SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 30, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Moskowitz, Abdus-Salaam, Gische, JJ.

9059 Manuel Reis, etc., et al., Index 108539/04
Plaintiffs-Appellants-Respondents, 590162/06

-against-

Volvo Cars of North America, et al.,
Defendants-Respondents-Appellants.
- - - - -
[And a Third Party Action]

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Kreindler & Kreindler LLP, New York (Noah H. Kushlefsky of counsel), for appellants-respondents.

Hardin, Kundla, McKeon, Paulette & Polifroni, P.A., New York (Stephen J. Donahue of counsel), for respondents-appellants.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 2, 2011, after a jury trial, awarding plaintiff damages on his negligence claim, modified, on the law, to reduce the jury's award for future household relocation and modification costs by $168,000, and otherwise affirmed, without costs.

The trial court properly set aside the jury's verdict on plaintiffs' failure to warn claim. The trial court was bound by

our decision of May 4, 2010 (73 AD3d 420 [1st Dept 2010]), which was issued after the jury rendered its verdict but before the judgment was entered, modifying the motion court's decision denying defendants' motion for dismissal of that claim (*see Caleb v Sevenson Envtl. Servs., Inc.*, 72 AD3d 1517 [4th Dept 2010]). Plaintiffs did not cure the deficiency in his opposition to that motion with the evidence he offered at trial, and defendants did not waive their appeal by failing to seek a stay of the trial.

Plaintiffs' experts testified that in 1987 many major car manufacturers, including General Motors, Ford, Nissan, Mazda and Toyota, equipped their manual transmission cars with a starter safety switch that would prevent a car from moving if someone reached in and started the car while it was in gear. The trial court properly instructed the jury that in determining the negligent design claim it first had to decide whether, from the evidence at trial, there was a general custom or practice by automobile manufacturers selling manual transmission vehicles in the United States in 1987. The proof adduced at trial was sufficient to permit a jury to conclude that the practice was fairly well defined in the car manufacturing industry. Plaintiffs were not required to prove universal application of

the practice in order for the jury to consider this question (*see Trimarco v Klein*, 56 NY2d 98 [1982]). The court further properly instructed the jury that if there was such a custom and practice, it could be considered along with all of the other facts and circumstances, in determining whether Volvo had exercised reasonable care (*see John v Great Neck Union Free School Dist.*, 42 AD3d 437 [2d Dept 2007]). From all of the evidence in the record, including the experts' testimony, the jury reasonably concluded that defendants were negligent in failing to use a starter interlock device in its vehicle (*Voss v. Black & Decker Mfg. Co.*, 59 NY2d 102 [1983]). The trial court correctly denied defendants' motion for a directed verdict because there was sufficient evidence supporting plaintiffs' negligent design claim.

The trial court did not commit error by charging the jury on special knowledge (PJI 2:15) and customary business practices (PJI 2:16), as tailored to the facts of this case, in addition to PJI 2:120. The jury separately considered the issues of negligent design and strict products liability. PJI 2:120 applies to the claim of strict products liability, whereas PJI 2:15 and 2:16 apply to the negligent design claim. There is no reversible error because the charges did not confuse the jury or

create any doubt as to the principle of law to be applied (*see Lopato v Kinney Rent-A-Car,* 73 AD2d 565 [1st Dept 1979]). Defendants' argument that the jury's verdict is inconsistent because it found that the 1987 Volvo was not defective without a starter interlock device, but that defendants were nevertheless negligent in how they designed this vehicle, is a claim not preserved for appeal (*Arrieta v Shams Waterproofing,* 76 AD3d 495, 496 [1st Dept 2010] citing *Barry v Manglass,* 55 NY2d 803, 806 [1981]). Defendants did not raise this objection before the jury was discharged, although they had the opportunity to do so. It was raised for the first time in their motion to set aside the verdict based upon the weight of the evidence (*see Knox v Piccorelli,* 83 AD3d 581 [1st Dept 2011]).

A comparative negligence charge (PJI 2:36) was unwarranted because there is no valid line of reasoning based on the trial evidence that would have permitted the factfinder to conclude that the injured plaintiff was negligent. There was no evidence that plaintiff knew or should have known that a car with a manual transmission can jump forward when started while in gear (*see Perales v City of New York*, 274 AD2d 349 [1st Dept 2000]).

The trial court properly admitted evidence of a nonparty manufacturer's postmanufacture, preaccident modification on the

issue of feasibility regarding the failure to warn claim, which, although later dismissed, was before the jury at the time of trial (*see Haran v Union Carbide Corp.*, 68 NY2d 710 [1986]). The nonparty manufacturer's manual was properly admitted, with a limiting instruction, to prove what defendant knew or should have known about the dangers posed by its product. The manuals were not considered for the truth of their contents. The trial court did not abuse its discretion in permitting the use of demonstrative evidence to assist the jury (*see Rojas v City of New York*, 208 AD2d 416, 417 [1st Dept 1994], *lv denied* 86 NY2d 705 [1995]), or in its management of jury requests for readback of testimony. The trial court, which was in the best position to review plaintiffs' counsel's comments on summation, correctly concluded that they were fair comment and did not warrant a new trial.

The court erred, however, in permitting plaintiffs' life-care expert to testify about the cost of plaintiffs' relocation and renovation costs in the amount of $168,000. Her opinion and calculations were based exclusively on subcontractors' quotes, which constituted hearsay, and were not further supported by any

evidence of professional reliability (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984]; *Ainetchi v 500 W. End LLC*, 51 AD3d 513 [1st Dept 2008]).

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

All concur except Tom, J.P., and Abdus-Salaam, J. who dissent in part in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting in part)

I believe that the judgment must be vacated and the matter remanded for a new trial on the negligence claim. The court erred in charging PJI 2:16, which permits a jury to consider customary business practices in determining the standard of care. It was undisputed that in 1987, some manufacturers used safety switches, while others did not. Thus, there was no evidence of a customary procedure or policy that was "reflective of an industry standard or a generally-accepted safety practice" (1A PJI3d 2:16 at 260 [2013]), and the court should not have given this charge, which is based on the jury having heard such evidence. Given that the jury's verdict was inconsistent in that it found in favor of Volvo on the strict liability theory of recovery, but against Volvo on the negligence claim, I differ with the majority's view that the charge did not confuse the jury.

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

ENTERED: APRIL 30, 2013

CLERK

Tom, J.P., Andrias, Freedman, Román, Gische, JJ.

8952 Cleopatra Lovelace, Index 308154/10
Plaintiff-Appellant,

-against-

Marc C. Hendler, et al.,
Defendants-Respondents.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Mitchell J. Danzinger, J.), entered on or about June 20, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 17, 2013,

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

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

ENTERED: APRIL 30, 2013

CLERK

Friedman, J.P., DeGrasse, Richter, Abdus-Salaam, Feinman, JJ.

9174-
9174A Camille San Filippo, Index 400111/04
400280/04
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Respondent,

Metropolitan Transportation Authority, et al.,
Defendants.

- - - - -

Jannet Velez,
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Respondent,

Metropolitan Transportation Authority, et al.,
Defendants.

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Patrick H. Barth, New York, for appellants.

Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

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Judgments, Supreme Court, New York County (Lottie E. Wilkins, J.), entered September 13, 2011, dismissing the complaints against defendant the New York City Transit Authority, and bringing up for review a consolidated order, same court and Justice, dictated on the record December 22, 2010, which granted the Transit Authority's motion for judgment pursuant to CPLR

4401, unanimously reversed, on the law, without costs, the judgments vacated, the motion denied, and the jury verdicts awarding plaintiffs money damages reinstated. The Clerk is directed to enter judgment accordingly in favor plaintiff Camille San Filippo. This matter is remanded as to plaintiff Jannet Velez for further proceedings pursuant to CPLR article 50-B.

Plaintiffs are police officers who were injured in a subway station while a perpetrator struggled to resist their attempt to arrest him. The arrest stemmed from a criminal act that was committed in the street in plaintiffs' presence. The perpetrator fled and was chased by plaintiffs into the subway station. Upon entering the station plaintiffs, who were in plainclothes, displayed their shields and asked the station agent, Corbin, to call for backup support. At the time, Corbin was inside a locked token booth that was equipped with an Emergency Booth Communication System (EBCS) that would have enabled him to summon help by pressing a button or stepping on a pedal. Both plaintiffs were injured when the perpetrator put up a fierce and protracted struggle to resist arrest. Corbin watched the struggle from his token booth and did not activate the EBCS or make any other attempt to summon help. Plaintiffs' theory is that Corbin's failure to call for help constituted negligence

which was a proximate cause of their injuries. The trial court granted the Transit Authority's motion for judgment, finding that Corbin was under no duty to call for any assistance to plaintiffs. We reverse.

Public Authorities Law § 1212(3) imposes liability upon the Transit Authority for the negligence of its employees in the operation of the subway system. Although it is a common carrier, the Transit Authority is held to a duty of ordinary care under the particular circumstances of each case (*Bethel v New York City Tr. Auth.*, 92 NY2d 348, 351 [1998]). In *Crosland v New York City Tr. Auth.* (68 NY2d 165 [1986]), the Court of Appeals held that the Transit Authority could be held liable for the negligent failure of its employees to summon aid as they watched a gang of thugs fatally assault a passenger. As the Court stated, "Watching someone being beaten from a vantage point offering both safety and the means to summon help without danger is within the narrow range of circumstances which could be found to be actionable" (*id.* at 170 [citation omitted]). The trial court held that *Crosland* had no application here because plaintiffs were police officers. This was error.

The broad definition of onlooker liability articulated by the *Crosland* Court does not lend itself to any exception based

upon an injured party's status as a police officer. To be sure, General Obligations Law § 11-106 gives police officers as well as firefighters, who are injured in the line of duty, a distinct right of action against tortfeasors that cause such injuries. Accordingly, plaintiffs' recovery is not barred by their status as police officers and the Transit Authority's liability was established at trial. The Transit Authority also argues that the evidence did not establish that a timely response on Corbin's part would have prevented plaintiffs' injuries. We decline to consider this argument as it was raised for the first time on appeal. Were we to consider the argument, we would find it unavailing.

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

ENTERED: APRIL 30, 2013

CLERK

Tom, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

9185 Burnett Williams, Index 23644/05
Plaintiff-Respondent,

-against-

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

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

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

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 28, 2011, upon a jury verdict, awarding plaintiff the principal amounts of $1,200,000 for past pain and suffering, $2,000,000 for future pain and suffering over 15 years, $312,000 for past lost earnings, $225,000 for future lost earnings over 4.5 years, $159,000 for past medical expenses and $115,000 for future medical expenses over 15 years, unanimously modified, on the facts, to vacate the award for future pain and suffering and order a new trial solely as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future pain and suffering of $1,200,000, and to entry of an amended judgment in accordance therewith, and to vacate the award for future medical

expenses and order a new trial solely as to such damages, unless plaintiff, within 30 days of service of a copy of this order with notice of entry, stipulates to accept a reduced award for future medical expenses of $70,000, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs.

Plaintiff was injured when, while working as a lead and asbestos inspector during rehabilitation of a subway station, he fell through wood planks and landed on his buttocks and lower back on a steel beam below him. He began feeling lower back pain and pain radiating down his legs following the fall.

The awards for lost wages and medical expenses are supported by the evidence adduced at trial and are not excessive. Such evidence supported the jury's findings that the accident substantially aggravated plaintiff's preexisting back and left leg condition, that the accident caused new injuries, and that the accident was a substantial cause of the treatment he received. Plaintiff was also incapable of working after the accident and would need future care for the remainder of his life due to the compromised nature of his spine (*see Ortiz v 975 LLC*, 74 AD3d 485, 486 [1st Dept 2010] ["the amount of damages awarded ... is primarily a question for the jury, the judgment of which is entitled to great deference based upon its evaluation of the

evidence, including conflicting expert testimony."]).

The award for past pain and suffering is also not excessive in light of the evidence that plaintiff underwent a discectomy and then a fusion surgery that ultimately resulted in removal of the L4/L5 disc. He also underwent a painful discogram, a painful IDET procedure, and multiple epidural injections.

We find, however, that the award for future pain and suffering deviates materially from what would constitute reasonable compensation under the circumstances. Notably, plaintiff testified that although he still experiences significant pain, he improved significantly after fusion surgery performed in 2007, and had "good days" about four days per week, during which he could perform household chores, walk a mile, and run errands (*see e.g. Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261 AD2d 324, 328 [1st Dept 1999], *lv denied* 94 NY2d 754 [1999]; *Gonzalez v Rosenberg*, 247 AD2d 337 [1st Dept 1998]).

Moreover, the award for future medical expenses is not supported by the record and is speculative to the extent it exceeds the amount set forth above (*see Buggs v Veterans Butter & Egg Co.*, 120 AD2d 361, 361 [1st Dept 1986]).

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

ENTERED: APRIL 30, 2013

CLERK

Mazzarelli, J.P., Acosta, Freedman, Richter, Gische, JJ.

9362 Richard Fields, Index 18101/06
Plaintiff-Respondent,

-against-

Lambert Houses Redevelopment Corp., et al.,
Defendants-Appellants.

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Landman Corsi Ballaine & Ford P.C., New York (Andrew P. Keaveney of counsel), for appellants.

Robert L. Boydstun, White Plains, for respondent.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 31, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion to strike or vacate plaintiff's amended bill of particulars, and denied defendants' motion for summary judgment dismissing the complaint's first cause of action, unanimously affirmed, without costs.

On January 28, 2006, plaintiff filed a summons and complaint asserting, among other things, causes of action for personal injury due to mold exposure in his apartment, which was owned and managed by defendants. He alleged that he was "caused to sustain asthma, sinusitis, chronic headaches, facial swelling, nose bleeds and other serious personal injuries" due to defendants'

failure to remove the mold and prevent its growth. Plaintiff's verified bill of particulars alleged that his exposure to mold commenced in or about August 2003. It further asserted that he was treated at the emergency room of Bronx Lebanon Hospital Center on February 12, 2003 and September 30, 2003.

Plaintiff testified at his deposition that he first saw mold in his apartment in January 2003. He stated that he had started to experience sinusitis, sleeplessness, headaches and depression in February 2003, and sought medical treatment at Bronx Lebanon Hospital Center that month. He further testified that, during that visit, he explained to the doctor that he had mold in his apartment, and that the doctor attributed his symptoms to the conditions in his apartment.

Plaintiff filed a note of issue on November 10, 2009. The IAS court vacated the note of issue on March 12, 2010 pursuant to a stipulation between the parties whereby defendants were permitted to conduct a medical examination of plaintiff and plaintiff was permitted to supplement his bill of particulars to include special damages.

Before plaintiff refiled his note of issue, defendants moved for summary judgment dismissing the complaint, arguing, among other things, that plaintiff's personal injury claims were time-

barred. In support, they cited plaintiff's deposition testimony in which he claimed that he first saw mold in his apartment in January 2003, that he first sought treatment for symptoms in February 2003, and that his doctors had attributed his symptoms to mold exposure during that visit. They argued that the evidence demonstrated that plaintiff discovered his injury by February 2003, and that as a result, the three-year statute of limitations afforded by CPLR 214-c(2) had expired by February 2006, four months before the commencement of this action. Two days after defendants moved, plaintiff served a supplemental bill of particulars, which differed from his original bill of particulars only insofar as it added estimated medical expenses.

Plaintiff subsequently submitted his affidavit in opposition to defendants' motion. He stated that he had mistakenly testified at his deposition that he went to the emergency room in February 2003 for symptoms related to his exposure to mold in his apartment. Indeed, he stated that his February 2003 hospital visit did not relate to his mold exposure, but instead to anxiety resulting from his home having recently been burglarized. He added that he did not seek treatment for injuries related to mold exposure until September 2003. He attributed his failure to give accurate information at the deposition to the facts that when it

was held, 6-1/2 years had already passed since the relevant events, and that he failed to review his hospital records prior to his deposition. After oral argument of the motion, plaintiff served an amended bill of particulars, which deleted any reference to treatment in February 2003.

After agreeing to withdraw their motion for summary judgment, without prejudice, and to refile within 45 days, defendants renewed the motion.[1] The renewed motion additionally sought to vacate plaintiff's amended bill of particulars. Plaintiff's attorney filed an affirmation in opposition, which argued that the action was timely, and that plaintiff properly filed the amended bill of particulars. Attached to the affirmation were two hospital records, one from plaintiff's February 12, 2003 visit to Bronx Lebanon Hospital Center, and one from his September 3, 2003 visit. The February record reported that plaintiff had complained of headaches and sleeplessness following a robbery. It listed no other symptoms or causes for plaintiff's symptoms. The September record indicated that plaintiff had been suffering from headaches and nosebleeds for

[1] Defendants withdrew the motion because in attaching plaintiff's deposition transcript as an exhibit they inadvertently left off the signature page and errata sheet.

two months. It also stated that plaintiff had found mold in his home and believed the mold to be the cause of his symptoms.

Supreme Court denied defendants' motion for summary judgment. It held that plaintiff properly served his amended bill of particulars, given the pre-note of issue posture of the case. The court also held that there was an issue of fact as to whether plaintiff timely commenced the action, noting that there was a question of credibility on the matter of when plaintiff began to experience mold-related symptoms, which it could not assess in a summary judgment motion.

On appeal, defendants argue that plaintiff's amended bill of particulars was untimely and meritless. They contend that plaintiff was not entitled to amend his bill of particulars as of right under CPLR 3042(b), because he had already filed a note of issue. They argue that the court vacated the note of issue solely to allow defendants to take plaintiff's physical examination, and to allow plaintiff to serve a supplemental (not amended) bill of particulars as to special damages. Defendants further claim that plaintiff offered no reasonable excuse for the belated service of the amended bill after the completion of discovery and the submission of defendants' first summary judgment motion.

Defendants additionally argue that no triable issue of fact exists as to whether plaintiff's personal injury claim is barred by the three-year statute of limitations, since he admitted at his deposition that he discovered the mold condition and its toxic effects on his body more than three years before he commenced the action. Defendants argue that this Court should disregard plaintiff's affidavit, which they characterize as "self-serving," since it contradicts the deposition testimony.

A party may amend its bill of particulars once as of course before the filing of the note of issue (CPLR 3042[b]). In *Vargas v Villa Josefa Realty Corp.* (28 AD3d 389, 391 [1st Dept 2006]), this Court held that an amended bill of particulars was properly served because the note of issue had been vacated. Here, when plaintiff served his amended bill of particulars, the court had vacated the original note of issue. Nothing in the record suggests that a second note of issue had been filed. Furthermore, plaintiff had not yet amended his bill of particulars. Therefore, plaintiff properly served his amended bill of particulars without obtaining leave from the court.

An affidavit submitted in opposition to a motion for summary judgment does not raise a triable issue of fact where the affidavit "can only be considered to have been tailored to avoid

the consequences of . . . earlier testimony" (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). A court can infer dishonest intent where there is no supporting evidence for the contradictory affidavit (*see Beaubrun v New York City Tr. Auth.*, 9 AD3d 258, 259 [1st Dept 2004]). However, evidence in the record apart from the affidavit itself can raise a triable issue of fact, notwithstanding contradictory deposition testimony (*see Kalt v. Ritman*, 21 AD3d 321, 323 [1st Dept 2005]).

Here, the hospital records submitted by plaintiff support his theory that the action was timely, and suggest that his deposition was the product of true forgetfulness. The documents credibly support the theory that plaintiff did not tailor his affidavit solely to avoid the consequences of his deposition testimony, but to reflect the true historical record. Defendants ignore the records and seek summary judgment based solely on plaintiff's contradictory statements. Indeed, they would be entitled to summary judgment had plaintiff merely submitted his deposition transcript and affidavit, without the hospital records (*see Phillips*, 268 AD2d at 320). However, where there is

arguably a genuine issue of fact, such a determination is improper, and a party's credibility remains a matter for a jury to consider (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

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

ENTERED: APRIL 30, 2013

CLERK

Tom, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

9403 In re Mogid Saad, Index 403001/11
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Mogid Saad, appellant pro se.

Kelly D. MacNeal, New York (Kimberly W. Wong of counsel), for respondent.

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Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 24, 2012, denying the petition seeking to annul respondent's determination, dated September 21, 2011, which denied, after a hearing, petitioner's remaining family member grievance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition treated as one transferred to this Court for de novo review, and, upon such review, the determination confirmed, the petition denied, and the proceeding dismissed.

The petition raises an issue of substantial evidence and therefore the proceeding should have been transferred to this Court pursuant to CPLR 7804(g). Accordingly, we will "treat the

substantial evidence issues de novo and decide all issues as if the proceeding had been properly transferred" (*Matter of Jimenez v Popolizio*, 180 AD2d 590, 591 [1st Dept 1992]).

The determination that petitioner does not qualify as a remaining family member is supported by substantial evidence. The record shows that petitioner was granted written permission to reside in the subject apartment with his wife in January 2007 and that petitioner's wife passed away in August 2007. Thus, petitioner did not occupy the apartment, pursuant to the written permission of respondent, for one year prior to the death of his wife (the tenant of record) (*see Matter of Echeverria v New York City Hous. Auth.*, 85 AD3d 580, 581 [1st Dept 2011]). That the determination may present a hardship for petitioner does not provide a basis to annul the determination (*see Matter of Guzman v New York City Hous. Auth.*, 85 AD3d 514 [1st Dept 2011]).

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

ENTERED: APRIL 30, 2013

CLERK

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

9583 Mercedes McIntosh, Index 300294/05
Plaintiff-Respondent,

-against-

Sisters Servants of Mary, et al.,
Defendants-Appellants.

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

Rodman and Campbell, P.C., Bronx (Hugh W. Campbell of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about December 30, 2010, which affirmed an order of the Civil Court, Bronx County (Mitchell Danziger, J.), entered on or about June 9, 2010, denying defendants' motion for summary judgment dismissing plaintiff's complaint alleging a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain a serious injury as a result of the subject accident by proffering the affirmation of a radiologist who found degenerative disc disease and no posttraumatic abnormality (*see Barhak v Almanzar-Cespedes*, 101 AD3d 564, 564-565 [1st Dept 2012]; *Porter v Bajana*, 82 AD3d 488 [1st Dept 2011]).

In opposition, plaintiff raised a triable issue of fact. The medical records she submitted not only showed that doctors had diagnosed her with degenerative osteoarthritic changes before the accident and that MRIs taken shortly after the accident noted disc desiccation and diffuse degenerative disc disease, but also that she was asymptomatic during the four years prior to the accident. Plaintiff also submitted the affidavit of her chiropractor who found significant limitations in range of motion of her cervical and lumbar spine immediately after and persisting after the accident. Plaintiff's neurologist made similar range of motion findings in an examination almost six years after the accident. Both doctors opined that plaintiff's injuries resulted from the accident. Moreover, her chiropractor opined that, given her "pre-existing cervical and lumbar condition," the injuries she sustained from the accident "were superimposed upon her already delicate medical condition." Thus, plaintiff's submissions and the opinions of her experts suffice to raise an issue of fact as to the significant limitations of her cervical and lumbar spine (*see Perl v Meher*, 18 NY3d 208, 219 [2011]).

Plaintiff adequately explained a gap in treatment by submitting the affidavit of her chiropractor, wherein he opined that after a year of treating plaintiff she had reached the

maximum therapeutic benefit and that further treatment would not benefit her recovery (*see Pommels v Perez*, 4 NY3d 566, 577 [2005]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 355 [2002]).

As to her 90/180-day claim, plaintiff raised an issue of fact with the submission of her chiropractor's affidavit in which he averred that shortly after the accident he recommended that she refrain from working until further notice, and he concluded a year later that "she was still unable to perform her usual daily activities" (*see Pannell-Thomas v Bath*, 99 AD3d 485 [1st Dept 2012]). In her affidavit, plaintiff reported that her injuries prevented her from performing her usual daily activities for at least nine months following the accident.

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

ENTERED: APRIL 30, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9719 William Ortiz, Index 400103/11
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant.

_____

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

Cronin & Byczek, LLP, Lake Success (Linda M. Cronin of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered February 23, 2012, which denied defendant's motion to dismiss the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff failed to sufficiently allege a cause of action under the State and City Human Rights Law (*see* Executive Law § 296; Administrative Code of the City of New York § 8-107; *cf. Vig v New York Hairspray Co., L.P.*, 67 AD3d 140 [1st Dept 2009]). There is no dispute that because plaintiff was not reinstated as a police officer until after one year from his voluntary retirement, he was not entitled to receive reinstatement at his previous salary and seniority levels. Although he alleged that

his application for reinstatement, made within one year of his retirement, was not promptly expedited, he did not specifically allege that the application was intentionally delayed or that racial discrimination was the reason for the failure to expedite the application (*see e.g. McDowell v North Shore-Long Is. Jewish Health Sys., Inc.*, 788 F Supp 2d 78, 81-83 [ED NY 2011]).

All concur except Abdus-Salaam and Gische, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows:

ABDUS-SALAAM, J. (dissenting)

I would affirm.

In this litigation by a Hispanic New York City police officer alleging discrimination based upon national origin, the complaint includes allegations that after plaintiff retired, he timely sought reinstatement; that although he timely sought reinstatement within a year of retirement he was reinstated without retaining his seniority and salary while similarly situated Caucasian officers were reinstated with their seniority and salary; and that these acts by the City of New York were in violation of his rights pursuant to the State and City Human Rights Law (*see* Executive Law § 296; Administrative Code of the City of New York § 8-107). "On a CPLR 3211 motion to dismiss, the court will 'accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'"(*Nonnon v City of New York*, 9 NY3d 825, 827 [2007]). Additionally, "employment discrimination cases are themselves generally reviewed under notice pleading standards" (*Vig v New York Hairspray Co., L.P.*, 67 AD3d 140, 145 [1st Dept 2009]). In "[a]pplying these liberal pleading

standards" (*id.* at 145), the motion court properly found that plaintiff has stated causes of action for employment discrimination under both the State and City Human Rights Laws.

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

ENTERED: APRIL 30, 2013

CLERK

Mazzarelli, J.P., DeGrasse, Abdus-Salaam, Manzanet-Daniels, Clark, JJ.

9807 Washington Realty Owners, LLC, Index 603169/09
Plaintiff-Appellant,

-against-

260 Washington Street, LLC,
Defendant-Respondent.

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Michael Konopka, New York, for appellant.

Meyner & Landis LLP, Nyack (David B. Grantz of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 10, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and motion denied.

The motion court erred when it determined that defendant met its prima facie burden since defendant failed to include all of the pleadings. Although CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has discretion to overlook the procedural defect of missing pleadings when the record is "sufficiently complete" (*Welch v Hauck*, 18 AD3d 1096, 1098 [3d Dept 2005], *lv denied* 5 NY3d 708 [2005] [internal quotation marks omitted]; *see Ayer v Sky Club, Inc.*, 70 AD2d 863, 864 [1st Dept 1979] [the parties were

permitted to supplement the record by submitting a copy of the pleadings], appeal dismissed 48 NY2d 705 [1979]). The record is sufficiently complete when, although the movant has not attached all of the pleadings to the motion, a complete set of the papers is available from the materials submitted (*see e.g. Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1st Dept 2012] [the pleadings were filed electronically and were available for the court's consideration], *Pandian v New York Health and Hospitals Corp.*, 54 AD3d 590, 591 [1st Dept 2008] [the pleadings were attached to the reply papers]; *Welch*, 18 AD3d at 1098 [summary judgment properly granted to plaintiff on cross motion where pleadings were attached to defendant's motion for summary judgment]).

Here, respondent's answer was not included as part of the record. Thus, the motion court did not have a complete set of pleadings available for its consideration. Accordingly, the omission of the pleadings renders the motion procedurally defective (*see* CPLR 3212[b]; *Matsyuk v Konkalipos*, 35 AD3d 675 [2d Dept 2006]; *Wider v Heller*, 24 AD3d 433 [2d Dept 2006]); *Greene v Wood*, 6 AD3d 976 [3d Dept 2004]; *Welton v Drobnicki*, 298

AD2d 757 [3d Dept 2002]; *Krasner v Transcontinental Equities*, 64 AD2d 551 [1st Dept 1978]).

In light of the foregoing, we do not consider the remaining contentions with regard to the merits of the motion.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9919 The People of the State of New York, Ind. 2648/09
Respondent,

-against-

Jerkeida Grant,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered July 22, 2010, as amended July 29, 2010, convicting defendant, after a jury trial, of assault in the second degree and criminal possession of a weapon in the third degree, and sentencing her to an aggregate term of six months, concurrent with five years' probation, unanimously affirmed.

The court's limited justification charge was appropriate under the circumstances of the case when the evidence is viewed in the light most favorable to defendant (*see People v Watts*, 57 NY2d 299, 301-302 [1982]).

There was no reasonable view that defendant subjectively believed that the use of deadly physical force against her was imminent, or that such a belief would have been objectively

reasonable (*see People v Goetz*, 68 NY2d 96 [1986]). Accordingly, the court properly declined to charge the jury on the justifiable use of deadly physical force.

Under the particular facts, there was no reasonable view that defendant committed second degree assault under a theory of use of a dangerous instrument, as defined in Penal Law § 10.00(13), but nevertheless did not use deadly physical force as defined in Penal Law § 10.00(11) (*see People v Mickens*, 219 AD2d 543 [1995], *lv denied* 87 NY2d 904 [1995]). Accordingly, the court properly charged the jury on the justifiable use of nondeadly force, but limited that charge to the lesser included offense of third degree assault, which did not require use of a dangerous instrument.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9920 Jean M. Buchanan, Index 105057/10
Plaintiff-Respondent,

-against-

521 Eighth Avenue, LLC, et al.,
Defendants-Appellants.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Paul Wooten, J.), entered on or about November 9, 2012,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated April 8, 2013,

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

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9921 In re Michael Miller, also know as Mike Johnson, Petitioner-Respondent,

-against-

New York State Department of Corrections and Community Supervision, Respondent-Appellant.

Ind. 6561/91
Index 401723/11

Eric T. Schneiderman, Attorney General, New York (Patrick J. Walsh of counsel), for appellant.

Order, Supreme Court, New York County (Marcy L. Kahn, J.), entered on or about September 9, 2011, which granted the petition brought pursuant to CPLR article 78 seeking an order directing respondent Department of Corrections and Community Supervision (DOCCS) to terminate petitioner's parole administratively pursuant to Correction Law § 205(4), and accordingly ordered respondent to grant petitioner termination of sentence, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Correction Law § 205 provides, in pertinent part, that DOCCS "must grant termination of sentence after three years of unrevoked presumptive release or parole to a person *serving an indeterminate sentence* for a class A felony offense defined in

[Penal Law Article 220 or 221]" (Correction Law § 205[4] [emphasis added]). Here, although petitioner's parole was not adjudicated to have been revoked until May 5, 2005, by operation of Penal Law § 70.40, that revocation had the effect of interrupting his indeterminate sentence retroactively as of the date of his delinquency, which was December 19, 2004 (*see* Penal Law § 70.40[3][a]). Since his sentence was interrupted, petitioner was not "serving" his indeterminate sentence on February 12, 2005, the effective date of Correction Law § 205(4), as required by that statute for termination of sentence (*cf. People ex rel Rosa v Warden, Edgecombe Correctional Facility*, 80 AD3d 525, 526 [1st Dept 2011] [holding that the petitioner was "entitled to have his sentence terminated because . . . he had completed over two years of *uninterrupted* presumptive release from the statute's effective date prior to having it revoked on January 22, 2008"] [emphasis added]).

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9922 In re Patricia Benjamin, Index 104905/11
Petitioner-Appellant,

-against-

New York City Board/Department of Education,
Respondent-Respondent.

_____

Law Offices of Nicholas A. Penkovsky, P.C., Riverdale (Nicholas A. Penkovsky of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Moon Choi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered on or about April 4, 2012, denying the petition seeking to vacate and annul the Hearing Officer's award, dated April 8, 2011, which terminated petitioner's employment with respondent as a tenured school teacher, and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 75 and confirm the award, unanimously affirmed, without costs.

Adequate evidence in the record supported the Hearing Officer's determination that petitioner was guilty of multiple specifications charging her with failure to follow procedures and carry out normal duties, and incompetent and inefficient service

during three school years (*see Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]). The evidence showed that petitioner was either unwilling or unable to implement suggestions and constructive criticism of her ineffective teaching methods. She also continued to blame others and refused to accept any responsibility for her failure to provide a valid educational experience for her students and deliver consistently effective instruction.

Under the circumstances, the penalty of termination does not shock our sense of fairness (*Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 569 [1st Dept 2008]).

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

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9923 Moshe Steinmetz, Index 600808/07
Plaintiff-Respondent,

-against-

Samuel-Rozenbaum USA, Inc.,
Defendant-Appellant.

_____

Ofeck & Heinze, LLP, New York (Mark F. Heinze of counsel), for appellant.

The Catafago Law Firm, P.C., New York (Jacques Catafago of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered September 23, 2010, after a nonjury trial, awarding plaintiff $130,000 plus interest in the amount of $23,880.82, and costs and disbursements in the amount of $1,025.00, unanimously modified, on the facts, to reduce the principal amount of the award from $130,000 to $75,000, and to remand the matter for the calculation of interest, and otherwise affirmed, without costs.

The trial court properly allowed plaintiff to substitute a correct copy of the contract at issue from the court file for a poorly photocopied copy, since plaintiff promptly authenticated the correct copy (*see Matter of Khatibi v Weill*, 8 AD3d 485 [2d Dept 2004]).

There is no basis for disturbing the court's finding, which rested largely on credibility determinations, that the purported November 2005 agreement was not genuine (*see Nagel v Nagel*, 85 AD3d 559 [1st Dept 2011]). The document is riddled with anomalies (the court said it looked "cut and pasted"), and plaintiff testified that he had never signed it.

The contract stated that plaintiff could be fired only for cause during the first two years of the three-year employment term, and thereafter for any reason upon 30 days' notice. Plaintiff was terminated approximately nine months into the contract term. Thus, his damages equal his lost wages from that date until the end of the two-year period, plus one month for notice, or 15 months (*see Bogy v Berlage*, 265 App Div 249 [1st Dept 1942]; *Delvecchio v Bayside Chrysler Plymouth Jeep Eagle*, 271 AD2d 636, 638-639 [2d Dept 2000]). Based on the record evidence of plaintiff's net monthly salary, the amount of his lost wages for 15 months is $75,000.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9924 The People of the State of New York, Ind. 6299/10
Respondent,

-against-

Eduardo Guzman,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 4, 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: APRIL 30, 2013

CLERK

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

CORRECTED ORDER - MAY 7, 2013

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9925-
9926 The People of the State of New York,
Respondent,

Ind. 3488/09

-against-

Dwayne B.,
Defendant-Appellant.

Richard M. Greenberg, Office of The Appellate Defender, New York (Lauren Stephens-Davidowitz 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 (Ronald A. Zweibel, J.), rendered November 10, 2010, as amended June 21, 2012, convicting defendant, upon his plea of guilty, of grand larceny in the third degree, and sentencing him to a term of 364 days, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender, and otherwise affirmed.

We find the sentence excessive to the extent it did not include youthful offender treatment.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9930 Citizens Insurance Company of America, Plaintiff-Appellant, Index 105872/11

-against-

Illinois Union Insurance Company, Defendant-Respondent,

Everest National Insurance Company, Defendant.

_____

Goldberg Segalla LLP, White Plains (Michael P. Kandler of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Eric D. Suben of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered May 10, 2012, which granted defendant Illinois Union Insurance Company's motion for summary judgment dismissing the complaint as against it, denied, in part, plaintiff's cross motion for summary judgment, and declared, among other things, that the limit of Illinois Union's indemnity obligation on behalf of Northside Tower Realty, LLC and Northside Tower Enterprises (Northside) for the underlying personal injury action was $100,000.00, unanimously affirmed, with costs.

Based upon the plain language of the Illinois Union insurance policy (*see P.J.P. Mech. Corp. v Commerce & Indus. Ins. Co.*, 65 AD3d 195, 198 [1st Dept 2009]), the motion court properly found that the sub-limit endorsement contained in that policy, which only imposes conditions upon the "named insured," yet provides that coverage for "any such loss" will be reduced to $100,000 if the "named insured" breaches any of the conditions, also automatically will reduce the policy limit of an "additional insured." Even applying the separation of insureds doctrine, which provides that "each individual [] insured although not named as an insured in the policy must be treated as if separately covered by the policy" (*Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 124 [1959]), the sub-limit endorsement language still applies to all insureds, named or additional.

Citizens' argument, that under Insurance Law § 3420(d), Illinois Union is estopped from relying on its sub-limit endorsement because of a purported delay in asserting same, is unavailing because there is no showing of prejudice to the insured by reason of the sub-limit (*see Federated Dept. Stores, Inc. v Twin City Fire Ins. Co.*, 28 AD3d 32, 38 [1st Dept 2006]). Here, Illinois Union provided Northside with a full defense in the underlying action and full payment of the sub-limit coverage,

and there was no excess exposure to the insured because the Citizens coverage applied as excess and paid the balance of the settlement. There is no prejudice to additional insured Northside on these facts, and thus no basis for an estoppel.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9931 The People of the State of New York, Ind. 500/10
Respondent,

-against-

Fernando Madera,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered May 10, 2011, convicting defendant, after a jury trial, of three counts each of robbery in the first and second degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility, including its resolution of any discrepancies in the main witness's description of the perpetrator. The reliability of this witness's identification was enhanced by the fact that she was familiar with defendant from his repeated presence in the area, and from having seen him shortly before the crime.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). Defendant's prior felony conviction was probative of credibility and was not so similar to the case on trial as to be unduly prejudicial. In addition, the court only permitted a limited inquiry into defendant's record of misdemeanor convictions.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9932 Violet Geffs, et al., Index 16769/04
Plaintiffs-Appellants,

-against-

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

- - - - -

The City of New York, et al.,
Third-Party Plaintiffs,

-against-

Temco Service Industries, Inc.,
Third-Party Defendant-Intervenor.

_____

Hoberman & Trepp, P.C., Bronx (Adam F. Raclaw of counsel), for appellants.

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

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for intervenor.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 23, 2011, which, to the extent appealed from as limited by the briefs, granted defendant New York City Department of Education's (DOE) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

The DOE failed to meet its prima facie burden of showing that it neither created nor had actual or constructive notice of

the wet condition in the school cafeteria upon which plaintiff slipped and fell (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Defendants' own submissions show that questions of fact exist as to whether they had notice of the condition. One of the custodial workers at the subject school testified that another custodian called him and told him that caution signs were placed "out," but because he was not present when the accident occurred, he was unable to testify about where or when the warning sign or signs were placed. Because the presence of at least one warning sign is sufficient evidence to raise an issue of fact as to whether a defendant had actual notice of a hazardous condition, the DOE's motion should have been denied (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]; *Rosado v Phipps Houses Servs., Inc.*, 93 AD3d 597, 597 [1st Dept 2012]).

Further, even if the DOE could delegate its duty to maintain the school premises in a reasonably safe condition (*see Kush v City of Buffalo*, 59 NY2d 26, 29 [1983]; *Jonathan A. v Board of Educ. of City of N.Y.*, 8 AD3d 80, 82 [1st Dept 2004]), the DOE did not establish, as was its burden, that the contract between it and third-party defendant Temco Service Industries constituted an exclusive maintenance contract completely displacing the DOE's duty (*see Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]). If

any written agreement exists, none was proffered, and the testimony about the agreement indicates that the DOE retained at least some control over cleaning and maintenance (*see Gronski v County of Monroe*, 18 NY3d 374, 379-382 [2011]).

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9934- Index 651532/11
9935 Aramid Entertainment Fund Ltd., et al.,
Plaintiffs-Appellants,

-against-

Wimbledon Financing Master Fund, Ltd., et al.,
Defendants-Respondents,

Fortis Bank Cayman, Ltd., et al.,
Defendants.

_____

Stroock & Stroock & Lavan LLP, New York (Claude G. Szyfer of counsel), for appellants.

Weingarten Brown LLP, Los Angeles, CA (Alex M. Weingarten of the bar of the State of California, admitted pro hac vice, of counsel), for Wimbledon Financing Master Fund, Ltd., WFM Holdings Ltd., Joseph Bianco and David Bergstein, respondents.

Toptani Law Offices, New York (Edward Toptani of counsel), for Stillwater Capital Partners, Inc. and Stillwater Market Neutral Fund III SPC, respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about March 28, 2012, which granted defendant David Bergstein's motion to dismiss the complaint as against him for lack of personal jurisdiction, and order, same court and Justice, entered March 22, 2012, which granted the motion of defendants Wimbledon Financing Master Fund, Ltd., WFM Holdings Ltd., Stillwater Capital Partners, Inc., Stillwater Market Neutral Fund III SPC, Gerova Financial Group, and Joseph Bianco,

dismissing the complaint as against them for failure to state a cause of action, unanimously affirmed, with costs.

Plaintiffs failed to state a claim for tortious interference with prospective business advantage, since there was no sufficient allegation that, but for defendants' interference, Aramid would have completed the sale of its assets to a third party (*see Gebbia v Toronto-Dominion Bank*, 306 AD2d 37, 38 [1st Dept 2003]). Nor have plaintiffs sufficiently alleged any facts suggesting that defendants undertook actions with the sole purpose of harming plaintiffs (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]). Plaintiffs also failed to state a claim for prima facie tort, since they failed to allege that defendants' actions were solely motivated by malice or disinterested malevolence and they failed to plead special damages (*see Golub v Esquire Publ.*, 124 AD2d 528, 529 [1st Dept 1986], *lv denied* 69 NY2d 606 [1987]).

Plaintiffs failed to set forth a prima facie basis for jurisdiction over defendant Bergstein under CPLR 302(a)(2). In particular, plaintiffs failed to allege facts showing that defendants, including defendant Bianco, as the agent of Bergstein, committed a tortious act in New York for the benefit and with the consent and knowledge of Bergstein, and in

furtherance of a conspiracy that included Bergstein (*see de Capriles v Lugo*, 293 AD2d 405 [1st Dept 2002], *lv dismissed and denied* 98 NY2d 717 [2002]).

The court properly exercised its discretion in denying plaintiffs' request for jurisdictional discovery, since they did not show that facts may exist supporting their theory of conspiracy (*Lugo*, 293 AD2d at 406).

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9936 The People of the State of New York, Ind. 4959/10
Respondent,

-against-

Eric Wolfe,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 25, 2011, 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: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9937 Derfner Management Inc., Index 650060/11
Plaintiff-Respondent,

-against-

Lenhill Realty Corp., et al.,
Defendants-Appellants.

_____

Stroock & Stroock & Lavan LLP, New York (Charles G. Moerdler of counsel), for appellants.

Kaye Scholer LLP, New York (James D. Herschlein and Daniel P. Hope of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 26, 2012, which, to the extent appealed from, granted plaintiff's motion for a preliminary injunction to the extent defendants had withdrawn their notices of termination for defendants Blair Hall, Inc. and Edwin Realty Corp., and the board of directors of Lenhill Realty Corp. had withdrawn the previously issued notice of termination, granted plaintiff's motion for a judgment declaring that the December 21, 2010 special meeting of the board of directors of Lenhill Realty Corp. was properly noticed and the election of the five directors at that meeting was lawful, and so declared, and denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, with costs, plaintiff's motions denied, the injunction and declaration vacated, and defendants' motion granted. The Clerk is directed

to enter judgment in defendants' favor dismissing the complaint.

Plaintiff alleges that defendants breached the oral agreement pursuant to which it served as the exclusive manager of the real property owned by defendants Lenhill Realty Corp., Blair Hall, Inc., and Edwin Realty Corp. by terminating the agreement without giving it reasonable notice. We find, however, that the rule that a contract lacking a clearly expressed duration will be held to have been intended to continue for a reasonable time does not apply to the subject exclusive agency agreement (*see Haines v City of New York*, 41 NY2d 769, 772-773 [1977]; *see e.g. Banana Kelly Community Improvement Assn. v Schur Mgt. Co., Ltd.*, 34 Misc 3d 1207[A], *8-9 [Sup Ct, Bronx County 2012] [enjoining defendant from continuing to act as plaintiff's property manager due to irreparable deterioration of parties' eight-year relationship]). Thus, defendants were not required to give plaintiff reasonable notice of the termination.

The preliminary injunction granted to plaintiff must be vacated in light of the foregoing. In any event, plaintiff failed to demonstrate its entitlement thereto. In particular, there is no showing of irreparable harm for which monetary damages could not adequately compensate (*see New York City Off-Track Betting Corp. v New York Racing Assn.*, 250 AD2d 437, 442 [1st Dept 1998]). Indeed, the complaint seeks damages in an

amount equal to fees alleged to have been wrongfully withheld by defendants.

Plaintiff's request for a declaratory judgment should not have been granted because plaintiff failed to assert a claim for declaratory relief in a pleading (*see McHugh v Weissman*, 46 AD3d 369 [1st Dept 2007]).

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9938- Ind. 3846/03
9939- 5973/03
9940 The People of the State of New York,
Respondent,

-against-

John Ramos,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered September 11, 2009, resentencing defendant pursuant to Penal Law § 70.85 to an aggregate term of 20 years, without any period of postrelease supervision, unanimously affirmed. Appeal from order, same court and Justice, entered on or about July 24, 2009, which denied defendant' CPL 440.10 motion to vacate judgment, unanimously dismissed for lack of jurisdiction to entertain the appeal.

A Justice of this Court denied defendant's pro se CPL 460.15 application for leave to appeal from the denial of defendant's CPL 440.10 motion. However, defendant, through counsel, made a second leave application, which asserted upon information and belief that no other leave application had been made. In

reliance on this inaccurate statement, another Justice of this Court issued a certificate granting leave to appeal.

"Not more than one application may be made for such certificate" (CPL 460.15[2]). Prohibitions on multiple leave applications are jurisdictional (*see People v Nelson*, 55 NY2d 743, 743-744 [1981]), and we have no authority to disregard them, in the interest of justice or otherwise. The fact that the first application was made pro se while the second was made by counsel is of no consequence (*see People v Liner*, 70 NY2d 945 [1988]). Accordingly, we vacate the certificate and dismiss the appeal.

Although defendant's direct appeal from his judgment of resentence is properly before us, that appeal does not bring up for review any of defendant's present challenges to his original conviction (*see People v Jordan*, 16 NY3d 845 [2011]), and defendant has not demonstrated any basis for reversal or modification of the judgment of resentence.

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9941N Maninder Bhugra, Index 110825/07
Plaintiff-Appellant,

-against-

Massachusetts Casualty
Insurance Company, et al.,
Defendants-Respondents,

Videckis Financial Services, et al.,
Defendants.

_____

Maninder Bhugra, appellant pro se.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered October 25, 2011, which, to the extent appealed from, denied plaintiff's motion for a default judgment against defendants Massachusetts Casualty Insurance Company, Centre Life Insurance Company, Centre Solutions, and Zurich American Insurance Company (the MCIC defendants), unanimously affirmed, without costs.

This Court previously determined that the MCIC defendants timely served their answer in accordance with the parties' written stipulation (*Bhugra v Massachusetts Cas. Ins. Co.*, 94 AD3d 563 [1st Dept 2012], *appeal dismissed* 19 NY3d 1064 [2012]). Accordingly, this Court essentially held that the MCIC defendants

were never in default, and that determination operates to foreclose reexamination of the question of default on this appeal (*see Morrison Cohen, LLP v Fink*, 92 AD3d 514 [1st Dept 2012], *lv dismissed* 19 NY3d 1017 [2012]; *Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, 79 AD3d 417 [1st Dept 2010], *affd on other grounds* 18 NY3d 617 [2012], *cert denied __ US __*, 133 S Ct 654 [2012]). Moreover, that determination renders academic plaintiff's arguments concerning whether the MCIC defendants failed to show a reasonable excuse for the default or a meritorious defense (*see Rossini Excavating Corp. v Shelter Rock Bldrs., LLC*, 89 AD3d 467 [1st Dept 2011]).

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

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

ENTERED: APRIL 30, 2013

CLERK

Acosta, J.P., Moskowitz, Renwick, Freedman, Clark, JJ.

9942N Inez Simens, etc., et al., Index 105097/09
Plaintiffs,

-against-

Charles Darwish, etc., et al.,
Defendants.

- - - - -

Neal Fellenbaum, etc.,
Petitioner-Respondent,

-against-

Smallbone, Inc., etc.,
Respondent-Appellant.

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Rosen Livingston & Cholst LLP, New York (Andrew J. Wagner of counsel), for appellant.

Zegen & Fellenbaum, New York (Neal Fellenbaum of counsel), and Peter Kolodny, New York, for respondent.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered August 6, 2012, which granted the motion of petitioner Neal Fellenbaum, as Temporary Receiver, to remove the holdover proceeding pending against respondent Smallbone in Civil Court (L&T 57366-12) to Supreme Court, and consolidated that proceeding with an action pending in Supreme Court under Index No. 105097-09, unanimously reversed, on the law and the facts, without costs, and the motion denied.

The Temporary Receiver, having commenced a holdover proceeding against Smallbone, a commercial tenant, in Civil

Court, where complete relief can be afforded to him, has shown no basis for removing that proceeding to Supreme Court (*see Brecker v 295 Cent. Park W., Inc.*, 71 AD3d 564 [1st Dept 2010]). Smallbone's counterclaims, based on partial actual and constructive eviction, are within the traditional scope of jurisdiction of Civil Court, which "is the preferred forum for resolving landlord-tenant issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]). Thus, the court erred in granting the motion to remove the summary proceeding, which was then scheduled for a traverse hearing and trial. Moreover, the court should not have consolidated the landlord-tenant summary holdover proceeding with an entirely distinct action involving accounting, fraud, and breach of contract claims between property owners (*see* CPLR 602).

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

ENTERED: APRIL 30, 2013

CLERK