SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 20, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Catterson, Richter, Abdus-Salaam, Román, JJ.

7409-
7410-
7411 Joseph W. Sullivan,
Plaintiff-Respondent,

-against-

William F. Harnisch, et al.,
Defendants-Appellants.

Index 115092/08

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Law Offices of Daniel Felber, New York (Benjamin N. Leftin of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 15, 2011, which granted plaintiff's motion for summary judgment dismissing defendants' first counterclaim, alleging a breach of confidentiality, unanimously affirmed, without costs. Order, same court and Justice, entered December 8, 2011, which, upon defendants' motion to renew and reargue and for leave to amend their answer, directed that the issue of nominal damages on the first counterclaim be heard by a referee,

and denied leave to amend, unanimously affirmed, without costs.

In this action, plaintiff asserts claims arising out of the termination of his employment by defendant investment companies. The facts underlying this case are discussed in a decision on a prior appeal (81 AD3d 117 [1st Dept 2010], *affd* 19 NY3d 259 [2012]).

Defendants' first counterclaim alleges that plaintiff's disclosure of clients' identities in the complaint, and to the media, caused defendants to sustain damages. Plaintiff's motion for summary judgment dismissing this counterclaim was supported by the testimony of representatives of two former clients who were alleged by defendants to have left defendant companies as a result of the disclosure of their identities. This testimony established that the two clients left the defendant companies because of the allegations contained in this action and an action brought by defendants against plaintiff, and the existence of the lawsuits, and not due to the disclosure of the clients' identities. In opposition, defendants failed to establish a triable issue of fact as to the existence of consequential damages resulting from the disclosure of clients' identities, via admissible evidence (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The court properly rejected defendant William Harnisch's hearsay testimony concerning the reasons that clients left his companies. While "[h]earsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the only evidence submitted" (*Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002]), no such additional evidence was submitted here.

The trial court properly denied defendants' motion to renew as to consequential damages, as defendants did not assert additional material facts that existed at the time of the original motion but were unknown to them, and failed to demonstrate a reasonable excuse for not presenting such evidence earlier (*see* CPLR 2221[e]; *Haussmann v Wolf*, 187 AD2d 371, 373 [1st Dept 1992]). The subsequent retention of an expert is not proper grounds for renewal (*see Mundo v SMS Hasenclever Maschinenfabrik*, 224 AD2d 343, 344 [1st Dept 1996], *lv dismissed in part, denied in part* 88 NY2d 1014 [1996]). In any event, the purportedly new evidence would not have altered the initial determination on that issue. The court properly granted reargument to allow nominal damages, and appropriately referred the issue to a referee.

Finally, the trial court did not abuse its discretion in

denying defendants' motion for leave to amend the answer to supplement the claimed breaches of confidentiality. Defendants failed to establish that the proposed amended pleading was not palpably insufficient or clearly devoid of merit, and not duplicative of dismissed claims (*see Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]).

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

> The Decision and Order of this Court entered herein on May 22, 2012 is hereby recalled and vacated (*see* M—2921 decided simultaneously herewith).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Friedman, J.P. Acosta, Renwick, Richter, Abdus-Salaam, JJ.

8146 Sophia H. Kang, Index 350210/06
Plaintiff-Respondent-Appellant,

-against-

Edward C. Kim,
Defendant-Appellant-Respondent.

Barry Elisofon, Brooklyn, for appellant-respondent.

Richard L. Derzaw, New York, for respondent-appellant.

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about November 3, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff wife's motion to direct defendant husband to comply with the terms of the parties' agreement regarding plaintiff's option to buy out defendant's share of the former marital residence, with the agreement terms to be given the meaning ascribed to them by plaintiff, but declined to address the issue of the validity of defendant's appraiser's report, and denied defendant's cross motion to reform the terms of the parties' agreement, unanimously modified, on the law, to the extent of denying the motion, and otherwise affirmed, without costs.

The parties entered into a property settlement and support agreement in connection with their divorce, which provides, as

relevant here, that the wife shall have exclusive possession of the marital residence, a cooperative apartment, until the occurrence of specified events (such as the wife's remarriage or the parties' child becoming 16 years old), upon which the residence would be sold. The agreement also states that after January 1, 2011, the wife shall have the right to purchase the husband's interest in the apartment. The clause at issue provides:

> "If the parties are unable to agree as to the terms for such purchase within 30 days of the day that the Wife gave notice to the Husband then the value of the Husband's interest (the 'buy-out price') shall be one half of the value of the apartment as determined by a Real Estate Appraisers [*sic*] agreed to by the parties less the outstanding amount owed upon the First Mortgage."

The wife asserts, and the motion court agreed, that this provision of the agreement is unambiguous and that the buyout price is one half of the value of the apartment less the entire outstanding amount of the mortgage, whereas the husband asserts that the buyout price is half the value of the apartment less the wife's share of the mortgage, which is one-half of the outstanding amount of the mortgage. In other words, the husband asserts that the buyout price is one half of the equity in the apartment.

Upon examination of the settlement agreement in its entirety, "'and consider[ing] the relation of the parties and the circumstances under which it was executed'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519 [1927]), the agreement is ambiguous because the provision is "'reasonably susceptible of more than one interpretation'" (*China Privatization Fund (Del), L.P. v Galaxy Entertainment Group Ltd*,, 95 AD3d 769, 770 [1st Dept 2012], quoting *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *see also NFL Enters. LLC v Comcast Cable Communications*, LLC, 51 AD3d 52, 58 [1st Dept 2008]). Notably, the agreement also provides that all marital property is to be divided 50/50 and that if the premises is sold to a third party, the "net proceeds of sale" shall be divided equally. In light of the ambiguity, the construction of the provision is for the trier of fact (*NFL Enters. LLC,* 51 AD3d at 61; *see also Nappy v Nappy*, 40 AD3d 825, 826 [2d Dept 2007]).

The motion court was correct in declining to address the issue relating to the validity of defendant's appraiser's report,

since that issue was not before it.

We have considered the parties' remaining contentions and find then unavailing.

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

ENTERED: NOVEMBER 20, 2012

CLERK

Friedman, J.P., Sweeny, Moskowitz, Freedman, Román, JJ.

8513 In re Beatrice Riese, deceased, Index 1376/04

Roger Mosesson,
Petitioner-Respondent,

-against-

Brooklyn Institute of Arts and Sciences,
doing business as, The Brooklyn Museum,
Respondent-Appellant.

Hughes Hubbard & Reed LLP, New York (Daniel H. Weiner of counsel), for appellant.

William H. Roth, New York, for respondent.

Order, Surrogate's Court, New York County (Kristin Booth Glen, S.), entered on or about September 30, 2011, which, insofar as appealed from, granted petitioner's motion to enforce a stipulation directing respondent museum to relinquish its rights to a statue from decedent's collection that was on loan to it from petitioner, unanimously affirmed, without costs.

A negotiated stipulation between the parties contemplated the possibility of petitioner donating art from decedent's collection to respondent museum based on a procedure by which petitioner would deliver to the museum a "Deed of Gift" for a sculpture from decedent's collection known as Songye Wood

Standing Male Figure, and respondent could accept the offer by completing and delivering to petitioner a countersigned "Deed of Gift," no later than 30 days after the offer.

The stipulation provided that petitioner would place 14 specific pieces from decedent's art collection on loan with the museum. The stipulation also gave the museum the unqualified right to acquire any of the pieces at a nominal sum of $100 each, at the end of 10 years, during which time petitioner could not dispose of the loaned pieces other than to the museum. The stipulation further provided that:

> "If an Offer is not accepted by [the Museum] in strict compliance with the manner, terms and time set forth . . . time being of the essence, such Offer shall be deemed irrevocably rejected. In such event, the Loan and Loan Period as to the Piece(s) included within such rejected Offer shall immediately terminate, such Piece(s) shall be returned to Petitioner within fourteen (14) days thereafter, and the [loan provisions] shall no longer apply to such Piece(s)."

It is well established that "signatories of any agreement are free to tailor their contract to meet their particular needs and to include or exclude those provisions which they choose" (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Accordingly, the court properly enforced the terms of the stipulation and directed respondent to return the sculpture after it failed to deliver a

countersigned deed to petitioner within the requisite time period following the offer to donate (*see Kaiser-Haidri v Battery Place Green, LLC*, 85 AD3d 730, 733-734 [2d Dept 2011]).

Indeed, on November 29, 2010, petitioner executed the Deed of Gift offering to donate the sculpture and, by overnight mail, sent the Deed to respondent. On December 9, 2010, respondent's Board of Trustees reviewed and voted to accept petitioner's gift, and respondent's Deputy Director countersigned the Deed. On December 30, 2010, respondent executed a letter acknowledging the gift. However, respondent did not mail this letter and the countersigned Deed of Gift until January 3, 2011. It is undisputed that respondent failed to deliver the acceptance to petitioner within the 30 days of the Deed of Gift.

Contrary to respondent's contentions, no circumstances warranting equitable intervention are present here (*see e.g.*

Fifty States Mgt. Corp. v Pioneer Auto Parks, 46 NY2d 573, 576-577 [1979]; *1029 Sixth v Riniv Corp.*, 9 AD3d 142, 149-150 [1st Dept 2004], *lv dismissed* 4 NY3d 795 [2005]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8596 The People of the State of New York, Ind. 1122/08
Respondent,

-against-

Richard Young,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at dismissal motions; Renee A. White, J. at jury trial and sentencing), rendered September 1, 2009, convicting defendant of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3½ to 7 years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence. The evidence supports the conclusion that defendant's use of force against store employees was for the purpose, at least in part, of retaining control of the stolen merchandise that was still in his

possession (*see e.g. People v Nieves*, 37 AD3d 277 [1st Dept 2007], *lv denied* 9 NY3d 848 [2007]; *People v McMahon*, 279 AD2d 272 [1st Dept 2001], *lv denied* 96 NY2d 803 [2001]).

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). Defendant's criminal record was very extensive, and the court placed reasonable limits on the prosecutor's ability to elicit the scope and contents of that record.

The court properly denied defendant's motions to dismiss the indictment, made on the ground that the prosecutor's questioning of defendant before the grand jury was allegedly improper. The cross-examination at issue was generally appropriate and responsive to defendant's testimony. Any defects fell far short of impairing the integrity of the proceeding; accordingly, they

did not warrant the exceptional remedy of dismissal (*see People v Huston*, 88 NY2d 400, 410 [1996]; *People v Darby*, 75 NY2d 449, 455 [1990]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8597 Michael Lambe, Index 108486/10
Plaintiff-Appellant,

-against-

Lenox Hill Hospital, et al.,
Defendants,

Smith Carroad Levy P.C.,
Defendant-Respondent.

_____

Silver & Silver, LLP, New York (Herbert J. Silver of counsel), for appellant.

Smith, Carroad, Levy & Wan, Commack (Timothy Wan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered July 27, 2011, which granted defendant-respondent's (defendant) motion to dismiss the complaint as against it, unanimously affirmed, without costs.

Plaintiff failed to state a cognizable cause of action as against defendant. Indeed, read generously, the complaint merely alleges that defendant issued restraining notices on a duly filed default judgment, obtained by predecessor counsel. This conduct

does not amount to a tort (*Caribbean Constr. Servs. & Assoc. v Zurich Ins. Co.*, 267 AD2d 81, 83 [1st Dept 1999]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8598-
8598A In re Jeremy H., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Logann K.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Judith Waksberg of counsel), attorney for the child Jeremy H.

Lawyers For Children, Inc., New York (Ronnie Dane of counsel), attorney for the children Jasir H. And Jyeh H.

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about December 8, 2011, which, following a fact-finding hearing, determined that appellant mother had neglected Jasir-Keiomura H. and Jeremy H., and derivatively neglected Jyeh-Keiyonce H., and committed custody and guardianship of the children to their maternal grandmother, directed the mother to submit to a mental health evaluation, and limited her visitation to bi-weekly supervised visits,

unanimously affirmed, without costs. Appeal from the fact-finding order, same court and Judge, entered on or about August 16, 2011, unanimously dismissed, without costs, as superseded by the appeal from the order of disposition.

This Court previously held that the mother derivatively neglected two of her other children, finding that the same evidence that supported the Family Court's findings that the mother had used inappropriate and excessive corporal punishment against two of the subject children, and derivatively neglected the third subject child, demonstrated by a preponderance of the evidence that she had neglected those two children as well (*Matter of Jacob H [Logann K.]*, 94 AD3d 628 [1st Dept 2012], *lv dismissed* 19 NY3d 952 [2012]). That finding is law of the case (*see Kenney v City of New York*, 74 AD3d 630, 630-631 [1st Dept 2010]).

In any event, considering the merits of the mother's arguments raised on this appeal, we conclude that the findings of neglect and derivative neglect as to the subject children were supported by a preponderance of the evidence. Such evidence included the testimony of a caseworker that Jeremy stated that the mother hit him in the head with a closed fist and that he got the "worse" of all the children, and that Jasir told her that the

mother hit her with a belt, a ruler, and a spoon that felt "like a rock." The caseworker also observed four healing nail marks on one child's arm, and the medical records noted scratches on Jasir that were too numerous to have occurred in the normal course. Moreover, the court was entitled to draw the strongest negative inference from the mother's failure to testify in the proceedings (*see Matter of Taylor C. [Christin C.]*, 89 AD3d 405, 406 [1st Dept 2011]). The out-of-court statements of Jasir and Jeremy to the caseworker were corroborated by the caseworker's testimony, the medical records of Jasir, and the consistent account of those two children (*see Matter of Keisha McL.*, 261 AD2d 341, 342 [1st Dept 1999]). This evidence also amply supported the court's finding of derivative neglect.

The mother asserts that the court improperly limited her visits to bi-weekly supervised visits at the agency. The court properly exercised its discretion in limiting the mother's visits where she had not visited consistently in the past and her mental

condition appeared to be deteriorating.

We have considered the mother's other arguments, and find them unavailing.

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8599 In re The City of New York, et al., Petitioners-Appellants, Index 401614/10

–against–

The Commissioner of Labor, et al., Respondents-Respondents.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Matthew William Grieco and C. Michael Higgins of counsel), for Commissioner of Labor and Industrial Board of Appeals, respondents.

Mary J. O'Connell, New York (Aaron S. Amaral of counsel), for District Council 37, AFSCME and AFL-CIO, respondents.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered February 15, 2011, which denied the petition seeking annulment of a decision of respondent State Industrial Board of Appeals upholding three notices of violation issued by the Public Employee Safety and Health Bureau of the New York State Department of Labor against three juvenile detention centers, and dismissed the proceeding, unanimously affirmed, without costs.

We agree with petitioners that the question at issue, whether the provisions of the Workplace Violence Prevention Act

(WVPA) (Labor Law § 27-b) are "specific standards" that precluded the Department of Labor from issuing citations based on the General Duty Clause (Labor Law § 27-a[3]) of the Public Employee Safety and Health Act, is one of pure statutory interpretation subject to de novo review, and not one requiring deference to the special expertise of the agency (*see Kurcsics v Merchants Mut. Ins. Co.,* 49 NY2d 451, 549 [1980]).

Nevertheless, the article 78 court properly found that the statutory provisions are not specific standards within the meaning of Labor Law § 27-a(4)(b), which requires that such standards must be duly enacted and promulgated regulations (*see Matter of New York State Coalition of Pub. Employers v New York State Dept. of Labor*, 89 AD2d 283, 287 [3d Dept 1982], *affd* 60 NY2d 789 [1983]).

Further, the court was correct in concluding that the WVPA provisions – the implementing regulations of which had not been enacted at the time of the subject citations – did not take precedence over the General Duty Clause under established principles of statutory interpretation. The WVPA provides a general mechanism for, inter alia, evaluating the risk of workplace violence and creating employer plans to address it. The statutory language does not support the conclusion that the

statute – especially prior to enactment of implementing regulations – was intended to preempt the affirmative obligation that the General Duty Clause imposes on employers to provide a workplace free from recognized hazards that are causing or likely to cause death or serious physical injury, and with reasonable and adequate protection to employees' lives, safety and health. Thus, Supreme Court properly concluded that the two statutes are not inconsistent here and can both be given effect when they stand together (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 397).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8600 Evan Tawil, Index 312293/10
Plaintiff-Appellant,

-against-

Vanessa Tawil,
Defendant-Respondent.

Saltzman Chetkof & Rosenberg, LLP, Garden City (Lee Rosenberg of counsel), for appellant.

Vanessa Tawil, respondent pro se.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered April 6, 2011, which, insofar as appealed from as limited by the briefs, upon defendant wife's motion for various relief, awarded defendant interim maintenance in the amount of $12,457.25 per month, temporary child support in the amount of $9,375 per month and interim counsel fees in the amount of $25,000, unanimously affirmed, without costs.

The court properly considered the factors under Domestic Relations Law § 236(B)(5-a)(e)(1) to arrive at an interim maintenance award. As its order indicates, the court adjusted the award based on its consideration of the statutory factors, including the standard of living established during the marriage. Likewise, the court properly considered the statutory factors in

awarding temporary child support (Domestic Relations Law § 240[1-b]). The court also properly determined that defendant, as the less-monied spouse, was entitled to an award of counsel fees (*see* Domestic Relations Law § 237[a]; *DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]).

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

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8601 In re Williamsburg Community Coalition, etc., et al., Petitioners-Appellants, Index 115437/10

-against-

The Council of the City of New York, et al., Respondents-Respondents.

Young/Sommer, LLC, Albany (Jeffrey S. Baker of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg and Sarah Kogel-Smucker of counsel), for municipal respondents.

Sive, Paget & Riesel, P.C., New York (David Paget of counsel), for The Refinery LLC, respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 2, 2011, denying the petition to annul the determination of respondent City Council to rezone the site of a mixed-use development project in the Williamsburg section of Brooklyn (the Project), to annul the determination of respondent Planning Commission approving the Project, and to enjoin all respondents from proceeding with the Project until it is reconsidered under the State Environmental Quality Review Act (SEQRA) and City Environmental Quality Review (CEQR), and dismissing the petition brought pursuant to CPLR article 78,

unanimously affirmed, without costs.

Our review of the record indicates that the municipal respondents took the requisite "hard look" at the Project's anticipated adverse environmental impacts and provided a "reasoned elaboration" of the basis for their approval of the Project, and that their determination was not arbitrary and capricious or unsupported by the evidence (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 231-232 [2007]; *Akpan v Koch*, 75 NY2d 561, 570 [1990]).

Contrary to petitioners' contention, the fact that respondent developer's 30% affordable housing figure was a mere goal, rather than a binding commitment, was adequately disclosed to the public. The Draft and Final Environmental Impact Statements (DEIS and FEIS) noted that the developer "would be required to allocate 20% of the residential floor area as affordable housing," although it was the developer's "stated intention" to make 30% of the units affordable housing. Public commentators on the DEIS noted that the developer was not obligated to make more than 20% of the units affordable housing, and requested a "written commitment" or "suitable assurance" that it would meet the 30% goal. At the request of the City Council, following a public hearing, the developer and the New York City

Department of Housing Preservation and Development executed a non-binding Memorandum of Understanding reciting that "[n]ot less than [30%] of all dwelling units developed on the Site . . . will be Affordable Housing, provided, however, that if the Project is constructed without any public subsidy . . ., not less than [20%] of all dwelling units . . . will be Affordable Housing."

Petitioners' contention that the record is devoid of evidence of any need for the Project or for a change in zoning from manufacturing to mixed-use residential is belied by the statement of the Project's objectives and goals in the FEIS. These objectives and goals included "address[ing] community concerns that affordable housing is still not achievable for existing working-class residents of Williamsburg," "[c]reat[ing] physical and visual access to the waterfront, including a substantial amount of publicly accessible open space," and "[r]edevelop[ing] a former waterfront industrial site into an economically integrated mix of residential, retail/commercial, and community facility uses with a high quality design."

Contrary to petitioners' argument, respondents considered a number of reasonable alternatives to the Project, including the requisite "No Action Alternative" (the continuation of the heavy industrial zoning) and a reduced density alternative (a smaller

project with lower building heights and the assumption that 20% of the units would be affordable housing). After considering these alternatives, the Planning Commission concluded that the Project minimized or avoided adverse environmental impacts to the greatest extent practicable. This analysis amply satisfies the requirements of SEQRA and CEQR (*see Matter of Town of Dryden v Tompkins County Bd. of Representatives*, 78 NY2d 331, 334 [1991]; *see also* 6 NYCRR 617.9[b][5][v]; *Matter of Save Open Space v Planning Bd. of the Town of Newburgh*, 74 AD3d 1350, 1352 [2d Dept], *lv denied* 15 NY3d 711 [2010]).

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: NOVEMBER 20, 2012

CLERK

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

8602 In re Shawanta L-K.,
Petitioner-Respondent,

-against-

Melvin K.,
Respondent-Appellant.

Steven N. Feinman, White Plains, for appellant.

Order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about March 10, 2011, which, upon appellant's consent, awarded petitioner mother custody of the subject child, unanimously affirmed, without costs.

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.

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8604 Alvaro Anton, Index 22782/06
Plaintiff, 85841/07

–against–

West Manor Construction Corp., et al.,
Defendants-Respondents.

- - - - -

West Manor Construction Corp., et al.,
Third-Party Plaintiffs-Respondents,

–against–

Tiegre Mechanical Corp.,
Third-Party Defendant-Appellant,

Larino Masonry, Inc.,
Third-Party Defendant.

_____

O’Conner Redd, LLP, White Plains (Amy Lyn Fenno of counsel), for appellant.

Callahan & Fusco, LLC, New York (William A. Sicheri of counsel), for West Manor Construction Corp., Larino Masonry, Inc., and Bradhurst 100 Development, LLC, respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 1, 2012, which, insofar as appealed from as limited by the briefs, upon reargument of third-party defendant Tiegre Mechanical Corp.’s motion for summary judgment dismissing West Manor Construction Corp. and Bradhurst 100 Development LLC’s claims for contractual indemnification, common-law indemnification and contribution against it and West Manor and

Bradhurst's motion for summary judgment in their favor on their contractual indemnification claims against Tiegre, adhered to the original determination granting Tiegre's motion as to the contractual indemnification claims and denying West Manor and Bradhurst's motion as to those claims, and denying Tiegre's motion as to the claims for common-law indemnification and contribution, unanimously modified, on the law, to grant Tiegre's motion as to the common-law indemnification and contribution claims, and otherwise affirmed, without costs.

As to West Manor and Bradhurst's claims for common-law indemnification and contribution as against Tiegre, the injured plaintiff's employer, Tiegre established prima facie that plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11, and West Manor and Bradhurst failed to raise an issue of fact (*see Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363 [2005]; *Altonen v Toyota Motor Credit Corp.*, 32 AD3d 342, 343-344 [1st Dept 2006]). Plaintiff's bill of particulars, deposition testimony, and medical records, and the independent medical examination reports indicate that, while plaintiff may have been unable for a time to work in his chosen profession, his disability was caused by his neck and shoulder injuries, not by "an acquired injury to the brain" – the

only potentially applicable category of grave injury under Workers' Compensation Law § 11. The daily headaches and frustrating loss of focus from which plaintiff testified he suffered do not satisfy the acquired brain injury standard (*see Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 417 [2004]; *Tzic v Kasampas*, 93 AD3d 438, 440 [1st Dept 2012]).

As to their contractual indemnification claims against Tiegre, West Manor and Bradhurst argue that Tiegre was negligent in failing to instruct plaintiff that the driveway exit through which he entered the building under construction was reserved solely for supervisors of contractors and subcontractors. However, it is undisputed that plaintiff was injured by a cinder block that was dropped off the sixth floor of the building by an employee of defendant Larino Masonry, Inc. Thus, even assuming the existence of a rule that prohibited workers – as opposed to supervisors – from using the driveway exit, plaintiff's "violation" of the rule was not a proximate cause of the

accident, but merely furnished the condition or occasion for its occurrence (*see Margolin v Friedman*, 43 NY2d 982 [1978]; *Gerrity v Muthana*, 28 AD3d 1063 [4th Dept 2006], *affd* 7 NY3d 834 [2006]; *Constantine v Bernardo*, 239 AD2d 539 [2d Dept 1997]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8605 Miles Matsumura, Index 600197/10
Plaintiff-Respondent,

-against-

Smart LLC, etc., et al.,
Defendants-Appellants.

_____

Fox Rothschild LLP, New York (Brian D. Sullivan of counsel), for appellants.

Ahmad Naqvi Rodriguez, LLP, New York (Christine A. Rodriguez of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered on or about March 23, 2011, which, to the extent 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 dismissing the complaint.

The e-mails that are plaintiff's sole support for his contention that he was employed by defendants pursuant to a five-

year contract fail to establish a contract for a fixed period of time (*see TSR Consulting Servs. v Steinhouse*, 267 AD2d 25 [1st Dept 1999]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8608 In re Jamyra T.,

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

Lisa H. Blitman, New York, for appellant.

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

Order of disposition, Family Court, Bronx County (Nancy M. Bannon, J.), entered on or about September 27, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts that, if committed by an adult, would constitute the crimes of criminal possession of a weapon in the second degree and possession of pistol or revolver ammunition, and also committed the act of unlawful possession of a weapon by a person under 16 (two counts), unanimously reversed, on the law, without costs, and the petition dismissed.

As the presentment agency concedes, the hearing improperly continued past the time limit set forth in Family Court Act § 340.1 without a showing of special circumstances (*see Matter of Paul W.*, 96 AD3d 426 [1st Dept 2012]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8609 The People of the State of New York, Ind. 1053/00
Respondent,

-against-

Felix Aponte,
Defendant-Appellant.

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

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

Order, Supreme Court, New York County (Bruce Allen, J.), issued on or about May 12, 2010, which denied defendant's CPL 440.10 motion to set aside a resentence of the same court and Justice, rendered June 20, 2008, resentencing defendant to a term of eight years with three years' postrelease supervision, unanimously reversed, on the law, the motion granted, and the original sentence of eight years without postrelease supervision reinstated.

Although defendant's original sentence in 2000 unlawfully omitted postrelease supervision, the 2008 resentence adding PRS was also unlawful because defendant had already completed his entire sentence (*see People v Williams*, 14 NY3d 198, 217 [2010]).

In connection with the resentencing, defendant negotiated a

particular term of PRS and waived his right to appeal. However, the waiver does not foreclose defendant's present claim. The addition of PRS after defendant had completed his original sentence produced a substantively unlawful sentence; that is, a sentence that the court had no power to impose. A defendant cannot validly consent to such a sentence, and the right to challenge such a sentence cannot be waived (*see People v Seaberg*, 74 NY2d 1, 9 [1989]).

Although *Williams* was grounded in double jeopardy concerns, a double jeopardy violation that renders a sentence unlawful is distinguishable from the kind of double jeopardy violation that may be expressly waived, because different societal interests are involved (*see People v Allen*, 86 NY2d 599, 602-603 [1995]). In any event, the record does not establish an express waiver of defendant's double jeopardy rights at the time of the

resentencing.

The People's remaining arguments are unpreserved and without merit.

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8610 In re The City of New York, et al., Petitioners, Index 403276/10

-against-

The Commissioner of Labor, et al., Respondents.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for petitioners.

Eric T. Schneiderman, Attorney General, New York (C. Michael Higgins of counsel), for The Commissioner of Labor and New York State Industrial Board of Appeals, respondents.

Mary J. O'Connell, New York (Aaron S. Amaral of counsel), for District Council 37, AFSCME and AFL-CIO, respondents.

Determination of respondent Industrial Board of Appeals (IBA), dated September 22, 2010, which, after a hearing, among other things, imposed daily penalties upon the Commissioner of Labor's findings that the citations for petitioners' violation of 29 CFR 1910.1030(c)(1)(iv) and 29 CFR 1910.1030(g)(2)(viii) were not abated, unanimously confirmed, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered February 24, 2011) dismissed.

Contrary to petitioners' contention, they had the burden in

the appeal to the IBA to show that they had abated the violations (*see* State Administrative Procedure Act 306 [1]; 12 NYCRR 65.30; *see also* 29 CFR 1956.52 [h]). Further, IBA's findings were supported by substantial evidence. IBA reasonably concluded that petitioners failed to show that the three facilities in question had sufficiently knowledgeable trainers, given that the New York City Department of Juvenile Justice (DJJ) failed to submit documentation of the training provided to the trainers on the process of addressing exposure to bloodborne pathogens. Further, contrary to petitioners' contention, the Commissioner's citation for the failure to adequately update the plan constituted sufficient notice to DJJ about the need to provide a site-specific plan. In any event, to the extent that such notice was insufficient under Labor Law 27-a(6)(a), it would not constitute a basis to annul the determination in an article 78 proceeding (*see Matter of D & D Mason Contrs., Inc. v Smith*, 81 AD3d 943, 944-945 [2d Dept 2011], *lv denied* 17 NY3d 714 [2011]).

Contrary to respondents' contentions, petitioners did not waive their challenges to the daily penalties assessed, which were raised in their closing memorandum in the appeal to IBA (*see* Labor Law § 101 [2]). However, we reject those challenges on the merits. The penalties assessed are within the limits set by

Labor Law § 27-a(6)(a), were appropriately assessed separately for each facility found to be in violation, and do not shock the conscience (*see Statharos v New York City Taxi & Limousine Commn.*, 269 AD2d 280, 281 [1st Dept 2000], *lv denied* 95 NY2d 767 [2000]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8611-
8611A Inez Simens, etc., et al.,
Plaintiffs-Respondents,

-against-

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

Index 105097/09

Rosenfeld & Kaplan, LLP, New York (Steven M. Kaplan of counsel), for appellants.

Scott F. Guardino, PLLC, Albertson (Scott F. Guardino of counsel), for respondents.

Amended order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about May 22, 2012, which sua sponte vacated a prior order and judgment (one paper), same court and Justice, entered on or about April 26, 2012, and granted so much of plaintiffs' motion as sought to find defendant Charles Darwish in criminal contempt for violating a March, 2010 order, and directed that he be incarcerated for 14 days, unanimously reversed, on the law, without costs, the finding of criminal contempt vacated, and the matter remanded to Supreme Court for an evidentiary hearing on defendant's alleged wilfulness in failing to comply with the prior order. Appeal from the April 26, 2012 order and judgment, unanimously

dismissed, without costs.

The fact that a party does not comply with a court order does not, in and of itself, constitute criminal contempt (*see e.g. Matter of Stone v Stone*, 54 AD2d 858 [1st Dept 1976]; *New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d 49, 50 [1st Dept 1997]). Where, as here, defendant asserts that he did not wilfully disobey the court order in that he believed, in good faith, that the order did not prohibit him from taking the challenged actions, the court must hold a hearing to determine whether the disobedience was wilful (*see Usina Costa Pinto, S.A. v Sanco Sav. Co.*, 174 AD2d 487 [1st Dept 1991]).

Moreover, Supreme Court failed to apply the correct standard of proof when it held that Darwish's criminal contempt had been demonstrated by "clear and convincing evidence." "[C]riminal

contempt must be proven beyond a reasonable doubt" (*Town Bd. of Town of Southampton v R.K.B. Realty, LLC*, 91 AD3d 628, 629 [2d Dept 2012]; *see New York City Coalition to End Lead Poisoning v Giuliani*, 245 AD2d at 50).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8612 In re Tyler R.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Patricia S. Colella of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about December 14, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of robbery in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him with the Office of Children and Family Services for a period of 18 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 determinations concerning identification

and credibility. The victim made a prompt and reliable identification, which was corroborated by circumstantial evidence provided by a police officer.

The court providently exercised its discretion in drawing an adverse inference from appellant's failure to call two witnesses who could have supported his alibi testimony (*see People v Savinon*, 100 NY2d 192, 197 [2003]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8613 The People of the State of New York, Ind. 1884/08
Respondent,

-against-

Randy Dicks,
Defendant-Appellant.

Law Offices of Douglas G. Rankin, P.C., Brooklyn (Douglas G. Rankin of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered April 29, 2011, convicting defendant, after a jury trial, of bribery in the third degree, and sentencing him to a term of six months of intermittent imprisonment to be served on weekends, unanimously affirmed.

Recordings of incriminating conversations between defendant and other persons were properly authenticated by participants' testimony that the recordings were accurate, complete and unaltered (*see People v Ely*, 68 NY2d 520, 527 [1986]; *People v Agudelo*, 96 AD3d 611 [1st Dept 2012]). Defendant's identity as a participant in the conversations was sufficiently established by the testimony of another participant, as well as the surrounding circumstances, including several face-to-face meetings that

followed up on the recorded conversations. No chain-of-custody evidence was required (*see People v Ely*, 68 NY2d at 528), and since the contents of the tapes were not in dispute, the best evidence rule did not apply (*see People v Schozer v William Penn Life Ins. Co.*, 84 NY2d 639, 643 [1984]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8614 Steven Tanger, Index 116838/05
Plaintiff-Appellant,

-against-

Alfred Ferrer III, et al.,
Defendants-Respondents.

Brown & Whalen, P.C., New York (Rodney A. Brown of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 1, 2012, which granted defendants' motion for leave to serve a demand for a jury trial nunc pro tunc, and denied plaintiff's motion to strike the jury demand and for sanctions, unanimously affirmed, without costs.

Defendants established that their failure to timely serve a jury demand was unintentional, and plaintiff failed to demonstrate any prejudice arising from the delay (*see* CPLR 4102[a], [e]; *Ossory Trading v Geldermann, Inc.*, 200 AD2d 423 [1st Dept 1994]). Defendants' lead counsel affirmed that he simply failed to notice plaintiff's request for a nonjury trial in the note of issue, because he was focused on reviewing the voluminous case file to insure that discovery was complete. To

the extent plaintiff argues that he will be prejudiced by the glimpse defendants were afforded into his trial strategy during the parties' mediation, which he says was based on the understanding that a nonjury trial would follow if mediation failed, we find that he has not demonstrated such prejudice. Moreover, at the time of defendants' motion, the parties were contemplating continued mediation and no trial date had been scheduled; as the motion court observed, plaintiff will have adequate time to prepare for trial.

Defendants' conduct does not rise to the level of frivolous conduct as defined in 22 NYCRR 130-1.1(c). Moreover, we note that the motion court awarded costs to plaintiff.

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

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8615 Cambridge Integrated Services Group, Inc., etc.,
Plaintiff-Respondent,

-against-

Norman L. Faber, Esq., et al.,
Defendants-Appellants,

Donald Pressley,
Defendant.

Index 104108/09

Norman L. Faber, New York, appellant pro se and for Law Office of Norman L. Faber, Esq., appellant.

Barry, McTiernan & Wedinger, Staten Island (Laurel A. Wedinger of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered November 30, 2010, which, insofar as appealed, denied the motion of defendants Norman L. Faber, Esq., and Law Office of Norman L. Faber, Esq. (collectively, Faber) for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On September 14, 2000, defendant Donald Pressley, a New York City resident, was injured in a tractor-trailer accident in Connecticut during the course of his employment with nonparty Cobra Express Inc., which is located in New Jersey. Fremont Compensation Company (Fremont), the workers' compensation carrier

for Cobra Express, paid Pressley New Jersey workers' compensation benefits, making the last payment to Pressley on May 9, 2002.

On or about September 19, 2000, Pressley retained nonparty Paul A. Shneyer, Esq., to bring a personal injury lawsuit for injuries he sustained in the accident. When Shneyer failed to timely commence an action, Pressley commenced a malpractice action against him. The Faber defendants represented Pressley in that action and settled the case against Shneyer in December 2008. On March 24, 2009, plaintiff, the administrator for Fremont (now in liquidation), commenced the instant action to enforce a lien against the settlement proceeds.

The Faber defendants maintain that under *Matter of Shutter v Phillips Display Components Co.* (90 NY2d 703 [1997]), New Jersey cases holding that workers' compensation liens attach to legal malpractice recoveries (*see Frazier v New Jersey Mfrs. Ins. Co.*, 142 NJ 590, 667 A2d 670 [1995]; *Utica Mut. Ins. Co. v Maran & Maran*, 142 NJ 609, 667 A2d 680 [1995]) do not apply in this case because the malpractice recovery did not duplicate the medical payments and lost wages Pressley received under workers' compensation. This argument is unavailing. Pursuant to a June 2010 order from which the Faber defendants did not appeal, New Jersey law applies to the merits of plaintiff's claims and thus,

New York law regarding double recoveries is inapplicable.

Under New Jersey law, a double recovery "occurs when the employee keeps *any* workers' compensation benefits that have been matched by recovery against the liable third person" (*Frazier*, 142 NJ at 602, 667 A2d at 676 [emphasis in original]), rendering irrelevant whether the settlement of the legal malpractice action included medical expenses and lost wages. We note, however, that even if New York law applied, the settlement did not specify what it was for and therefore, we cannot conclude that no part of it was for medical expenses and lost wages.

Defendants' argument that the application of New Jersey law in this case violates New York public policy because Pressley is a New York resident fails because although defendants have shown that New York and New Jersey law differ on this issue, they have not satisfied the stringent test for rejecting New Jersey law as against New York public policy (*see* 19A NY Jur 2d, Conflict of Laws § 17).

Contrary to defendants' argument, the instant action is not time-barred. As agreed to by the parties, New York's three year

statute of limitations is applicable. We agree with the motion court that plaintiff's claim accrued when Pressley received the settlement payment from Shneyer (*see Aetna Life & Cas. Co. v Nelson*, 67 NY2d 169, 175-176 [1986]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8616 The People of the State of New York, ex rel. James Smith,
Petitioner-Appellant,

-against-

Joandrea Davis, etc.,
Respondent-Respondent.

Index 400502/11

Steven N. Feinman, White Plains, for appellant.

Order, Supreme Court, New York County (Larry Stephan J.), entered March 18, 2011, unanimously affirmed, without costs.

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.

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

ENTERED: NOVEMBER 20, 2012

CLERK

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

8617N Arianit Simoni, Index 24300/06
Plaintiff-Respondent,

-against-

Elizabeth Costigan,
Defendant-Appellant,

Ann Morgan Bernardone, et al.,
Defendants.

- - - - -

Arianit Simoni,
Plaintiff-Respondent,

-against-

Paul J. Napoli, Esq., et al.,
Defendants-Respondents.

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Lewis Johs Avallone Aviles, LLP, Melville (Seth M. Weinberg of counsel), for appellant.

The Dauti Law Firm, P.C., New York (Ylber Albert Dauti of counsel), for Arianit Simoni, respondent.

Ropers Majeski Kohn & Bentley, New York (Andrew L. Margulis of counsel), for Paul J. Napoli, Marc J. Bern, Alan S. Ripka, Napoli Bern Ripka, LLP and Jeffrey W. Varcadipane, respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered February 17, 2011, which, inter alia, denied defendant Costigan's motion to consolidate two personal injury actions with a legal malpractice action, unanimously affirmed, without costs.

Although the personal injury actions and the legal

malpractice action involve “a common question of law or fact” (CPLR 602[a]), consolidation could engender jury confusion and prejudice the defendants in the malpractice action (*see Addison v New York Presbyt. Hosp./Columbia Univ. Med. Ctr.*, 52 AD3d 269, [1st Dept 2008]; *Brown v Brooklyn Union Gas Co.*, 137 AD2d 479 [2nd Dept 1988]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8637-
8637A Index 302046/11

Hutchinson Burger, Inc., et al.,
Plaintiffs-Respondents,

-against-

Hutch Restaurant Associates, L.P., et al.,
Defendants-Appellants,

Kathleen R. Bradshaw,
Defendant.

Braunstein Turkish LLP, Woodbury (William J. Turkish of counsel), for appellants.

K.C. Okoli, New York, for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 10, 2012, which, in this action for, inter alia, breach of contract, upon reargument, to the extent appealed from, denied so much of defendants-appellants' motion as sought to dismiss the complaint as against defendants Hutch Restaurant Associates, L.P., Burger Brothers Hutch, Inc., and John Froccaro, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered June 27, 2011, unanimously dismissed, without costs, as superseded by the appeal

from the order on reargument.

In this case, plaintiffs were obligated to obtain a valid drive-thru permit as a condition to the closing of the sale of a Burger King restaurant. When the initial closing date passed without the permit, the parties executed an amendment that lowered the purchase price of the property, payable as cash and a non-interest-bearing note to the plaintiffs. This amendment also provided for a reduction in the value of the note should the plaintiffs fail to obtain the drive-thru license within a new specified time. Several weeks later, without a closing or progress on the permit, the parties revised the agreement again to add that the outstanding balance on the note would be further reduced to zero should the plaintiffs fail to obtain the permit within one year of the closing date. The transaction closed on March 24, 2009 with the cash payment and the transfer of the note. On September 14, 2010, over six months after the one year time limit for obtaining the permit, it was finally obtained.

Plaintiffs now claim that the amendment reducing the value of the note to zero was a penalty disguised as a liquidated damages clause. The motion court denied defendants' motion to dismiss on the ground that there were questions of fact concerning a meeting of the minds with regard to the amendment.

The documentary evidence submitted on the motion conclusively establishes that the 100% reduction term in the note at issue is fully enforceable (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). Indeed, the evidence shows that plaintiffs had notice of the term, discussed it amongst themselves and, ultimately, signed a letter agreement referencing the note containing the amendment at issue. That plaintiffs' representatives at closing failed to read the actual note is of no moment. Indeed, "a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it" (*Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 304 [2001]). Here, there is no valid excuse for plaintiffs' failure to read the note. The documentary evidence refutes any claim of fraud on the part of defendants (*see Pimpinello v Swift & Co.*, 253 NY 159, 162-164 [1930]). Further, plaintiffs never argued that their attorney lacked authority to sign the letter agreement, nor does the evidence support such a claim. Indeed, the record shows that plaintiffs' attorney signed the agreement pursuant to a power of attorney given by the corporate plaintiff's president, and in the presence of one of the corporate plaintiff's officers. The harsh

result of enforcing the 100% reduction term does not render it a penalty (*see CBS Inc. v P.A. Bldg. Co.*, 200 AD2d 527, 527 [1st Dept 1994]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8638 In re Marquis T.,

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

Patricia W. Jellen, Eastchester, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan B. Eisner of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about January 12, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of arson in the fourth and fifth degrees and criminal mischief in the fourth degree, and placed him on probation for a period of six months, unanimously affirmed, without costs.

The court's finding 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. We have considered and rejected defendant's argument concerning the statements he made to school officials (*see Matter of Cy R.*, 43 AD3d 267 [1st Dept 2007], *lv denied* 9 NY3d 814 [2007], *cert denied* 552 US 1320 [2008]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8639 James Bilias, Index 115369/06
Plaintiff-Respondent,

-against-

Gaslight, Inc.,
Defendant-Appellant,

Alex Sanchez,
Defendant.

_____

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for appellant.

Wingate, Russotti, Shapiro & Halperin, L.L.P., New York (William P. Hepner of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered October 17, 2011, which denied the motion of defendant Gaslight, Inc. for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Gaslight failed to establish its entitlement to judgment as a matter of law in this action for personal injuries allegedly sustained by plaintiff when he was attacked by defendant Sanchez after being forcibly escorted out of Gaslight's bar. The conflicting testimony contained in the record raises triable issues, including whether Sanchez was an employee of Gaslight, whether the acts complained of were excessive, and whether such

acts were within the scope of Sanchez's employment and in furtherance of Gaslight's business (*see Sims v Bergamo*, 3 NY2d 531, 534-535 [1957]; *Babikian v Nikki Midtown, LLC*, 60 AD3d 470 [1st Dept 2009]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8642-
8642A Index 603492/06

Apple Bank for Savings,
Plaintiff-Appellant,

-against-

PricewaterhouseCoopers LLP,
Defendant-Respondent.

Foley & Lardner LLP, New York (Peter N. Wang of counsel), for appellant.

Curtis, Mallet-Prevost, Colt & Mosle LLP, New York (Eliot Lauer of counsel), for respondent.

Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered December 20, 2011, which denied plaintiff's motion in limine for a clarification in its favor and concluded that the only claims remaining in this action are those concerning defendant's preparation of plaintiff's tax returns in 2002 and 2003, and granted defendant's motion in limine to preclude plaintiff from presenting, as evidence of damages, payments that it made for increased tax liability in 2002, 2004, and 2005 as a result of its share repurchases in those years, unanimously affirmed, with costs.

Plaintiff's breach of contract claim is based on the same facts as its negligence claim. Plaintiff's arguments that

defendant never sought to dismiss the breach of contract claim and that such claim is governed by the six-year statute of limitations set forth in CPLR 213(2) are unavailing. Defendant previously moved to dismiss plaintiff's causes of action for negligence and breach of contract as time-barred, arguing that they are claims for professional malpractice subject to a three-year statute of limitations (*see* CPLR 214[6]). In its opposition, plaintiff argued that the applicable three-year statute of limitations had been tolled, relying on the doctrine of continuous representation. Plaintiff did not argue that its contract claim was governed by the six-year statute of limitations in CPLR 213(2), and the motion court rejected the continuous representation doctrine with respect to claims arising from defendant's 2000, 2001, and 2002 audits of plaintiff's financial statements (*see Apple Bank for Sav. v PricewaterhouseCoopers, LLP*, 18 Misc 3d 1137[A], 2008 NY Slip Op 50340[U], *4 [Sup Ct, NY County 2008]). A subsequent motion to dismiss all of the remaining claims was denied, and on appeal, we rejected plaintiff's continuous representation argument (*see Apple Bank for Sav. v PricewaterhouseCoopers, LLP*, 23 Misc 3d 1126[A], 2009 NY Slip Op 50948[U] [Sup Ct, NY County 2009], *revd* 70 AD3d 438 [1st Dept 2010]). Thus, the motion court's denial

of plaintiff's motion in limine was entirely proper.

With regard to the appeal from the order granting defendant's motion in limine to preclude certain evidence, we reject plaintiff's argument that the motion court failed to focus on when plaintiff could have brought a claim for the damages suffered as a result of the 2002 redemption. Notably, the court considered – and rejected – plaintiff's accrual argument. Further, plaintiff's contention that, by not recording a recapture of its bad debt reserve, the 2002 tax return "re-endorsed" defendant's time-barred advice that plaintiff's purchase of certain shares would not cause such a recapture, is an attempt to evade our prior decision on continuous representation (*see Apple Bank for Sav. v PricewaterhouseCoopers, LLP*, 70 AD3d at 438).

Although defendant was aware in 2002 and 2003 that plaintiff was redeeming shares, "this knowledge, in and of itself, is insufficient, *as a matter of law*" to impose liability on defendant for plaintiff's increased taxes in 2004 and 2005 (*Kenford Co. v County of Erie*, 73 NY2d 312, 320 [1989] [emphasis added]) since defendant never contemplated at the time the parties executed the engagement letter for the preparation of plaintiff's 2002 tax return "that it assumed legal responsibility

for these damages upon a breach of the contract" (*id.; see also id.* at 322).

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: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8643 In re Melissa H.,
Petitioner-Respondent,

-against-

Shameer S.,
Respondent-Appellant.

Andrew J. Baer, New York, for appellant.

Yisroel Schulman, New York Legal Assistance Group, New York (Amanda Beltz of counsel), for respondent.

Order of disposition, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about December 21, 2011, which, after a fact-finding hearing, determined that respondent father had committed acts constituting the family offenses of aggravated harassment in the second degree and assault in the second degree against petitioner mother, and, after a finding of aggravated circumstances, issued a five-year order of protection against him, unanimously reversed, on the law, without costs, the orders vacated, and the matter remitted for a new hearing.

The fact-finding hearing was procedurally flawed and unfair to respondent. The court failed to conduct a "searching inquiry" to ensure that respondent knowingly, intelligently, and

voluntarily waived his statutory right to counsel (*see* Family Ct Act § 262[a][ii]; *People v Arroyo*, 98 NY2d 101, 103 [2002]; *People v Slaughter*, 78 NY2d 485, 491 [1991]). Further, the court concluded, without reviewing any financial documentation, that respondent was ineligible for assigned counsel. The court asked him only if he wished to have the matter adjourned so that he could retain counsel at his own expense. When respondent answered in the negative, the court proceeded to ask him questions relevant to the then-pending competing petitions for custody of the parties' children. There is no indication that respondent understood that from this point on the preliminary hearing would become the fact-finding hearing with respect to the family offense petition.

Moreover, although respondent had asked to make a statement in response to allegations made by petitioner, there is no indication that he understood that upon doing so, the court would then transform his statements into his testimony for purposes of the fact-finding hearing on the family offense petition. The court had cautioned respondent that what he said could be used against him in the pending criminal case, but assured him that the court would not hold what he said against him in this proceeding. However, the court did just that. In addition,

rather than having to first present a prima facie case in support of the allegations in her petition, the petitioner was allowed to respond only to respondent's version of events (*see generally Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]). In light of the above finding, we need not reach the other issues raised by respondent.

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8644 In re Scott Leo, Index 113955/11
Petitioner-Appellant,

–against–

The New York City Department
of Education,
Respondent-Respondent.

Scott Leo, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 26, 2012, denying the petition to annul respondent's termination of petitioner's probationary employment, revocation of his Department of Education (DOE) teaching certification, placement of his name on DOE's ineligible/inquiry list, and award of an overall unsatisfactory rating for the 2010-2011 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner's challenges to the revocation of his teaching certification and the placement of his name on the ineligible/inquiry list are not time-barred (*see* CPLR 217). However, the court correctly sustained those determinations and the determination terminating petitioner from his probationary

employment because petitioner failed to establish that his termination was done in bad faith (*see Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]). While petitioner's allegations of bad faith are not, as respondent contends, conclusory, the record contains evidence of good faith on respondent's part – for example, Principal Martin's intention was not to terminate petitioner's employment but to extend his probation for an additional year – as well as evidence of deficiencies in petitioner's performance.

Petitioner's challenge to his year-end U-rating was premature because he did not exhaust his administrative remedies (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept. 2011]; *Matter of Hazeltine v City of New York*, 89 AD3d 613, 614 [2011]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, JJ.

8645 The People of the State of New York, Ind. 2922/09
Respondent,

-against-

Selbin Martinez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered March 10, 2011, as amended March 25, 2011, convicting defendant, after a jury trial, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of 4½ years, unanimously affirmed.

The verdict was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). Moreover, we find that the evidence of defendant's guilt was overwhelming. There is no basis for disturbing the jury's credibility determinations.

The victim testified that he recognized defendant, who was wearing a mask, based on his body type and his manner of walking, since he had seen defendant in his apartment building on a

regular basis for years. In addition, the victim saw a portion of defendant's face that was left exposed, and heard him speak during the incident. The jury could have reasonably inferred that these factors facilitated the victim's ability to recognize defendant as one of his neighbors. The victim also recognized the other masked assailant as defendant's brother (*see People v Martinez*, 95 AD3d 677 [1st Dept 2012] [codefendant's appeal]).

Furthermore, shortly after the crime, the police went to defendant's apartment and were admitted by his mother. The officers found defendant hiding in a closet underneath a pile of clothing. Defendant had a bump and a fresh cut on his head. During the incident, the victim had hit the assailant he recognized as defendant in the head with a cue ball. There was no possible innocent explanation of these circumstances, which rendered the evidence overwhelming.

The court delivered an identification charge in which it marshaled some of the evidence relating to the victim's recognition of defendant. When viewed as a whole, the marshaling tended to favor defendant, and it did not deprive him of a fair trial (*see People v Culhane*, 45 NY2d 757, 758 [1978], *cert denied* 439 US 1047 [1978]).

An officer's testimony about his communications with

officers who were monitoring surveillance cameras in the apartment building where the incident occurred did not constitute inadmissible hearsay warranting reversal. Even if the officer's testimony that he did not learn of anyone who matched the assailants' description leaving the building could be viewed as implied hearsay, it was admissible to complete the officer's narrative by explaining why he then canvassed the building (*see People v Tosca*, 98 NY2d 660 [2002]). In any event, in light of the overwhelming evidence of guilt, there is no significant probability that this vague testimony affected the verdict (*see People v Kello*, 96 NY2d 740, 744 [2001]). Defendant's contention that the court erred by failing to give a limiting instruction is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we likewise find that any error in this regard was harmless.

The court properly exercised its discretion in declining to deliver an adverse inference charge pertaining to the loss of an officer's handwritten notes (*see Martinez*, 95 AD3d at 678).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8646 In re RCN Telecom Services of New York, LP, etc., et al., Petitioners-Appellants, -against- David M. Frankel, etc., et al., Respondents-Respondents. Index 105286/11

Law Offices of David M. Wise, P.A., Babylon (David M. Wise of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Robert J. Paparella of counsel), for respondents.

Order, Supreme Court, New York County (Martin Shulman, J.), entered March 15, 2012, which, insofar as appealed from as limited by the briefs, denied petitioners' motion for summary judgment declaring that their backup power equipment is not assessable as real property as a matter of law and that certain tax assessments on that equipment are nullities due to the municipal respondents' failure to provide timely notice thereof, and, upon a search of the record, awarded respondents summary judgment dismissing the causes of action seeking those declarations, unanimously modified, on the law, to vacate the award of summary judgment dismissing those causes of action and substitute therefor the declarations that petitioners' backup

power equipment is assessable as real property and that the assessments at issue are not nullities for lack of notice, and otherwise affirmed, without costs.

The property at issue is backup power equipment situated on leased premises around Manhattan, "hubs" of which comprise "Uninterruptible Power Supply" equipment (consisting of banks of batteries that smooth out power fluctuations and provide backup power in the event of brief power interruptions) and emergency backup generators, each capable of generating between 400 and 1,000 kilowatts of electricity, with fuel tanks of up to 1,800 gallons each. It is undisputed that each of petitioners' installations of backup power equipment may be removed by a few workers within two to four days, without any material injury to any structural element of the buildings in which they reside. Nevertheless, we reject petitioners' argument that this property is not assessable under Real Property Tax Law (RPTL) § 102(12(f) because it falls within the exception for "movable machinery or equipment."

RPTL 102(12)(f) provides that "'Real property' . . . mean[s] and include[s]":

> "Boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than

> counter-shafting and equipment for the distribution of heat, light, power, gases and liquids, but shall not include movable machinery or equipment consisting of structures or erections to the operation of which machinery is essential, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto."

Petitioners' backup power equipment clearly is "power generating apparatus," which is defined as assessable real property, and, at the same time, appears to be "movable machinery," which on its face is excluded from the definition of real property. However, § 102(12)(f) derives from former Tax Law § 3 and was "intended to effectuate a continuation and restatement, without change in substance or effect, of the provisions of [that] law[] and the classification of any property as real property or personal property, as the case may be, shall not be broadened, increased, discontinued, diminished, affected or impaired by reason of such re-enactment" (RPTL 2002[5]; *see Matter of City of Lackawanna v State Bd. of Equalization & Assessment of State of N.Y.*, 16 NY2d 222, 228 [1965]). Former Tax Law § 3 provided, in pertinent part:

> "All real property within the state is taxable unless exempt from taxation by law. . . . Notwithstanding any provision of this

> chapter, or of any other general, special or local law to the contrary, personal property, whether tangible or intangible, shall not be liable to taxation locally for state or local purposes. As used in this section, the term 'personal property,' in its application to the property of corporations taxable under article nine-a of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto and shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee."

Thus, former Tax Law § 3 provided that "personal property" included "movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto" but did not include, inter alia, "power generating apparatus." Construing RPTL 102(12)(f) as carrying forward former Tax Law § 3's provisions without substantive change (*see* RPTL 2002[5]), we find that under RPTL 102(12)(f) "power generating apparatus" is assessable real property, regardless of whether it is also "movable machinery [or]

equipment."

We reject petitioners' alternative contention that their backup power equipment is telecommunications equipment, which they argue was specifically exempted from real property tax by the enactment of Chapter 416 of the Laws of 1987. That legislation declared that "central office equipment" and "telecommunications equipment," which "mean[t] and include[d] equipment used to provide transmission or switching of electromagnetic voice, video and data signals between different entities . . . and related equipment necessary to the operation of such equipment . . ., shall constitute real property subject to taxation pursuant to the real property tax law" (L 1987, ch 416, § 6). Contrary to petitioners' contention, Chapter 416 does not repeal any and all property taxes on telecommunications equipment. It repeals then existing telecommunications-specific taxation provisions and provides that telecommunications equipment will thereafter be subject to real property taxation according to the generally applicable provisions of the Real Property Tax Law.

We have considered petitioners' remaining arguments, including their claim that respondents' failure to mail written notice of the assessments to petitioners' updated mailing address rendered the assessments void, and find them unavailing.

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Freedman, JJ.

8647 The People of the State of New York, SCI 88/04
Respondent,

-against-

Israel Negron,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (John P. Collins, J.), rendered on or about March 23, 2006,

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 order so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 20, 2012

CLERK

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

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8648 Ramon Corona, Index 301774/10
Plaintiff-Appellant,

-against-

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

Law Offices of Alan M. Greenberg, P.C., New York (Robert J. Menna of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 12, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action where plaintiff was injured while participating in a recreational softball game. As plaintiff was running, he stepped in a rut in the field and injured his leg. It is well established that "[b]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v State of New York*, 90 NY2d 471, 484 [1997]). Here, plaintiff assumed the risk of injury by

voluntarily participating in the sport of softball and the risks inherent in the sport include those associated with the construction of the playing surface (*see Lincoln v Canastota Cent. School Dist.*, 53 AD3d 851, 852 [3d Dept 2008]). The game was played on a natural surface and plaintiff, had the experience to know that imperfections might be present, and indeed, may have been created or increased over the course of the game (*compare Furnari v City of New York*, 89 AD3d 605, 606-607 [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: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8649-
8650 Index 350665/07

Yanina Rivera, an Infant by her
Mother and Natural Guardian,
Carmen Hernandez,
Plaintiff-Appellant,

-against-

K. Jothianandan, M.D.,
Defendant-Respondent.

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

Mauro Lilling Naparty LLP, Woodbury (Katherine Herr Soloman of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 24, 2012, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 16, 2011, which granted defendant's post-trial motion to set aside or, in the alternative, reduce the verdict, as legally insufficient and/or against the weight of the evidence, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiffs claim that defendant's alleged failure to diagnose and treat the infant plaintiff's appendicitis resulted in an unnecessary open appendectomy, with its resultant scar and

other damages, as opposed to the less invasive laparoscopic procedure.

On March 21, 2005, the infant plaintiff, a 10-year-old girl who had complained of a stomach ache and diarrhea, was taken to see defendant. Defendant examined plaintiff, and her findings showed no symptoms of appendicitis, including any fever, vomiting, or severe stomach pain, when she examined plaintiff's abdominal area. Defendant diagnosed gastroenteritis, and prescribed bed rest, Tylenol and Pedialyte. Plaintiff complained of stomach pain over the next few days, and, on Wednesday evening, March 23, 2005, over two days since she had seen defendant, her mother took her to the emergency room of Bronx Lebanon Hospital, where she underwent an emergency open appendectomy.

Because there was insufficient proof that plaintiff presented to defendant with the symptoms of appendicitis, the evidence was legally insufficient to support the verdict (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]).

Plaintiffs must show that defendant departed from the accepted standard of medical practice, and that this departure was a proximate cause of the patient's injuries, via the presentation of expert testimony, in order to prevail in a

medical malpractice action (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 24 [1st Dept 2009]; *Pauling v Orentreich Med. Group*, 14 AD3d 357 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]).

The only departure from good and accepted medical practices attributed to defendant was plaintiffs' expert's opinion that, had defendant written down the results of her findings, she might have noted "some issues," but he did not purport to explain what these issues were. Further, plaintiffs' expert relied on assumptions that were not supported by evidence in the record, such as an assumption that plaintiff presented with fever. Thus, his opinion was conclusory and speculative, and failed to make out a prima facie case, since he stated defendant's departures consisted of failing to "document" a good physical exam of plaintiff, not her failure to "perform" a good one (*see Rodriguez*, 28 AD3d 357).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8651 Abraham Silverio, Index 29841/02
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

Fraiden & Palen, Bronx (Norman Fraiden of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered June 29, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted since plaintiff failed to demonstrate that defendant had received prior written notice of the sidewalk defect that allegedly caused plaintiff's fall and resultant injuries (*see* Administrative Code § 7-201[c]; *Katz v City of New York*, 87 NY2d 241, 243 [1995]). The violation notices cited by plaintiff, dated 15 and 28 years before the accident, were too remote in time, and were superseded by a Big Apple map filed in 2001, which failed to depict any defect (*id.*

at 244). Moreover, the notices relied upon by plaintiff fail to specify the defective condition, and indicate that they relate to an address other than the location of the defect referred to by plaintiff in his notice of claim, complaint and testimony.

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8652 Terrence Noble, Index 100214/07
Plaintiff-Respondent, 590120/09

-against-

260-261 Madison Avenue, LLC, et al.,
Defendants-Appellants,

Ziruale Inc, et al.,
Defendants.

- - - - -

260-261 Madison Avenue, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

United Staffing Systems, Inc., et al.,
Third-Party Defendants.

_____

O'Connor O'Connor Hintz & Deveney, LLP, Melville (Eileen M. Baumgartner of counsel), for appellants.

Wingate Russotti Shapiro & Halperin, LLP, New York (William P. Hepner of counsel), for respondent.

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Amended order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 8, 2012, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, and granted plaintiff's cross motion for partial summary judgment on his Labor Law § 240(1) claim as against defendants-appellants 260-261 Madison Avenue, LLC and Ziruale

Construction, Inc. (defendants), unanimously modified, on the law, to deny the cross motion, and otherwise affirmed, without costs.

Defendants' evidence was sufficient to defeat plaintiff's cross motion for partial summary judgment on the Labor Law 240(1) claim. Defendants' evidence established, at minimum, that triable issues exist whether the 10-foot ladder provided to plaintiff, under the circumstances (including a measured ceiling height of 10 feet 7 inches), constituted an adequate safety device for the air duct removal work he was assigned to perform. Specifically, triable issues exist as to whether, inter alia: (1) the six-foot tall plaintiff was able to stand on the sixth or seventh rung of the 10-step ladder (as he claimed) and still have the necessary headroom to accomplish his work; (2) whether plaintiff actually stood lower down on the ladder in view of the apparent ceiling height constraints, such as might allow him ready hand access to the ladder for support; and (3) whether the admittedly stable ladder required another worker to hold it secure if plaintiff was working from a lower position than claimed, particularly considering that plaintiff admitted he only fell after the ceiling conduit pipe, onto which he purportedly held for support, broke free, resulting in his fall. Since there

was no evidence that plaintiff was leaning or had to reach to perform his work, triable issues exist whether plaintiff actually stood high enough on the ladder as would warrant securing the ladder beneath him and, further, assuming arguendo, the ladder was so secured, whether it would have prevented his fall once the conduit pipe broke free from its ceiling support system.

Defendants' evidence also raises a factual issue as to whether plaintiff's own acts or omissions were the sole cause of his accident; namely, whether an adequate safety device was available (i.e., the 10-foot ladder), but arguably not properly utilized by plaintiff (*see generally Robinson v East Med. Ctr., LP*, 6 NY3d 550 (2006); *cf. Gallagher v New York Post*, 14 NY3d 83 [2010]). Plaintiff did not state he was unable to support himself by holding onto the ladder (which was in front of him), but only stated that he had found himself holding onto the conduit rod for support. While a plaintiff may be granted partial summary judgment based on his own testimony as to how an accident happened, and notwithstanding that he was the sole witness to the accident, such motion may also be denied where, as here, defendants present evidence that raises factual issues whether the accident occurred in the manner the plaintiff claimed, and whether he was the sole cause of his accident (*see*

generally Woszczyna v BJW Assoc., 31 AD3d 754 [2d Dept 2006]; *cf. Klein v City of New York*, 89 NY2d 833 [1996]; *Rodriguez v Forest City Jay St. Assoc.*, 234 AD2d 68 [1st Dept 1996]).

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

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8653-
8653A The People of the State of New York, Respondent,

-against-

Antonio Albino, Defendant-Appellant.

Ind. 3000/10
SCI 179/08

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

Judgments, Supreme Court, New York County (Ellen M. Coin, J.), rendered on or about July 14, 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: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8654 Joel Stanger, Index 111703/09
Plaintiff-Respondent,

-against-

Dawn M. Morgan, et al.,
Defendants-Appellants.

McGivney & Kluger, P.C., New York (Michael R. Rawlinson of counsel), for appellants.

Westermann, Sheehy, Keenan, Samaan & Aydelott, LLP, White Plains (Timothy M. Smith of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered October 4, 2010, which denied defendants' motion for an order to compel plaintiff to accept service of their response to plaintiff's notice to admit nunc pro tunc or, in the alternative, to strike the third item in the notice to admit, unanimously modified, on the law, the third item in the notice stricken, and otherwise affirmed, without costs.

While defendants' brief delay in responding to the notice to admit, which occurred during the substitution of counsel, did not result in any prejudice, the motion court could not have compelled plaintiff to accept the response, as it was unsworn and improperly made "upon information and belief" (*see* CPLR 3123[a]; *Rosenfeld v Vorsanger*, 5 AD3d 462, 463 [2d Dept 2004]).

Nevertheless, the request for an admission that the defendant driver was on her cellular phone at the time of the accident was palpably improper, as the matter was in dispute and went to the heart of the issue of whether she was negligent in the operation of the subject vehicle (*see New Image Constr., Inc. v TDR Enters. Inc.*, 74 AD3d 680, 681 [1st Dept 2010]; *Meadowbrook-Richman, Inc. v Cicchiello*, 273 AD2d 6 [1st Dept 2000]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8656 Thomas J. O'Brien, Jr., Index 114853/10
Plaintiff-Respondent,

-against-

The Port Authority of New York
and New Jersey, et al.,
Defendants-Appellants,

Silverstein Properties, Inc., et al.,
Defendants.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellants.

The Perecman Firm, PLLC, New York (Peter D. Rigelhaupt of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered June 11, 2012, which, to the extent appealed from, upon defendant-appellants' (defendants) motion to compel plaintiff to provide authorizations for the release of all medical records preceding the accident in which he was allegedly injured, ordered plaintiff to provide authorizations for the five years preceding the accident, unanimously affirmed, without costs.

Defendants failed to demonstrate that all plaintiff's pre-

accident medical records were material and necessary in the defense of this action (*see* CPLR 3101). Plaintiff does not allege that the accident aggravated or exacerbated a preexisting injury or condition (*see McGlone v Port Auth. of N.Y. & N.J.*, 90 AD3d 479 [1st Dept 2011]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Corrected Order - November 29, 2012

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8657N Uniformed Fire Officers Association, Local 854, etc., et al.,
Petitioners-Respondents,

-against-

The City of New York,
Respondent-Appellant.

Index 101799/12

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for appellant.

Certilman Balin Adler & Hyman, LLP, East Meadow (Paul S. Linzer of counsel), for Uniformed Firefighters Association, Local 94, respondent.

Pryor Cashman, LLP, New York (Joshua Zuckerberg of counsel), for Uniformed Fire Officers Association, Local 854, respondent.

Order, Supreme Court, New York County (Arthur F. **Engoron**, J.), entered on or about April 10, 2012, which denied the City's motion to quash a judicial subpoena, unanimously affirmed, without costs.

The City failed to show that the public interest would be harmed by the disclosure of drafts of a public safety consultant's report recommending a change to the 911 call system (*see Matter of World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 10 [1999]). Absent sensitive subject matter or exposure of review participants to liability, the City's contention that the disclosure of the drafts would have a chilling effect on the

internal discussions of those engaged in reviewing technical projects such as this is speculative. Petitioners, on the other hand, have shown a need for the drafts in preparing their case before the Collective Bargaining Board.

There is no basis for the City's claim of protection under the so-called "self-critical" privilege. This privilege has never been recognized under New York law, and this case is not the exceptional and compelling case that justifies the judicial creation of a new privilege (*see Lamitie v Emerson Elec. Co.-White Rodgers Div.*, 142 AD2d 293, 298-299 [3d Dept 1988], *lv dismissed* 74 NY2d 650 [1989]).

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

ENTERED: NOVEMBER 20, 2012

CLERK

Mazzarelli, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

8658 [M-4050] In re Eric Owens, Petitioner,

-against-

Hon. Ronald Zweibel, etc., et al., Respondents.

Ind. 1050/12

Eric Owens, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Ronald Zweibel, respondent.

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

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 20, 2012

CLERK