failed to specify the threshold level of exposure to dampness or mold that would cause the plaintiff's health problems (*id.* at 419). Here too, plaintiffs offer no quantification whatsoever of the level of Cleghorne's allergen exposure, nor does plaintiffs' expert specify what level of any of the allergens would cause AHR to progress to chronic asthma (*see e.g. Smolowitz v Sherwin-Williams*

[1] One study referenced allergens including dust, housedust mite, animal danders, tree pollen, grass pollen and molds. Another referenced dust, mold, furred animals, cockroaches and pollens. One study stated that"constrictor agonists" were administered to its subjects to study airway response, but did not specify what they were. The last study examined the effects of exposure to quartz, asbestos, dust & fumes, but not allergens.

Co., 2008 WL 4862981, 2008 US Dist LEXIS 91019 [ED NY 2008] [complaint dismissed because plaintiff's expert failed to quantify the amount of the toxin to which plaintiff was allegedly exposed or that *limited* exposure can cause the plaintiff's disease]).

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8167 The People of the State of New York, Ind. 3546/10
Respondent,

-against-

Naim Jabbar,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered January 6, 2011, convicting defendant, after a jury trial, of robbery in the third degree and fraudulent accosting, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously affirmed.

We reject defendant's challenges to the sufficiency and weight of the evidence supporting the robbery conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence amply supported the conclusion that, after

unsuccessfully attempting to take the victim's money by way of a confidence game, defendant took the money by force (*see e.g. People v Spencer*, 255 AD2d 167 [1st Dept 1998], *lv denied* 93 NY2d 879 [1999]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8171 Raghda Dabbagh, et al., Index 111463/09
Plaintiffs-Respondents-Appellants,

-against-

Newmark Knight Frank Global Management Services, LLC, etc., et al.,
Defendants-Appellants-Respondents,

Roosevelt Field Mall, et al.,
Defendants-Respondents.

Law Offices of Charles J. Siegel, New York (Christopher A. South of counsel), for appellants-respondents.

Breadbar, Garfield, New York (Martin R. Garfield of counsel), for respondents-appellants.

Braff, Harris & Sukoneck, New York (Massimo F. D'Angelo of counsel), for respondents.

Order, Supreme Court, New York County (Emily J. Goodman, J.), entered October 4, 2011, which, insofar as appealed from, denied the motion of defendants Newmark Knight Frank Global Management Services, LLC, and Newmark Knight Frank Global Management Services (Newmark) for summary judgment, and granted the motion of defendants Roosevelt Field Mall, The Retail Property Trust, Simon Property Group, L.P., and Simon Property Group, Inc. (mall defendants) for summary judgment, unanimously modified, on the law, the mall defendants' motion denied, and

otherwise affirmed, without costs.

Supreme Court properly found that the factual accounts provided by the witnesses raised multiple issues of fact precluding summary judgment for Newmark. Plaintiff indicated she slipped on water near a warning cone while walking through a food court at the mall and moving to avoid other people. She did not see any liquid until after she fell. On the other hand, a security guard prepared an accident report stating that he was informed by an employee of a nearby restaurant that four cones had been placed around a spill prior to the accident, and his report and testimony were ambiguous as to whether the spill was cleaned by housekeeping before or after the accident occurred. In light of the conflicting evidence, an issue of fact exists as to the reasonableness of the steps taken to address the slippery condition (*see Signorelli v Great Atl. & Pac. Tea Co., Inc.*, 70 AD3d 439 [1st Dept 2010]; *Winter v Stewart's Shops Corp*. 55 AD3d 1075 [3d Dept 2008]; *cf Brown v New York Marriot Marquis Hotel*, 95 AD3d 585 [1st Dept 2012]). Affording plaintiffs, nonmovants, the benefit of all reasonable inferences in their favor, it cannot be said that Newmark demonstrated that no questions of fact exist as to the reasonableness of the precautions it took (*see Melendez v Dorville*, 93 AD3d 528 [1st Dept 2012]).

Supreme Court did not err in considering the unsworn affidavit of plaintiffs' daughter for the purpose of determining whether issues of fact exist. Whether an infant is competent to testify in a civil case is a matter of discretion for the trial court to decide depending on the particular circumstances and infant (*see Totan v Board of Educ. of City of N.Y.*, 133 AD2d 366 [2d Dept 1987], *lv denied* 70 NY2d 614 [1987]; *Rittenhouse v Town of N. Hempstead*, 11 AD2d 957 [2d Dept 1960]), and the fact that the affidavit was unsworn goes to its weight, not admissibility under these circumstances (*see Gangi v Fradus*, 227 NY 452 [1920]; *Berggren v Reilly*, 95 Misc 2d 486, 488 [Sup Ct, Nassau County 1978]).

However, Supreme Court should have denied the mall defendants' motion. As the movants, they bear the burden of disproving an essential element of plaintiffs' claims and cannot "'affirmatively establish[] the absence of notice as a matter of law' . . . merely by pointing out gaps in the plaintiff's case" (*Martinez v Khaimov*, 74 AD3d 1031, 1033 [2d Dept 2010], quoting *Goldman v Waldbaum, Inc.*, 248 AD2d 436, 437 [2d Dept 1998], *lv denied* 92 NY2d 805 [1998]). The timing of the placement of warning cones in the area by a security guard or housekeeping raises a question of fact as to actual notice (*see Rosado v*

Phipps Houses Servs. Inc., 93 AD3d 597 [lst Dept 2012]; *Felix v Sears, Roebuck & Co.*, 64 AD3d 499 [1st Dept 2009]). The scope and extent of the mall defendants' control or supervision over the companies retained to provide janitorial and security services is an issue of fact (*Hedvat v Yonkers Contr. Co., Inc.*, 96 AD3d 697, 698 [1st Dept 2012]). If either entity had notice of the condition, such knowledge may be imputable to the mall defendants, the owner of the premises (*see LoGiudice v Silverstein Props., Inc.*, 48 AD3d 286 [1st Dept 2008]; *Laecca v New York Univ.*, 7 AD3d 415 [1st Dept 2004], *lv denied* 3 NY3d 608 [2004]).

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

ENTERED: OCTOBER 4, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

8172-
8173 Index 303790/11

NDL Associates, Inc., etc.,
Plaintiff-Appellant,

-against-

Villanova Heights, Inc., et al.,
Defendants-Respondents,

Deutsche Bank Trust Company Americas, et al.,
Defendants.

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

Law Office of John M. Daly, Yonkers (John M. Daly of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about March 8, 2012, which, in an action to foreclose on a mechanic's lien, following a hearing, vacated and declared void plaintiff's mechanic's lien, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded and assigned to a different Justice. Appeal from order, same court and Justice, entered on or about October 7, 2011, which granted defendants-respondents' motion for a hearing on whether the mechanic's lien was wilfully exaggerated, unanimously dismissed, without costs.

Supreme Court improperly held a hearing on the issue of whether the mechanic's lien was wilfully exaggerated (*see Bryan's Quality Plus, LLC v Dorime*, 80 AD3d 639, 640-641 [2d Dept 2011]). That issue should be determined at trial or on a motion for summary judgment (*see e.g. Northe Group, Inc. v Spread NYC, LLC*, 88 AD3d 557 [1st Dept 2011]; *Aaron v Great Bay Contr.*, 290 AD2d 326 [1st Dept 2002]). Supreme Court's hearing effectively resulted in a bench trial on defendants' counterclaim of wilful exaggeration, prior to the close of discovery and without plaintiff waiving its right to a jury and consenting to a bench trial. Such a procedure is improper. In any event, defendants failed to demonstrate that plaintiff willfully exaggerated the lien. Indeed, even Supreme Court found that any excessive billing on plaintiff's part was not malicious or done with fraudulent intent (*see Minelli Constr. Co. v Arben Corp.*, 1 AD3d 580, 581 [2d Dept 2003]).

The matter should be assigned to a different Justice, as the record shows that Supreme Court was biased in favor of defendants.

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8174 The People of the State of New York, Ind. 3895/07
Respondent,

-against-

Jose Sotomayor,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (George R. Villegas, J.), rendered on or about April 17, 2009, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8175 In re Diamond Lee P.,

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

Paula C., also known as Paula T.,
Respondent-Appellant,

Cardinal McCloskey Services,
Petitioner-Respondent.

Neil D. Futerfas, White Plains, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

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

Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about October 24, 2011, which denied respondent mother's motion to vacate an order of disposition, same court and Judge, entered on or about July 19, 2011, upon her default, which, upon findings of permanent neglect, terminated her parental rights to the subject child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to demonstrate a reasonable excuse for her

default and a meritorious defense to the petition (*see* CPLR 5015[a][1]). Even if respondent was unable to attend the dispositional hearing due to a delay at her methadone clinic, she failed to explain why she could not notify her counsel, the court, or the agency about her alleged inability to appear at the hearing (*see Matter of Tyieyanna L. [Twanya McK.]*, 94 AD3d 494, 494 [1st Dept 2012]). Further, respondent failed to show that the agency did not make diligent efforts to help her with her drug problem (*see* Social Services Law § 384-b[7][f][3]), or that she had completed the drug programs and maintained sobriety during the statutorily relevant period (*see* § 384-b[7][a]; *Matter of Octavia Loretta R. [Randy McN.–Keisha W.]*, 93 AD3d 537, 538 [1st Dept 2012]). Nor did she demonstrate that at the time of the dispositional hearing she was ready to care for the child (*Matter of Octavia,* 93 AD3d at 538).

No appeal lies from the order of disposition entered on default (*see Matter of Lisa Marie Ann L. [Melissa L.]*, 91 AD3d 524, 525 [1st Dept 2012]). Were we to review the order, we would

conclude that the finding of permanent neglect was supported by clear and convincing evidence, and that a preponderance of the evidence showed that termination of respondent's parental rights was in the best interests of the child.

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8178 In re Kwan Fong Fung, et al., Petitioners-Appellants, Index 400559/11

-against-

New York City Housing Authority, Respondent-Respondent.

_____

Kwan Fong Fung appellant pro se.

Pak Fung, appellant pro se.

Kelly D. MacNeal, New York (Melissa Renwick of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, J.), entered September 2, 2011, denying the petition to annul respondent's determination, which denied petitioners succession rights as remaining family members to the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that petitioners did not qualify as remaining family members for purposes of succession rights to the subject apartment has a rational basis. The evidence shows that petitioner Kwan Fong Fung did not become an authorized occupant

of her father's apartment prior to his death in 2009 (*see Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486 [1st Dept 2010]).

Contrary to petitioners' contention, respondent did not implicitly approve of their residence in the subject apartment. A governmental agency cannot be estopped from discharging its statutory duties when a claimant does not meet the eligibility requirements for succession rights to an apartment, even if the managing agent acquiesced in an unauthorized occupancy (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 778-779 [2008]; *Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012]). Moreover, petitioners' age, declining health, and claim that they have nowhere else to live are mitigating factors and hardships that the hearing officer was not required to consider (*see Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1st Dept 2009]). Nor did the payment of rent by petitioners confer succession rights to them (*see Matter of Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [1st Dept 2011]; *see also Matter of Garcia v Franco*, 248 AD2d 263, 264-265 [1st Dept 1998], *lv denied* 92 NY2d 813 [1998]).

Finally, despite petitioners' compelling living situation,

this Court has no interest of justice authority in reviewing the agency's determination (*see Featherstone v Franco*, 95 NY2d 550, 554 [2001]).

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8179 The People of the State of New York, Ind. 212/09
Respondent,

-against-

Lidya Espinoza,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Robert G. Seewald, J. at plea; John P. Collins, J. at sentencing), rendered on or about May 20,2010,

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

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

8180 The People of the State of New York, Ind. 4191/08
Respondent,

-against-

Jermaine Cooper,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J. at suppression hearing; Robert M. Stolz, J. at jury trial and sentencing), rendered December 11, 2009, convicting defendant of robbery in the first degree (two counts), criminal possession of a weapon in the third degree (two counts), menacing in the second degree (three counts) and petit larceny, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress statements. Defendant did not preserve his claim that governmental involvement in the actions of store security personnel created a police-dominated atmosphere requiring *Miranda* warnings, and we decline to review it in the interest of justice.

The court did not "expressly decide[ ]" the issue "in response to a protest by a party" (CPL 470.05 [2]; *see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *People v Colon*, 46 AD3d 260, 263 [1st Dept 2007]). At most, the court ruled on the separate issue of whether the store employees were police agents (*see People v Cardona*, 41 NY2d 333, 335 [1977]).

As an alternative holding, we reject it on the merits. Defendant made statements while in the custody of store security personnel, and the record does not establish a police-dominated atmosphere. The police apprehended defendant and turned him over to the store personnel in order to permit them to perform the store's routine administrative procedures, which included giving defendant a notice that he was prohibited from entering the store again. The police had no vested interest in the outcome of the store's private procedures, which were not designed to elicit potentially inculpatory evidence. Rather, Macy's procedures in serving defendant with a "trespass" notice was for Macy's benefit in that it would assist Macy's in any subsequent prosecution of defendant, should he reenter the store at some point in the future. Furthermore, the police were not involved with, and did not orchestrate or supervise, the actions of the store employees. Therefore, there was no requirement that *Miranda* warnings be

administered (*compare People v Ray*, 65 NY2d 282, 286-87 [1985], *with People v Jones*, 47 NY2d 528 [1979]).

In any event, defendant's statements were spontaneous and not made in response to express questioning or its functional equivalent (*see Rhode Island v Innis*, 446 US 291, 301 [1980]; *People v Rivers*, 56 NY2d 476, 479-480 [1982]). The record clearly establishes that defendant's statements were the product of his own unprovoked and unsolicited insistence on chatting or bragging about the series of crimes he had committed at Macy's.

Only two of defendant's prosecutorial misconduct claims are even arguably preserved. First, defendant asserts that the prosecutor's opening statement was inflammatory and suggested that defendant had a propensity toward crime. We find that the challenged remarks were fair comment on the evidence to be presented (*see generally People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]). Second, defendant asserts that the prosecutor vouched for witnesses in summation. Again, we disagree and find that the prosecutor made permissible arguments in favor of crediting the witnesses' testimony (*see id.* at 144).

Defendant's remaining prosecutorial misconduct claims, and his challenge to the court's charge, are unpreserved and we

decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8183 In re Pablo S.,
Petitioner-Appellant,

-against-

Luz S.,
Respondent-Respondent.

Randall S. Carmel, Syosset, for appellant.

Gerald M. Pigott, Bethpage, for respondent.

Order, Family Court, New York County (Diane Costanzo, Special Referee), entered on or about July 18, 2011, which, after a fact-finding hearing in a proceeding brought pursuant to Article 8 of the Family Court Act, dismissed the petition for an order of protection, unanimously affirmed, without costs.

Petitioner failed to establish by a preponderance of the evidence that respondent, his estranged wife, had committed acts warranting an order of protection in petitioner's favor (*see Family Court Act* § 832; *Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). Petitioner did not offer sufficient

evidence in support of his petition. As the Family Court noted, there were several glaring inconsistencies in his testimony and between that testimony and the information he provided to police. There is no reason to disturb the Family Court's credibility determinations (*see id*.).

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

ENTERED: OCTOBER 4, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Manzanet-Daniels, JJ.

8185 Luis Carasquilo, Index 18594/01
Plaintiff-Respondent,

-against-

Macombs Village Associates, et al.,
Defendants-Appellants,

Malik Saunders, et al.,
Defendants.

Picciano & Scahill, P.C., Westbury (Gilbert J. Hardy of counsel), for appellants.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 12, 2011, which, in an action for personal injuries sustained when plaintiff was assaulted in the stairwell of a building owned and managed by defendants-appellants (defendants), denied defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The evidence presents triable issues of fact as to whether defendants breached their duty to take minimal security precautions to protect plaintiff from the criminal acts of third-party intruders and as to whether any such failure was the proximate cause of the attack upon plaintiff. Such evidence

included that the magnetic lock to the lobby door was not working, that two of the three contracted-for security guards were not on duty at the time of the incident, and that the building complex had been the scene of drug and other criminal activities, including a mugging and a robbery (*see e.g. Anokye v 240 E. 175th St. Hous. Dev. Fund Corp.*, 16 AD3d 287 [1st Dept 2005]).

The security reports of criminal activity in the building complex over the three years prior to the attack raise at least a triable issue as to the foreseeability of the attack against plaintiff (*see Romero v Twin Parks Southeast Houses, Inc.*, 70 AD3d 484, 485 [1st Dept 2010]; *Baez v 2347 Morris Realty, Inc.*, 69 AD3d 480 [1st Dept 2010]; *Rios v Jackson Assoc.*, 259 AD2d 608, 609-610 [2d Dept 1999]). Additional evidence presents triable issues as to whether it was more likely than not that the assailants were intruders who gained access to the premises through the allegedly negligently maintained entrance (*see Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 [1st Dept 2011]; *Calderin v Lyra Assoc.*, 281 AD2d 248 [1st Dept 2001]).

Moreover, the criminal assault was not so extraordinary and unforeseeable as to break the causal connection between plaintiff's injuries and defendant's conduct as a matter of law

(*see Newman v McDonald's Rests. of N.Y., Inc.*, 48 AD3d 1152, 1153 [4th Dept 2008]). The record does not include evidence of a criminal conspiracy to assault plaintiff that is sufficient to support the conclusion that it is most unlikely that reasonable security measures, such as a functioning magnetic door lock, would have deterred the criminal participants.

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

ENTERED: OCTOBER 4, 2012

CLERK

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

8187N In re Oscar Cintron, Index 994/05
Petitioner-Respondent,

-against-

Judith A. Calogero, etc.,
Respondent-Appellant.

_____

Gary R. Connor, New York, (Martin B. Schneider of counsel), for appellant.

BAS Legal Advocacy Program, Inc., Bronx (Randolph Petsche of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered August 3, 2011, which, among other things, granted petitioner's application pursuant to CPLR article 86 for counsel fees and expenses incurred in the underlying CPLR article 78 proceeding against respondent Department of Housing and Community Renewal (DHCR), denied DHCR's cross motion to deny the application, unanimously reversed, on the law, without costs, the cross motion granted, and the application denied.

The application should have been denied, since DHCR's position in the underlying CPLR article 78 proceeding was "substantially justified" (CPLR 8601[a]), that is, it had a

"reasonable basis both in law and fact" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 356 [1995] [internal quotation marks omitted]). Indeed, when the proceeding commenced, appellate precedent existed supporting the agency's position (*see e.g. Matter of Highlawn Assoc. v Division of Hous. & Community Renewal*, 309 AD2d 750 [2d Dept 2003], *overruled by Jenkins v Fieldbridge Assoc., LLC*, 65 AD3d 169, 173 and n 1 [2d Dept 2009], *lv dismissed* 13 NY3d 855 [2009]). Although that precedent was ultimately held invalid by the Court of Appeals (*see Matter of Cintron v Calogero*, 15 NY3d 347 [2010], *revg* 59 AD3d 345 [1st Dept 2009]), DHCR's position was not rendered unjustified "simply because it lost the case" (*Matter of New York State Clinical Lab.*, 85 NY2d at 357 [internal quotation marks omitted]). We reject petitioner's contention that DHCR is required to make a heightened "strong showing" to demonstrate that its position was substantially justified (*compare Ericksson v Commr. of Social Sec.*, 557 F3d 79, 82 n [2d Cir 2009], *with Matter of Graves v Doar*, 87 AD3d 744, 747 [2d Dept 2011], *and Matter of Barnett v New York State Dept. of Social Servs.*, 212 AD2d 696, 697-698 [2d Dept 1995], *lv dismissed* 85 NY2d 1032 [1995]).

Even if DHCR's position was not substantially justified,

petitioner is not entitled to counsel fees and expenses under CPLR article 86, as he did not meet his burden of establishing that he is a "party" eligible for such an award (*see* CPLR 8601[b][1]; *Matter of Hickey v Sinnott*, 179 Misc 2d 573, 574 [Sup Ct, Albany County 1998]). In particular, petitioner failed to show that his net worth at the time he commenced the CPLR article 78 proceeding did not exceed $50,000 (*see* CPLR 8602[d][I]; *Hickey*, 179 Misc 2d at 574). Indeed, in his opening papers in support of his application, petitioner failed even to allege that his net worth was less than or equal to $50,000. Although petitioner made such an allegation in an affidavit improperly submitted for the first time in his reply papers (*see generally Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]), he failed to set forth any concrete facts to support his claim (*see* CPLR 8601[b][1]), such as a statement of his

assets and liabilities (*see Broaddus v U.S. Army Corps of Engineers*, 380 F3d 162, 169 [4th Cir 2004]; *Hickey*, 179 Misc 2d at 575).

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

ENTERED: OCTOBER 4, 2012

CLERK

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

7908 Wilder Selzer, Index 112370/07
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

Armienti DeBellis Guglielmo & Rhoden LLC, New York (Vanessa M. Corchia of counsel), for appellant.

Langsam Law, New York (Kenneth J. Gorman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 31, 2011, reversed, on the law, without costs, the plaintiff's motion denied, and the verdict reinstated. The Clerk is directed to enter judgment dismissing the complaint.

Opinion by Catterson, J. All concur.

Order filed.

CORRECTED ORDER - OCTOBER 4, 2012

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
James M. Catterson
Rolando T. Acosta
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

7908
Index 112370/07

_____x

Wilder Selzer,
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____x

Defendant appeals from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered May 31, 2011, which granted plaintiff's motion pursuant to CPLR 4404 to set aside the jury verdict in favor of defendant and ordered a new trial.

Armienti DeBellis Guglielmo & Rhoden LLC, New York (Vanessa M. Corchia of counsel), and Wallace D. Gossett, Brooklyn, for appellant.

Langsam Law, New York (Kenneth J. Gorman of counsel), for respondent.

CATTERSON, J.

This appeal arises out of a personal injury action in which the plaintiff alleges that he sustained injuries as he was exiting a subway car on the R train at Whitehall Street, Manhattan. At trial, the plaintiff testified that the defendant's conductor negligently closed the doors on his ankle. The conductor of the train testified that he followed the correct procedures as to opening and closing subway doors, and that nothing out of the ordinary happened on the day of the plaintiff's accident. There were no witnesses to the incident according to the plaintiff, other than the "O-mouthed" passengers remaining on the train as it pulled out of the station. As the motion court acknowledged, this case from the beginning rested on a credibility issue.

The record reflects that at trial, the defense counsel advanced the theory that the plaintiff's account of his accident was implausible. In his opening remarks, the defense counsel told the jury, without objection, that the evidence would establish that "the only way [the accident] could have happened was because of some fault on the part of the plaintiff." Defense counsel told the jury "just use your common sense to try to understand the mechanics of something like this happening."

The plaintiff testified as follows: On May 11, 2007, he was

getting ready for an evening performance in Manhattan when he realized he had to return to his home in Staten Island to retrieve a forgotten item of clothing for the performance; he boarded the R train at 23rd Street station for the 20-25 minute trip to Whitehall Street, the last stop in Manhattan before the train continued to Brooklyn; he had not brought a book or video game with him, but he was "going over the show in his mind and thinking about it."

The plaintiff testified that upon reaching Whitehall Street, he exited the subway car at a normal pace. He described the accident as follows:

> "I put my left foot onto the platform, and then as I was passing through the doorway[,] I felt an impact and I fell forward onto my hands ...
> When I looked out at the subway car[,] I saw that my leg was still on the subway and that I was lying on the ground, and then I saw the faces of the people in the car who all looked very surprised, their faces were all in an O-mouthed expression of surprise ... I pulled the leg off of the train[,] and almost immediately after the train doors closed and the train took off."

In cross-examining the plaintiff, the defense counsel attempted to show that the plaintiff's right ankle was caught in the subway door because the plaintiff was not paying attention and moved to exit the subway car too late rather than because the train conductor negligently closed the doors as the plaintiff was

exiting the subway car. Further, defense counsel attempted to elicit the fact that the plaintiff could not risk failing to alight at the last stop in Manhattan. For example, defense counsel asked whether "White Hall Street station is the last stop ... in Manhattan in order to get to the ferry," and whether if he missed that stop, he would "have to travel [all the way] to Brooklyn."

The conductor of the train on which the plaintiff alleged he was riding testified that on the day of the accident he followed the procedures that are in place for all conductors with respect to the opening and closing of doors. Conductors open the doors using two buttons on the master control panel; they wait for a specified time, then make an announcement to stand clear of the closing doors, and then they close the doors. The conductor testified that the lights on the panel would indicate if the doors had not closed. The conductor further testified that he did not remember seeing anyone fall or get caught in the doors in the Whitehall Street station at or around the time that the plaintiff allegedly incurred the injury.

In summation, the defense counsel posited that the plaintiff "jetted out" of the train at the last second. Defense counsel

stated, “I am not a witness. What I say is not testimony. I’m only giving it to you to ponder.” He continued:

> “After all, if you imagine a person standing in a doorway just standing there when the doors closed – and all of you [have] seen this happen[] and I know this, during jury selection, you’ve all seen doors close on people and passengers, okay. You know what happens. It’s the upper part of the person’s body that’s contacted.”

At this point, the plaintiff objected, and the court sustained the objection. Then the defense counsel continued:

> “[B]ecause as I said in my opening, the plaintiff’s body was outside of the train at the time of the occurrence. Why was it that way? I have no idea but it wasn’t because his leg just happened to be at a particular point that it could be grabbed and held ... Think about it, how it happened. If he were going through, the upper part of his body would have been hit and would have been the contact point, his arm, shoulder or something like that.”

The plaintiff objected again, and the court sustained the objection. The defense counsel then completed his sentence: “But not his leg.”

At this point, the court repeated that it had sustained the objection. Defense counsel stated: “There is no other way I see it. You can – you’re the triers of the facts. You may decide otherwise.”

The court instructed the jury that a finding of the

defendant's negligence would require the jury to decide that the plaintiff was not jumping off the train at the very last minute. Moreover, it observed that the case rested on a credibility issue. In other words the jury would have to decide which witness it found credible -- the plaintiff or the train conductor -- since their accounts conflicted. Specifically, the court instructed the jury, consistent with the Pattern Jury Instructions, as follows:

> "[I]n deciding how much weight you choose to give to the testimony of any particular witness, ... The tests used in your everyday affairs to decide reliability or unreliability of statements made to you by others are the tests you will apply in your deliberations [...] You bring with you to this courtroom all of the experience and background of your lives."

Subsequently, the jury rendered a 5-1 verdict in favor of the defendant. The plaintiff moved pursuant to CPLR 4404 to set aside the verdict on the grounds that defense counsel's improper conduct deprived the plaintiff of the right to a fair trial; that the jury verdict was against the weight of evidence; and that the verdict was not supported by sufficient evidence. In support of the motion, the plaintiff offered the affidavit of a dissenting juror, who stated that the comments of other jurors reflected those of the defense counsel that the accident happened because the plaintiff was "rushing" out of the train.

By order dated May 18, 2011, the motion court set aside the defense verdict and ordered a new trial. The court in its decision included verbatim the defense counsel's summation comments, as set forth above, and held that the defense counsel "created an atmosphere that deprived the plaintiff of a fair trial, not by an isolated remark during summation, but by continual and deliberate efforts to divert attention from the issues." Contrary to its view when charging the jury that the case rested on a credibility issue, the court noted instead that "[g]iven the plausible, uncontradicted evidence from plaintiff that the accident occurred in the manner he claimed, and not in the manner which defense counsel asserted, substantial justice would not be done if the verdict were permitted to stand." It further held that "[t]he inflammatory and prejudicial comments made by defendant's counsel so contaminated the proceedings as to deny plaintiff his right to a fair trial," and that the counsel "so tainted the course of the trial that he effectively destroyed any chance for a fair outcome by interjecting his own view of the facts to the jury."

For the reasons set forth below, we reverse and reinstate the verdict in favor of the defendant. As a threshold matter, the defendant correctly asserts that the issue of counsel's alleged "misconduct" was unpreserved because the plaintiff raised

the claim for the first time in his motion to set aside the verdict. See Califano v. City of New York, 212 A.D.2d 146, 152-53, 627 N.Y.S.2d 1008, 1012 (1st Dept. 1995).

However, under CPLR 4404(a), the motion court has the discretion to set aside the verdict and order a new trial "in the interest of justice." The use of such discretionary power is warranted when the aggrieved party is deprived of substantial justice or a counsel's misconduct unduly affected the verdict. Micallef v. Miehle Co., Div. of Miehle-Gross Dexter, 39 N.Y.2d 376, 381, 384 N.Y.S.2d 115, 118, 348 N.E.2d 571, 574 (1976).

Here, we conclude the motion court erred in finding that the defense counsel's remarks "contaminated" the proceedings and thereby deprived the plaintiff of his right to a fair trial. Accordingly, we find that the motion court abused its discretion in setting aside the verdict.

It is well established that a counsel is afforded wide latitude in summation to characterize and comment on the evidence. Chappotin v. City of New York, 90 A.D.3d 425, 426, 933 N.Y.S.2d 856, 857 (1st Dept. 2011), lv. denied 19 N.Y.3d 808, 2012 N.Y. Slip Op. 77463 (2012). Defense counsel remains "within the broad bounds of rhetorical comment in pointing out the *insufficiency* and *contradictory* nature of a plaintiff's proof" without depriving the plaintiff of a fair trial. Id. (emphasis

added). Furthermore, making a reference to alternative ways in which evidence can be interpreted may constitute "a fair comment upon the evidence." Cerasuoli v. Brevetti, 166 A.D.2d 403, 404, 560 N.Y.S.2d 468, 469 (2d Dept. 1990) (holding that remarks suggesting other ways in which needle could have been embedded in plaintiff's abdomen were fair comments upon evidence, in medical malpractice action).

While there are certain boundaries to the counsel's latitude, (see Caraballo v. City of New York, 86 A.D.2d 580, 581, 446 N.Y.S.2d 318, 319 (1st Dept. 1982)), the defense counsel in this case did not exceed those boundaries. Counsel's remarks on summation simply did not amount to an argument based on facts not in the record. See e.g. Benson v. Behrman, 248 A.D.2d 153, 154, 670 N.Y.S.2d 760, 760 (1st Dept. 1998) (upholding "restraining plaintiff's counsel from straying outside four corners of the evidence and offering his own speculation on summation"); see also People v. Marin, 102 A.D.2d 14, 33, 478 N.Y.S.2d 650, 662 (2d Dept. 1984), aff'd, 65 N.Y.2d 741, 492 N.Y.S.2d 16, 481 N.E.2d 556 (1985) (holding that verdict cannot stand based on speculation and conjecture). The defense counsel merely argued that the plaintiff's account of the accident did not make sense, pointing out the insufficient and contradictory nature of his testimony. Thus, his summation was directed at the credibility

of the plaintiff's testimony, and was not an interjection of the counsel's own view of the facts. The plaintiff, as the sole witness to the accident, claimed that the doors shut only on his right ankle while he was exiting the subway car at a normal pace. The defense counsel simply posited that in the normal course of events the doors would close on the upper part of an individual's body if the person was walking out of the subway car at a normal pace because the upper body is wider than the right leg.

Moreover, the defense counsel's suggestion that the jurors consider their own experience of using the subway does not render his arguments speculative or conjectural. Jurors are required to evaluate conflicting evidence and draw conclusions therefrom based on their day-to-day experiences. Notably, that was precisely what the motion court instructed the jury to do.

We also find that the counsel's remarks that the accident happened because the plaintiff was "jet[ting] out" of the train constituted a fair comment on the evidence. As in Cerasuoli, defense counsel referred to an *alternative* way in which the doors could shut only on the right leg. See 166 A.D.2d at 404, 560 N.Y.S.2d at 469.

Further, the defense counsel did not make any statements that were designed to inflame the jury's passion, which would result in the jury deciding the case on an emotional rather than

rational basis. See cf. Minichiello v. Supper Club, 296 A.D.2d 350, 352, 745 N.Y.S.2d 24, 25 (1st Dept. 2002) (holding that the misconduct of plaintiff's counsel warranted mistrial when counsel analogized a witness to a Nazi). On the contrary, defense counsel specifically asked the jurors to evaluate the plaintiff's account of the accident consistent with their own experiences of seeing subway doors close.

Finally, defense counsel did not make any character attacks on the plaintiff or the plaintiff's witnesses. See cf. Steidel v. County of Nassau, 182 A.D.2d 809, 814, 582 N.Y.S.2d 805, 808 (2d Dept. 1992) (new trial when counsel referred to opposing expert as "hired gun" whose idea of truth and justice is that "this is a game to be played"). In order to warrant a mistrial, an ad hominem attack must be extreme and pervasive. See Chappotin, 90 A.D.3d at 426, 933 N.Y.S.2d at 857 (denying mistrial where defense counsel referred to plaintiff as a man who has played the system for 15 years without concerns about medical care or jobs).

Here, the defense counsel primarily attempted to undermine the credibility of the plaintiff's testimony based on its inherent contradictions, and not by a character attack on the plaintiff. Thus, we conclude that the motion court erred in finding that defense counsel's conduct deprived the plaintiff of

his right to a fair trial.

With respect to the juror affidavit, we note that the motion court erroneously considered the dissenting juror's postverdict affidavit in its determination of the motion. "Juror affidavits should not be used to impeach a jury verdict absent extraordinary circumstances." Martinez v. Te, 75 A.D.3d 1, 7, 901 N.Y.S.2d 161, 165 (1st Dept. 2010), citing Mosher v. Murell, 295 A.D.2d 729, 731, 744 N.Y.S.2d 61, 64 (3d Dept. 2002), lv. denied 98 N.Y.2d 613, 751 N.Y.S.2d 168, 780 N.E.2d 979 (2002); see also Hersh v. New York City Tr. Auth., 290 A.D.2d 258, 735 N.Y.S.2d 527 (1st Dept. 2002) (affirming mistrial for juror confusion not based on juror affidavits but based on verdict sheets and juror questions). A court may take into account juror affidavits only to clarify errors in deliberation, such as when juror confusion is apparent from a nonsensical verdict or there are obvious errors such as omissions or confusion on a special verdict sheet. See e.g. Porter v. Milhorat, 26 A.D.3d 424, 809 N.Y.S.2d 210 (2d Dept. 2006) (granting new trial in medical malpractice action where jury awarded future damages without filling out past damages in contradiction to instructions given on verdict sheet).

In this case, there were no extraordinary circumstances to warrant the use of a dissenting juror's affidavit to impeach the verdict. The verdict was not "nonsensical" if the jurors

accepted the subway conductor's testimony, and thus inferred that the plaintiff's leg was caught between the doors because he "jetted out" of the subway car at the last moment. Moreover, the jury verdict is supported by the circumstantial evidence that the plaintiff had reason to be in a hurry and could not "afford" to miss the last subway stop in Manhattan. Based on the evidence, the jury could reasonably infer that the plaintiff's haste at the last moment, not the conductor's negligence, caused the injuries. In making that inference, the jury did not need expert testimony since the way in which doors of a subway close is not outside the experience and knowledge of the average juror. See Ferguson v. Mantell, 216 A.D.2d 160, 161, 628 N.Y.S.2d 286, 287-88 (1st Dept. 1995) (finding expert testimony proper when information provided is "outside the experience and knowledge of the average juror"). For all of the foregoing reasons, we also reject the plaintiff's argument that the verdict in favor of the defendant was against the weight of the evidence.

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered May 31, 2011, which granted the plaintiff's motion pursuant to CPLR 4404 to set aside the jury verdict in favor of the defendant and ordered a new trial, should be reversed, on the law, without costs, the plaintiff's motion

denied, and the verdict reinstated. The Clerk is directed to enter judgment dismissing the complaint.

All concur.

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

ENTERED: OCTOBER 4, 2012

CLERK