SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 7, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3559 Escape Airports (USA), Inc., Index 104945/08
Plaintiff-Respondent,

-against-

Kent, Beatty & Gordon, LLP,
Defendant-Appellant.

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L'Abbate, Balkan, Colavita & Contini, L.L.P., Garden City (William T. McCaffery of counsel), for appellant.

McCallion & Associates LLP, New York (Kenneth McCallion of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 23, 2009, which denied defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The complaint, premised on defendant law firm's alleged failure to include a provision permitting plaintiff to terminate its individual agreements with air carriers in the event the owner of the airport terminal space terminated plaintiff's right to occupy the subject lounge spaces, stated a cause of action

sufficient to withstand the motion to dismiss. It sufficiently pleaded that defendant failed to exercise the ordinary and reasonable skill and knowledge commonly possessed by a member of the legal profession in failing to include such a termination provision, and that plaintiff sustained actual and ascertainable damages as a result of this breach of duty (*Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [2007]). The allegation that plaintiff had to forego an opportunity to cut its losses and instead incur further expenditures and debt, in order to continue providing lounge services to the same number of airline passengers in half the amount of space, sufficiently states a claim for ascertainable and quantifiable damages. We also reject defendant's contentions that plaintiff did not sufficiently allege proximate cause, and that the claim is unduly speculative because it rests on a hypothetical assumption that the airlines would have accepted such a termination provision. The essence of plaintiff's claim is that it consulted defendant for advice concerning the individual contracts with airlines that were based on the template agreement defendant had drafted; defendant gave it bad advice in failing to recommend that a termination provision be added or otherwise advise plaintiff that such protection was lacking; plaintiff had no way of knowing that it had been given bad advice until after it signed the individual

agreements; the airlines had an incentive to agree to a termination provision because plaintiff would not otherwise have been able to provide the contracted for lounge services; and but for this omission, plaintiff would not have incurred damages.

At this juncture, i.e., the motion to dismiss, the professional judgment rule cannot be invoked to determine whether defendant was negligent in failing to include a termination provision, because the state of the record does not allow a determination as a matter of law that defendant deliberately excluded that provision in favor of an equally protective alternative provision (*see e.g. Rosner v Paley*, 65 NY2d 736, 738 [1985]; *Zarin v Reid & Priest*, 184 AD2d 385, 386-387 [1992]). Nor can we conclude that it is or is not overly speculative to surmise that a carrier would have agreed to a termination clause in its lease equivalent to that found in plaintiff's agreement with the airport.

We also decline to upset the court's refusal to dismiss the claim to the extent it is predicated on defendant's alleged failure to include upper-limit-of-passengers and exclusivity provisions. Plaintiff has offered evidence that it suffered damages due to one airline vacating the premises during the lease period, and using the services of another lounge. Whether restrictive lease provisions would have been acceptable to the

vacating airline is an issue we need not determine.

That portion of the motion addressing plaintiff's claim predicated on the occupancy agreement entered into with JFK International Air Terminal LLC was also correctly denied. The fact that plaintiff signed, and is thus bound by, the terms of this agreement does not preclude an action for malpractice against the attorney who assisted in drafting it. Plaintiff alleges that it retained defendant for the express purpose of providing advice with respect to standard terms and conditions to be incorporated in the occupancy agreement. It further alleges that defendant agreed to undertake this task, and did provide plaintiff with very specific comments regarding the standard terms and conditions, but failed to highlight or comment on the termination provision. It is axiomatic that counsel "may not shift to the client the legal responsibility it was specifically hired to undertake because of its superior knowledge" (*Hart v Carro, Spanbock, Kaster & Cuiffo*, 211 AD2d 617, 619 [1995]). Thus, a fact issue is presented as to whether defendant was negligent in the performance of duties within its area of expertise, and for which expertise it was retained.

Finally, we reject defendant's contention that the damages sought in the claim based on the occupancy agreement are too speculative. The complaint alleges actual and ascertainable

damages flowing from defendant's failure to point out and protect plaintiff against any harm arising from JFK's right to terminate without cause on three months' notice, including expenditures for architecture, design, construction and legal fees.

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

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

ENTERED: DECEMBER 7, 2010

CLERK

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

2519 Lydia Williams, Index 14520/01
Plaintiff-Appellant-Respondent,

-against-

New York City Health and Hospitals Corporation, et al.,
Defendants-Respondents-Appellants,

North Central Bronx Hospital, et al.,
Defendants.

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

Martin Clearwater & Bell, LLP, New York (Ellen B. Fishman of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered March 3, 2009, which denied defendants' posttrial motion insofar as it sought to set aside the jury's verdict as to liability, granted the motion insofar as it sought to set aside the jury's award of $6.5 million as excessive, and directed a new trial as to damages unless plaintiff stipulated to a reduced award of $1 million, affirmed, without costs.

Viewed in the light most favorable to plaintiff, the prevailing party, the evidence sufficiently supports the jury's findings that defendant physician deviated from good and acceptable medical standards by performing an unnecessary modified radical mastectomy on plaintiff and by failing to inform

her that a lumpectomy was a viable alternative treatment, and that a reasonably prudent person in plaintiff's position would not have undergone a mastectomy had she been informed of her condition and of less invasive, medically sound alternative treatments (*see Motichka v Cody*, 279 AD2d 310, 310-311 [2001], *lv denied* 97 NY2d 609 [2002]). In light of appellate precedents upholding damage awards in cases where an unnecessary mastectomy was performed when a lumpectomy was a viable alternative treatment (*see Donlon v City of New York*, 284 AD2d 13, 18 [2001]), the trial court properly directed a new trial on the issue of damages unless plaintiff stipulated to reduce the jury awards of $3 million and $3.5 million for past and future pain and suffering, respectively, to $600,000 and $400,000, respectively (*see Motichka*, 279 AD2d at 311, citing *King v Jordan*, 265 AD2d 619 [1999]; *Lopez v Bautista*, 287 AD2d 601 [2001]). The dissent's suggestion that plaintiff must have suffered extreme emotional distress is not supported by the record.

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

CATTERSON, J. (dissenting)

I must respectfully dissent because I believe the motion court improvidently exercised its discretion in directing the plaintiff, Ms. Lydia Williams, to stipulate to a drastically reduced award. Following a jury verdict in her favor for $6.5 million, the motion court directed a new trial as to damages unless Ms. Williams, a 32-year-old single female, stipulated to a reduced award of $1 million for past and future pain and suffering arising out of mastectomy performed when she was, in fact, cancer-free. I agree with Ms. Williams that in reducing the jury verdict, the court undervalued the profound emotional and psychological damage arising from the loss of a healthy breast and the resultant severe disfigurement of her upper and lower torso, photographs of which are included in the record.

The following facts were established at trial: Ms. Williams was diagnosed with breast cancer in January 2000. On November 6, 2000, following chemotherapy, the plaintiff no longer had a palpable mass according to mammogram films. At that time, defendant Dr. Karen L. Hiotis told the plaintiff that a mastectomy was the only way to tell whether any cancerous cells remained.

On November 22, 2000, after signing informed consent forms, Ms. Williams underwent a modified radical mastectomy and axillary

dissection performed by Hiotis at Bellevue Hospital. Hiotis removed 28 lymph nodes from Ms. Williams' left breast. Hiotis commenced reconstructive surgery immediately thereafter. Subsequent pathological testing confirmed that all of the removed breast tissue and lymph nodes were cancer-free.

On October 3, 2008, the jury returned a verdict in Ms. Williams' favor, finding that: Dr. Hiotis had departed from good and acceptable medical standards; the departure was a substantial factor in causing the plaintiff to undergo an unnecessary mastectomy; Dr. Hiotis had failed to provide Ms. Williams with sufficient information in order to obtain informed consent for the surgery; a reasonable person in Ms. Williams' position, if adequately informed, would not have consented to the mastectomy; and the mastectomy and reconstructive surgery had injured Ms. Williams.

The jury ascribed 100% of the fault to the defendants Dr. Hiotis and New York City Health and Hospitals Corp., which owns and operates Bellevue Hospital. The jury awarded Lydia Williams $3 million for past pain and suffering and $3.5 million for future pain and suffering extending over 41.9 years.

The defendants moved pursuant to CPLR 4404(a) to set aside the verdict, or in the alternative, to set aside the jury award as excessive pursuant to CPLR 5501(c). The trial court granted

the defendants' motion to the extent that it sought to vacate the damages award as excessive unless the plaintiff stipulated to a reduced award of $1 million ($600,000 for past pain and suffering and $400,000 for future pain and suffering).

The trial court based its determination on a comparison of awards in what the court considered similar cases reviewed by the Appellate Division. It relied solely on Motichka v. Cody (279 A.D.2d 310, 720 N.Y.S.2d 9 (1st Dept. 2001), lv. denied, 97 N.Y.2d 609, 739 N.Y.S.2d 98, 765 N.E.2d 301 (2002)), and King v. Jordan (265 A.D.2d 619, 696 N.Y.S.2d 280 (3rd Dept. 1999)). The awards affirmed for unnecessary mastectomies in those two cases were $850,000 and $925,000, respectively. In this case, the motion court determined that $1 million is "appropriate" because the latter two cases were decided "eight to ten years ago."

On appeal, the plaintiff asserts that Motichka and King are not analogous in that the unnecessary mastectomies involved cancerous breasts rather than a healthy one as in the instant case, and that the facts and circumstances of those cases are not congruent with the facts of this case. I agree, and for the reasons set forth below, I believe the motion court erred.

It is well established that the Appellate Division shall determine that an award is excessive or inadequate if it deviates materially from what would be "reasonable compensation." CPLR

5501(c). Compensation has been deemed reasonable when it falls within boundaries of other awards that have been previously approved on appellate review. Donlon v. City of New York, 284 A.D.2d 13, 18, 727 N.Y.S.2d 94, 98 (1st Dept. 2001). In Donlon, this Court held that an "analysis of appealed verdicts using CPLR 5501(c) is not optional but a legislative mandate." 284 A.D.2d at 16, 727 N.Y.S.2d at 97. Moreover, "[c]ase comparison cannot be expected to depend upon perfect factual identity. More often, analogous cases will be useful as benchmarks." Id.

However, this Court has also held that not all awards lend themselves to review and approval by comparison with previously approved verdicts. See Launders v. Steinberg, 39 A.D.3d 57, 828 N.Y.S.2d 36 (1st Dept. 2007), mod. on other grounds, 9 N.Y.3d 930, 845 N.Y.S.2d 215, 876 N.E.2d 901 (2007); see also Morisette v. "The Final Call," 309 A.D.2d 249, 256, 764 N.Y.S.2d 416, 422 (1st Dept. 2003), lv. dismissed, 5 N.Y.3d 756, 801 N.Y.S.2d 248, 834 N.E.2d 1258 (2005) (personal injury awards, especially those for pain and suffering, are subjective in nature, formulated without the availability of precise mathematical quantification); Senko v. Fonda, 53 A.D.2d 638, 639, 384 N.Y.S.2d 849, 851 (2d Dept. 1976) (determining an award of monetary damages is an inherently imprecise and difficult undertaking because each case presents a unique set of facts, and, even in cases with similar

injuries, other courts' awards have limited precedential value).

As a threshold matter, it can be stated that this is not a case "without precedential analog" (see Launders, 39 A.D.3d at 59, 828 N.Y.S.2d at 38) and the motion court correctly found the jury's award of $6.5 million excessive. First, the plaintiff herself assessed her injuries at $4 million. Second, a cursory glance at jury verdicts that have not been reviewed or reduced by appellate courts shows that even such awards have generally remained below a $3 million dollar limit in wrongful mastectomy cases.[1]

That said, in my opinion, the motion court reduced the award too drastically because it failed to consider the unique import of breast disfigurement for a *young*, *single* woman. Reliance solely on Motichka and King was error not least of all because the factual descriptions in those cases are so meager that there is no basis for viewing them as analogous to the instant case.

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[1] In Russano v. Shulman, the plaintiff commenced a malpractice suit to recover for personal injuries associated with the removal of 13 lymph nodes that caused lymphedema. 2001 WL 1703038, 2001 N.Y. Misc. LEXIS 841 (Sup Ct, N.Y. County 2001) The jury awarded the plaintiff $2.15 million. In Byron v. Gaston, a *72-year-old* plaintiff needed only a lumpectomy, but was given a mastectomy because the physician misread the mammography results. The jury awarded $1.75 million. 2005 WL 2030400 (Sup Ct, Bronx County 2005). In McCord v. Berman, as a result of the physician's negligence, the plaintiff's breasts were severely disfigured. The jury awarded $3.5 million. 2010 WL 1347245 (Sup Ct, Richmond County 2010).

The Motichka plaintiff was 45 at the time of trial so was about 13 years older than Ms. Williams, but nothing is known about her marital status; the King plaintiff was married at the time of the mastectomy whereas Ms. Williams is single. There are no specifics of the King plaintiff's physical injuries, and no details about the "ugly scar" (265 A.D.2d at 621, 696 N.Y.S.2d at 282) referenced in her testimony so it cannot fairly be compared to the horrific and extensive scarring and disfigurement of Lydia Williams' breast and abdomen.

There is no mention of the King plaintiff suffering lymphedema, as Ms. Williams does, and which defendant Hiotis testified can be a chronic painful and permanent condition resulting from lymph node excision. Moreover King does not provide any information about the plaintiff's age or the number of years the jury allocated for future pain and suffering. The court simply affirmed a jury verdict of $925,000 ($500,000 for past pain and suffering; $300,000 for future pain and suffering and $125,000 for plaintiff's husband for loss of services).

Moreover, as the plaintiff correctly asserts, all that is established in cases in which a damage award is simply upheld by an appellate court is that the jury's award was not excessive; it does not mean that a higher award would not have been upheld. Indeed, the King Court specifically highlighted the deference due

to a jury, and noted that its own discretionary power to overturn a jury verdict should be exercised sparingly. King, 265 A.D.2d at 621, 696 N.Y.S.2d at 282 (internal citations omitted).

This Court's ruling in Motichka followed 15 months later in 2001, with a finding that the jury award of $2.25 million ($780,000 for past pain and suffering, $1.47 million for future pain and suffering) deviated materially from reasonable compensation under the circumstances. Relying solely on King, it further found that the motion court's reduction of the award to $850,000 was proper. Motichka, 279 A.D.2d at 311, 720 N.Y.S.2d at 10. While the plaintiff's examination of the jury verdict report shows that the Motichka plaintiff did not undergo reconstructive surgery, or suffer abdominal scarring or lymphedema, there was no analysis whatsoever in the decision itself. This Court made no comparisons to the King plaintiff, so nothing can be gleaned from the decision as to any similarities in the facts and circumstances of the two cases. It is also unclear whether the pain and suffering award was for past or future suffering, or a combination of the two. This Court simply affirmed the reduction because it mirrored the amount awarded to the King plaintiff.

The absence of critical information notwithstanding, Motichka and King have been used as precedential authority by

appellate courts reviewing jury awards in medical malpractice actions where the malpractice has resulted in injuries and disfigurement of plaintiff's breasts. See Gonzalez v. Jamaica Hospital, 25 A.D.3d 652, 807 N.Y.S.2d 316 (2d Dept. 2006) (court affirmed jury verdict of $850,000 for unnecessary mastectomy); Sutch v. Yarinsky 292 A.D.2d 715, 739 N.Y.S.2d 214 (3rd Dept. 2002) (appellate court affirmed jury verdict of $300,000 and $500,000 for past and future pain and suffering respectively where left breast was scarred, and nipple was lost in breast reduction surgery); see also Lopez v. Bautista (287 A.D.2d 601, 732 N.Y.S.2d 172 (2d Dept. 2001) (court affirmed a jury verdict of $1 million where cancer not diagnosed for 20 months after initial consultation to point where plaintiff needed radical mastectomy).

Significantly, the female plaintiffs in these cases were married at the time they became disfigured; and two, at least, were in their mid-40s, and therefore older than the plaintiff in the instant case. These are critical distinctions. See e.g Waldron v. Wild, 96 A.D.2d 190, 194, 468 N.Y.S.2d 244, 247 (4th Dept. 1983) (facial scarring to be evaluated taking into account age, sex, and occupation of victim).

Moreover, I would reject the defendants' argument that there is no proof of future pain and suffering in the instant case

because the plaintiff did not testify extensively about her emotional distress. Interestingly, they reproduce the following excerpt from the decision of the King Court as an example of the type of "compelling testimony" they sought:

> "Plaintiff's evidence established that she had a difficult physical recovery enduring weeks of pain followed by continuing emotional distress. She testified that the surgery left her with an ugly scar which makes her feel very self-conscious. She related the difficulties with wearing a prosthesis and the manner of her dress. According to plaintiff, she no longer sunbathes nor does she enjoy clothes shopping. She testifies that she avoids many normal things married couples do like going out to restaurants. Plaintiff no longer dresses in front of her husband. She described feeling 'less than a woman' and testified that the mastectomy has hampered intimate relations with her husband." King, 265 A.D.2d at 621, 696 N.Y.S.2d at 282.

The defendants appear to believe that because the plaintiff in this case was not able to articulate a similar experience of shame, embarrassment and humiliation, she therefore does not suffer such emotional distress. The defendants appear not to have heard the oft-quoted phrase "a picture is worth a thousand words."

Moreover, the majority's view that the plaintiff's extreme emotional distress is not supported by the record clearly indicates that the majority has not viewed the photos in the record. Given the post-operative photos of the plaintiff, I believe any testimony by the plaintiff as to distress, for

example, over not being able to wear a bathing suit; or of her fears of never finding someone to love or desire her would be simply superfluous, if not overkill.

Indeed, the defendants' reproduction of that excerpt simply serves to highlight the certain emotional and psychological damages suffered by the plaintiff in the instant case. The King plaintiff, at least, continued to engage in intimate relations with her husband. In this case, it is likely that the plaintiff does not enjoy even "hampered" intimate relations because she does not yet have a husband. In King, the plaintiff testified to avoiding "many normal things married couples do"; how much more likely is it that the plaintiff in this case, will avoid almost all "normal things" that young singles do. In my view, if going out to restaurants with a husband was stressful for the King plaintiff, walking alone or even with friends into a bar or a club or any locale full of strangers will be that much more stressful for Lydia Williams. The King plaintiff's husband was aware that his wife was undergoing a mastectomy, and was probably made aware of the possible injuries arising from surgery; the plaintiff in the instant case will have a horrendous obstacle to overcome in explaining to anyone with whom she wants an intimate relationship that she has suffered significant disfigurement that is not initially visible; and should the relationship progress

after such revelations, then she will still endure anxiety and doubt about progressing to the most intimate level in the relationship.

The plaintiff in Sutch (292 A.D.2d 715, 739 N.Y.S.2d 214) expressed some of these fears after breast reduction surgery left her with a two-inch hole in one breast, and like the plaintiff in the instant case, without a nipple and areola.[2] The Court noted that she "detailed her fear of rejection, particularly by men, and specifically testified that she does not believe that she will ever be able to have a relationship with another man again. She described that she no longer feels like a 'whole woman,' but instead feels like 'Frankenstein.'" Sutch, 292 A.D.2d at 716, 739 N.Y.S.2d at 216.

It is also worth noting that the Court, which affirmed a jury verdict that awarded the plaintiff more for future pain and suffering ($500,000) than for past ($300,000), considered the testimony of the Sutch plaintiff's clinical psychologist, and observed that:

> "[a]ccording to this expert, her disfigurement . . . has had a tremendous and powerful negative impact on her fear of rejection and sense of identity. He specifically confirmed that plaintiff has a fear of

[2] While the plaintiff in Sutch was married at the time of her surgery, by the time of trial her husband had died leaving her as a 31-year old widow.

> rejection by men which will keep her away from potentially satisfying interpersonal relationships in the future." Id., at 716-717, 739 N.Y.S.2d at 216.
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> Moreover, in a footnote, the Court noted that,
>
> "[t]his expert elaborated on why the trauma experienced by [the] plaintiff is much more significant than for example a scar on one's hand or arm. In his words '[t]his has to do with her sexual identity, her identity as a woman, so there's a clear, deep powerful meaning that goes right to the root of who she is because of the scars and disfigurement.'" 29 A.D.2d at 717, n.2, 739 N.Y.S.2d at 216, n.2.

In my view, the psychologist's analysis is grounded in a universal truth. As the plaintiff in the instant case asserts on appeal, "[t]here is a noteworthy cultural significance of the breast to women in our society . . . It is iconic, a symbol of many things, including femininity, sexuality, and womanhood."

Finally, in relying on Motichka and King to reduce the plaintiff's award, the motion court ignored an obvious and significant distinction. In both cases, it was determined that the defendants had incorrectly assessed the extent of the malignancy, and hence could have used a less invasive procedure like a lumpectomy. However, there was no dispute that both plaintiffs had breast cancer. This is in stark contrast to this case in which the plaintiff was cancer-free after chemotherapy. In Motichka and King the injuries were of degree; the plaintiffs could have suffered less disfigurement, less pain. In this case,

the plaintiff need not have suffered any disfigurement or pain at all. In my opinion therefore, the jury verdict in this case should not be reduced below $2.5 million of which $1.5 million should be awarded for future pain and suffering.

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

ENTERED: DECEMBER 7, 2010

CLERK

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

3070-
3070A Daniel Ryan, Index 601909/05
Plaintiff-Respondent,

-against-

Kellogg Partners Institutional Services,
Defendant-Appellant.

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Peckar & Abramson, P.C., New York (Kevin J. O'Connor of counsel), for appellant.

Law Offices of Thomas S. Rosenthal, New York (Thomas S. Rosenthal of counsel), for respondent.

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Judgment, Supreme Court, New York County (Saliann Scarpulla, J. and a jury), entered February 24, 2010, awarding plaintiff the total sum of $379,956.65, and bringing up for review an order, same court and Justice, entered January 6, 2010, which, inter alia, denied defendant's motion for a directed verdict, for judgment notwithstanding the verdict or for a new trial, and granted plaintiff's cross motion for attorneys' fees and costs pursuant to Labor Law § 198(1-a), and an order, same court and Justice, entered February 22, 2010, which amended the order entered January 6, 2010 to deny defendant's motion at trial to amend its answer and affirmative defenses, affirmed, without costs. Appeal from the January 6, 2010 order, unanimously dismissed, without costs, as subsumed in the appeal from the

judgment.

Supreme Court properly denied defendant's motions for a directed verdict (CPLR 4401), and for judgment notwithstanding the verdict or for a new trial (CPLR 4404[a]). Regardless of the employment application and employee handbook, the jury found that the parties entered into binding oral agreements whereby plaintiff was to leave his current employment to work for defendant and receive a bonus of $175,000 at the end of one year, payment of which was orally extended to the end of the following year. The verdict is based on sufficient evidence and is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The trial court correctly determined that defendant waived reliance on statutory provisions requiring an agreement to be reduced to a writing (General Obligations Law [GOL] §§ 5-701, 5-1103, 5-1105) by failing to plead the statute of frauds as an affirmative defense in its answer (CPLR 3018[b]; *see 23/23 Communications Corp. v General Motors Corp.*, 257 AD2d 367, 367 [1999], *lv denied* 93 NY2d 805 [1999]). The court also providently exercised its discretion in denying defendant's trial motion to amend his pleadings to assert these provisions, particularly since the motion was interposed after the close of

plaintiff's evidence (*see Mayers v D'Agostino*, 58 NY2d 696 [1982]).

Even if defendant had not waived the statute of frauds, the court properly determined that the subject GOL provisions do not apply to the facts of this case. Contrary to defendant's contention, the oral agreements to pay plaintiff a bonus were not based solely on past consideration, but on present and future consideration, respectively, plaintiff's promises to leave his current employer to join defendant and to work for defendant until the end of the year (*see Gruber v J.W.E. Silk, Inc.*, 52 AD3d 339, 340 [2008]), and thus the court correctly declined to charge GOL § 5-1105. Furthermore, because defendant disputed the existence of the oral agreements, and the agreements were capable of completion within one year, including the 2004 agreement which was supported by separate and new consideration, the court correctly declined to charge GOL §§ 5-701(a)(1) and 5-1103 (*cf. J.R. Loftus, Inc. v White*, 85 NY2d 874, 876 [1995]; *Weisse v Engelhard Mins. & Chems. Corp.*, 571 F2d 117 [1978]).

The court correctly determined that plaintiff's breach of contract claim was not barred by the provisions of defendant's employee handbook or his employment application. Those documents did not clearly indicate that bonuses are discretionary (*cf.*

Smalley v Dreyfus Corp., 40 AD3d 99, 106 [2007], *revd on other grounds* 10 NY3d 55 [2008]; *Kaplan v Capital Co. of Am.*, 298 AD2d 110, 111 [2002], *lv denied* 99 NY2d 510 [2003]), and whether the $175,000 payment was intended to be a discretionary bonus or earned income was a factual question for determination by the jury (*see Weiner v Diebold Group*, 173 AD2d 166, 167 [1991]).

The court providently exercised its discretion to preclude inquiry into plaintiff's financial commitments at the time he entered into the oral agreements with defendant. As the court determined, plaintiff's personal life was a collateral matter that had no direct bearing on any issue in this case other than credibility (*see generally Crooms v Sauer Bros. Inc.*, 48 AD3d 380, 381 [2008]). Moreover, any possible prejudice to defendant was alleviated by plaintiff's testimony that he found it necessary to take out a $50,000 loan against his 401(k) account as a result of not being paid his bonus.

The court properly determined that plaintiff was entitled to attorney's fees under New York Labor Law § 198(1-a). Contrary to defendant's contention, the type of bonus agreement involved in this case, i.e., a non-discretionary bonus based on labor and services rendered, constitutes "wages" within the meaning of

Labor Law § 190(1) (*cf. Truelove v Northeast Capital & Advisory*, 95 NY2d 220, 224 [2000]; *Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 [2008]).

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

McGUIRE, J. (dissenting)

I would reverse and dismiss the complaint on the ground that plaintiff's breach of contract claim is barred by the employment application he signed and the employee handbook. With respect to the former, plaintiff acknowledged his understanding that none of appellant-employer Kellogg Partners' "policies or procedures . . . carry any guarantee of employment for any length of time and that my employment, compensation and benefits are at will and can be terminated, with or without cause or notice, at any time, at the option of [employer] or myself." The majority upholds plaintiff's claim of entitlement to a bonus on the ground that the language just quoted does not "clearly indicate that bonuses are discretionary." Even assuming that the application or handbook must "clearly indicate" that bonuses are discretionary, that requirement was easily satisfied. Although the majority is not clear on the point, it may be of the view that the word "bonus" must appear in either the application or the handbook. If so, suffice it to say that none of the cases the majority cites so holds and that, at least in this context, it makes no sense to insist that an employer use a specific rather than a

more encompassing word (*cf. Bazak Intl. Corp v Mast Indus.*, 73 NY2d 113, 125 [1989] [rejecting significance in commercial case of failure of merchant to use "magic words"]). I need not determine whether appellant also is entitled to reversal on the other grounds it raises.

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

ENTERED: DECEMBER 7, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3464 In re Sheyna T.,

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

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

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at fact-finding determination; Nancy M. Bannon, J. at disposition), entered on or about March 10, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that she committed acts, which if committed by an adult, would constitute the crimes of assault in the second and third degrees, resisting arrest, and obstructing governmental administration in the second degree, and placed her on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence. The evidence satisfied the "lawful duty" element of the applicable theory of second-degree assault (Penal Law § 120.05[3]), the "official function" element of obstructing governmental administration

(Penal Law § 195.05) and the "authorized arrest" element of resisting arrest (Penal Law § 205.30).

While in school, an assistant principal and a school safety officer confronted appellant over a hammer that was protruding or visible from her book bag. The officer tried to persuade appellant to give her the hammer. Appellant refused and started to walk away. The officer walked in front of appellant and stated that if appellant did not give her the hammer, she would have to take it. When appellant again refused to surrender the hammer, the officer tried to seize it, but appellant put up a violent struggle that caused injury to the officer.

It is within the scope of school authorities' lawful and official functions, after noticing an item that could pose a threat to safety and order, to investigate and, if necessary, remove that item from a student, even where possession of the item would not be criminal without proof of intent to use unlawfully (*cf*. *Matter of Haseen N.*, 251 AD2d 505, 505-506 [1998] [in Fourth Amendment context, lawful for school staff to pat down students for eggs in order to prevent Halloween egg-throwing disturbances]).

There was ample evidence from which the trier of fact could reasonably infer that the officer's injuries caused "more than

slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), and went far beyond "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]).

We have considered and rejected appellant's remaining claims.

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

ENTERED: DECEMBER 7, 2010

CLERK

Andrias, J.P., Nardelli, Moskowitz, DeGrasse, Román, JJ.

3473 Janet Johnson, et al., Index 104080/06
Plaintiffs-Appellants,

-against-

Metropolitan Life Insurance Co.,
Defendant-Respondent.

_____

Smith Campbell, LLP, New York (Thomas M. Campbell of counsel), for appellants.

d'Arcambal, Levine & Ousley, LLP, New York (Aimee P. Levine of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 29, 2010, which denied plaintiffs' motion for summary judgment and granted defendant's cross motion to amend its answer to assert a defense and counterclaim for insurance fraud under the New Jersey Insurance Fraud Prevention Act (IFPA), unanimously affirmed, with costs.

Plaintiffs are the beneficiaries of two life insurance policies that defendant issued. The insured, now deceased, executed applications for the policies partly in New Jersey and partly in New York. The insured stated on the applications that he resided in Kearny, New Jersey and worked there as well. The policies that defendant issued in reliance on the applications contain a "NJ" notation on some pages.

On the applications, the insured answered "no" to every

question concerning whether he had a particular disease or disorder. He also represented in the applications that he would be paying the premiums. Allegedly relying on the representations in the applications, defendant issued the two policies. Plaintiff Johnson was the named beneficiary on one policy, and plaintiff Nicklas was the named beneficiary on the other.

In 2004, defendant learned that the insured had not made a single premium payment on his own, but rather, a third person had been making all the payments. On November 29, 2004, defendant advised the insured in writing that it considered the policies null and void because the insured had not paid any premiums himself, and requested identification of the person to whom it could return the premiums. It does not appear that defendant ever received a response. The insured died on August 7, 2005 from cardiopulmonary arrest.

After the insured's death, defendant disclaimed coverage on several grounds. First, defendant claimed that the policies were void because the insured decedent had misrepresented on the applications that he would pay the premiums when, in fact, a third party paid them. Second, defendant contended that contrary to the representations decedent made in the applications, he had a known history of serious and chronic medical problems, including "end-stage liver disease secondary to hepatitis C,"

hypertension and diabetes. Defendant also intimated that the policies were void because it appeared that the insured had not actually participated in the application process himself.

Plaintiffs commenced this action in 2006 to recover the proceeds of the policies. In 2009, they moved for summary judgment on their complaint and to dismiss defendant's counterclaims. Defendant cross-moved for leave to amend its answer to include a defense and counterclaim under the IFPA (NJ Stat Ann § 17:33A-7).

The motion court properly denied summary judgment. Defendant submitted affidavits from long-term employees, including its Vice President of Corporate Ethics and Compliance, Chief Underwriter and Senior Technical Claims Advisor, as well as internal underwriting and compliance documents. These submissions raise questions of fact regarding the materiality of the decedent's misrepresentations that he would be the payor, sufficient to defeat summary judgment at this juncture (*see Leamy v Berkshire Ins. Co.*, 39 NY2d 271, 274 [1976]).

With respect to its cross motion to amend to assert a defense and counterclaim for insurance fraud under the IFPA, defendant maintains that New Jersey law applies and permits this claim. Plaintiffs contend that the law is the same in New York and New Jersey, and the operation of either state's

"incontestability" statute bars defendant from pleading fraud as a defense or counterclaim more than two years after issuance of the policies.

Both New York and New Jersey have statutes that mandate that all life insurance policies contain a clause making the policy incontestable by the life insurer after the policy is in force for two years (Insurance Law § 3203[a][3]; NJSA §17B:25-4). However, the New Jersey Supreme Court has stated in dictum that "[e]ven after the expiration of the contestability period, an insurer may deny a claim if the insured committed fraud in the policy application" (*Ledley v William Penn Life Ins. Co.*, 138 NJ 627, 635, 651 A2d 92, 95 [1995]). In addition, New Jersey enacted the IFPA "to confront aggressively the problem of insurance fraud . . . by . . . requiring the restitution of fraudulently obtained insurance benefits" (NJSA §17:33A-2).

By contrast, New York's incontestability statute bars challenges even when the insured has failed to disclose facts on an insurance application (*see New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74 [1989]; *see also Ilyaich v Bankers Life Ins. Co of N.Y.*, 47 AD3d 614, 615 [2008] [alleged misrepresentation concerning insured's assets and the purpose for the insurance]). New York's approach represents a policy choice to place the onus on the insurance company to investigate, within the two-year

period, the veracity of the claims that a potential insured might make in an application for life insurance (*see New England Mutual*, 73 NY2d at 82; *see also Settlement Funding LLC v AXA Equitable Life Ins. Co.*, 2010 US Dist LEXIS 104451, *10-11, 2010 WL 3825735, *3 [SD NY] ["the incontestability clause serves the important function of encouraging buyers to purchase insurance with confidence that after the contestable period has passed they are assured of receiving benefits for which they pay premiums"]).

There indeed appears to be a conflict between the laws of the two states. However, no court in New York has directly held that an insurance company is restricted to the two-year period where the insured has lied about his or her health in an application for insurance. Obviously, correct health information is pertinent to an insurance company's decisions whether to take on the risk and what premium to charge. Nevertheless, we need not decide what New York law calls for because New Jersey law applies to this dispute. The decedent represented on the applications that he was a resident of New Jersey. On defendant's change-of-ownership form, dated July 10, 2003, he also listed his address in New Jersey as the mailing address for his niece, beneficiary and owner of one of the policies. The insured signed in New Jersey at least part of the applications that induced defendant to issue the policies. Defendant sent

bills for premiums to a Kearny, New Jersey address. No one suggested changing that billing address. As New Jersey was the place of contracting and defendant was led to believe that the location of the insured risk (i.e. the insured) was in New Jersey, no one should be surprised that New Jersey law applies to this dispute (*see Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17 [2006], *affd* 9 NY3d 928 [2007]).

Accordingly, the court properly permitted defendant to amend its answer to include a fraud defense and counterclaim asserting that the insured decedent knowingly provided false and misleading information on the applications regarding the decedent's medical history, even though defendant raised this defense outside the two-year contestability period (*see Paul Revere Life Ins. Co. v Haas*, 137 NJ 190, 201-202, 644 A2d 1098, 1104 [1994]; *see also Ledley*, 138 NJ at 635, 651 A2d at 95). This is consistent with the IFPA, that was enacted to prevent false or misleading

statements in insurance applications (*see Ashkenazi v Lincoln Natl. Life Ins. Co.*, 2009 US Dist LEXIS 40234, *18-20, 2009 WL 1346394, *6 [ED NY]; *Liberty Mut. Ins. Co. v Land*, 186 NJ 163, 171-172, 892 Ad 1240, 1245 [2006]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3786 The People of the State of New York, Ind. 1286/06
Respondent,

-against-

John Evans, also known as
Stanley Emerson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Hannah E.C. Moore of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael Sonberg, J.), rendered May 21, 2008, as amended May 28, 2008, convicting defendant, after a jury trial, of rape in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years,, unanimously affirmed.

Defendant, who was indicted for numerous crimes including forcible rape, was only convicted under a count of the indictment charging third-degree rape pursuant to Penal Law § 130.25(3). As part of the Sexual Assault Reform Act (L 2000, ch 1), the Legislature established a theory of rape in which the victim's "lack of consent is by reason of some factor other than incapacity to consent." Lack of consent for purposes of this crime occurs where "the victim clearly expressed that he or she

did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances" (Penal Law § 130.05[2][d]).

The verdict was based on legally sufficient evidence and was not against the weight of the evidence. The jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The victim testified that she repeatedly told defendant that she wanted to leave and that she was "crying the whole time." Thus, her words and actions clearly expressed an unwillingness to engage in the sexual act in such a way that a neutral observer would have understood that she was not consenting (*People v Newton*, 8 NY3d 460, 463-464 [2007]), particularly when viewed in light of defendant's own actions throughout this encounter, which began when defendant forced her to his apartment. Viewed in context, the victim's requests to leave were clear expressions of unwillingness to engage in sexual activity.

Third-degree rape under Penal Law § 130.25(3) also has several unusual procedural aspects, contained in CPL 300.50(6). That statute specifically provides that this type of third-degree rape is not a lesser included offense of any other crime, including first-degree rape. However, "such offense may be

submitted as a lesser included offense of the applicable first degree offense when (i) there is a reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater offense, and (ii) both parties consent to its submission."

At trial, defendant opposed submission of the third-degree rape count on which he was convicted (as well as other third-degree counts of which he was acquitted), but only on the ground that the evidence did not support the third-degree counts. Therefore, he did not preserve his present claim that even though it was a separate, preexisting count of the indictment, the court was still obligated to obtain his consent before submitting the third-degree count of which he was convicted, and we decline to review this claim in the interest of justice. As an alternative holding, we also reject it on the merits. The court did not submit the third-degree count as a lesser included offense of the first-degree count, but as a separate count of the indictment, a situation not addressed by CPL 300.50(6). Furthermore, this separate count was not a lesser included offense of the first-degree rape count, but was instead a noninclusory concurrent count (*see People v Leon*, 7 NY3d 109, 112-113 [2006]). As noted, the statute expressly declares that this type of third-degree rape is not a lesser included offense of forcible rape.

Moreover, even without this legislative declaration, we note that although forcible compulsion generally implies that the victim did not consent, a person could commit forcible first-degree rape without necessarily committing the particular type of third-degree rape criminalized under Penal Law §§ 130.05(2)(d) and 130.25(3). For example, a person might demand sexual intercourse while making a death threat, causing the terrified victim to submit immediately, without ever doing or saying anything to *express* lack of consent, as required by Penal Law § 130.05(2)(d).

Although the court, prior to summations, indicated that it would not allow defense counsel to argue that the victim had consented, counsel ultimately was able to make this point by repeatedly telling the jury that the victim was not telling the whole story, that the defendant's actions were inconsistent with those of a rapist, and that the victim was not forced to do anything. Thus, any error in the court's pre-summation ruling was harmless. Since defendant did not argue that he was constitutionally entitled to make the proposed argument, he did not preserve his constitutional claims (*see People v Angelo*, 88

NY2d 217 [1996]), and we decline to review his claims in the interest of justice. As an alternative holding, we also reject those claims on the merits, and find the alleged error to be harmless in any event.

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3787 Caroline Rostant, Index 102493/08
Plaintiff-Respondent,

-against-

David Swersky,
Defendant,

790 RSD Acquisition, LLC,
Defendant-Appellant.

_____

Michael J. Berman & Associates, P.C., New York (Michael J. Berman of counsel), for appellant.

Profeta & Eisenstein, New York (Jethro M. Eisenstein of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered February 5, 2010, which granted plaintiff's motion for leave to reargue the parties' motions for summary judgment on the cause of action for damages pursuant to RPAPL 853 and, upon reargument, granted plaintiff's motion for summary judgment on the issue of liability on that cause of action as against defendant 790 RSD Acquisition only and denied defendants' motion for summary judgment dismissing the cause of action, unanimously affirmed, without costs.

Plaintiff was not precluded from moving for reargument before the order on the first decision was entered. "A court has the inherent power, sua sponte or on motion of a party, to

reconsider and vacate its prior decision before issuing an order thereon" (*Hulett v Niagara Mohawk Power Corp.*, 1 AD3d 999, 1003 [2003]; *Manocherian v Lenox Hill Hosp.*, 229 AD2d 197, 202-203 [1997], *lv denied* 90 NY2d 835 [1997]). Nor did plaintiff's failure to submit all the original motion papers on her reargument motion render the latter procedurally defective. CPLR 2221 does not specify the papers that must be submitted on a motion for reargument, and the decision whether to entertain reargument is committed to the sound discretion of the court (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part, denied in part*, 80 NY2d 1005 [1992]). Moreover, the motion court gave all parties the opportunity to supplement the record with the underlying papers, and afforded defendants the opportunity to present any further argument warranted by the additional submissions. Thus, defendants were not prejudiced by the deficiencies in plaintiff's submissions on reargument or by the procedures adopted by the court (*see Addison v New York Presbyt. Hosp./Columbia Univ. Med. Ctr.*, 52 AD3d 269 [2008]).

The doctrine of res judicata ordinarily would preclude plaintiff, whose prior Housing Court action to restore possession had been brought to a final conclusion, from seeking to recover treble damages pursuant to RPAPL 853 in Supreme Court, regardless

of whether she had asserted a claim for those damages in the Housing Court action (*see Murray v National Broadcasting Co.*, 178 AD2d 157, 159 [1991]). However, in a summary proceeding to restore possession brought pursuant to RPAPL article 7, the court does not have jurisdiction over a cause of action for damages, including damages pursuant to RPAPL 853 (*Kiryankova v Brovkina*, 2003 NY Slip Op 50920[U], *2-*3 [2003]; *see also Matter of Bedford Gardens Co. v Silberstein*, 269 AD2d 445 [2000]; *A&E Tiebout Realty, LLC v Johnson*, 26 Misc 3d 131[A], 2010 NY Slip Op 50055[U] [2010], *affg for reasons stated at* 23 Misc 3d 1112[A], 2009 NY Slip Op 50715[U], *4 [2009]). Damages for wrongful eviction, including RPAPL 853 treble damages, must be sought in a separate action in a court of competent jurisdiction (*Saccheri v Cathedral Props. Corp.*, 16 Misc 3d 111, 114 [2007]; *A&E Tiebout*, 23 Misc 3d 1112[A], 2009 NY Slip Op 50715[U] at *4). Accordingly, the doctrine of res judicata is no bar to plaintiff's pursuit of that claim in the instant action (*see Mills v Wharton*, 161 Misc 2d 209, 211 [1994], *affd* 164 Misc 2d 812 [1995]; *see also Rodriguez v 1414-1422 Ogden Ave. Realty Corp.*, 304 AD2d 400, 401 [2003] [claim-splitting doctrine "does not preclude the tenant from seeking damages in an action separate from that in which he had sought to be restored to possession"]).

In view of the foregoing, it is of no moment that the motion court believed, albeit erroneously, that plaintiff represented herself in Housing Court.

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3790 Ben Barrow, et al., Index 603704/07
Plaintiffs-Appellants,

-against-

Lenox Terrace Development Associates,
Defendant-Respondent.

_____

Leonard Zack & Associates, New York (Leonard Zack of counsel), for appellants.

Michael B. Kramer & Associates, New York (R. Jay Ginsberg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered May 11, 2010, which, in an action by a commercial tenant against its landlord for damages allegedly caused by defendant's termination of the lease after a fire in the leased premises, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Three possible bases for terminating the subject lease as a result of fire are indicated in the lease: (1) the demised premises are rendered "wholly unusable"; (2) whether or not the demised premises are damaged in whole or in part, the building is "so damaged" that landlord decides to demolish it; and (3) the demised premises are "totally damaged." It would not avail tenant even if, as it argues, basis (3), which is set forth in a rider, supersedes bases (1) and (2), since the record establishes

that the fire damage was so extensive as to satisfy all three bases (*see Mawardi v Purple Potato*, 187 AD2d 569 [1992]). As a result of the fire, most of the roof caved in, causing the sky to be clearly visible from inside the premises; a structural wall was listing toward the adjacent property and in danger of collapse; the Fire Department ordered the building vacated as imminently perilous to life; the air conditioner on the roof was totally destroyed; the electrical systems were beyond repair; the basement was flooded and damaged by smoke and soot; the restaurant's windows, kitchen, ceiling, and floor were completely destroyed; and most of plaintiff's personal property and fixtures were found by its insurance carrier to be a total loss.

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3793 Douglas Ellison, et al., Index 117050/07
Plaintiffs-Respondents,

-against-

The Island Def Jam Music Group, etc., et al.
Defendants-Appellants,

Lynette Payne, et al.,
Defendants.

_____

Baker & Hostetler LLP, New York (John Siegal of counsel), for appellants.

Tony L. Axam, Atlanta, GA (of the Georgia Bar, admitted pro hac vice, of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 5, 2010, which granted the motion by defendants Island Def Jam Music Group and Shalik Berry for leave to reargue their motion to dismiss the complaint and, upon reargument, granted the motion as to the aiding and abetting claims and otherwise adhered to the original determination, unanimously affirmed, with costs.

The complaint contains the following allegations. Plaintiff artistic management company entered into an exclusive management agreement with Chrisette Michelle Payne (Ms. Michelle). Defendants have the right, pursuant to a written agreement with plaintiffs, to make recordings, bookings and sponsorship deals

for and with Ms. Michelle. Defendants used their contractual right of access to Ms. Michelle to attempt to have her sever all ties with plaintiffs, so that they could deal with Ms. Michelle directly. If successful, defendants' scheme to eliminate plaintiffs, the middlemen in the transaction, would have deprived plaintiffs of the benefit of their bargain. These allegations state a cause of action for violation of the covenant of good faith and fair dealing that is implied in every contract (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 302 [2003]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3794 In re Joseph E. Fodor, et al., Index 112530/08
Petitioners-Appellants,

-against-

N.Y.S. Division of Housing and
Community Renewal,
Respondent-Respondent,

230 Riverside LLC,
Intervenor-Respondent.

_____

Joseph E. Fodor, appellant pro se.

Mariana D. Fodor, appellant pro se.

Gary R. Connor, New York (Jack Kuttner of counsel), for DHCR, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 230 Riverside LLC, respondent.

_____

Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered April 29, 2009, dismissing an article 78 proceeding to annul a determination of respondent New York State Division of Housing and Community Renewal that had granted an application by the owner of the building in which petitioners reside to change from master metering to direct metering, unanimously affirmed, without costs.

DHCR's determination not to require the owner to upgrade the wiring inside each apartment is rationally based (*see generally Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]) on an

affidavit from a licensed electrical engineer stating that every apartment would be able to utilize modern appliances after the owner's proposed improvements were implemented, and that the rewiring would benefit the tenants even without an increase in amperage. By contrast, the tenants, including petitioners, submitted no affidavits from licensed electrical engineers. To the extent that petitioners' claim that the owner's rewiring is unsafe is based on a fire that occurred at the premises after DHCR's determination, such evidence may not be considered on this appeal (*see Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 110 [2005]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3795 The People of the State of New York, Ind. 5020/08
Respondent,

-against-

Jose Ortega,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 20, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 7, 2010

_____
CLERK

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

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3796 Nicholas P. Dermigny, Index 109057/07
Plaintiff-Respondent,

-against-

Muriel Siebert,
Defendant-Appellant.

_____

Kramer Levin Naftalis & Frankel LLP, New York (Stephen M. Sinaiko of counsel), for appellant.

Warren S. Hecht, Forest Hills, for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered May 18, 2009, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action for malicious prosecution, the court erred in holding that defendant, who had answered the complaint, was required to moved for summary judgment instead of moving to dismiss the complaint for failure to state a cause of action under CPLR 3211(a)(7) (CPLR 3211[e]; *Herman v Greenberg*, 221 AD2d 251 [1995]). The court's determination that plaintiff had sufficiently pleaded special injury in support of his malicious prosecution claim was also error. Plaintiff failed to allege facts that would establish special injury, i.e., "some concrete

harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit" (*Engel v CBS, Inc.*, 93 NY2d 195, 205 [1999]). Although plaintiff alleged generally that he did not receive job offers from employers during the pendency of the previous action commenced by defendant, he did not identify any employer that refused to offer him a job because of the prior action (*see id.* at 207; *Kaye v Trump*, 58 AD3d 579, 580 [2009], *lv denied* 13 NY3d 704 [2009]). In addition, his affidavit in opposition to defendant's motion, stating that he was interviewed by five employers and was offered one position, contradicted his claim that he had been "blacklisted" on Wall Street (*see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1999], *affd* 94 NY2d 659 [2000]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3797-
3797A Richard B. Cohen, Index 103900/07
Plaintiff-Respondent,

-against-

Akabas & Cohen, etc., et al.,
Defendants-Appellants.

_____

The Law Offices of Brickman & Bamberger, P.C., New York (David E. Bamberger of counsel), for appellants.

Ciampi LLC, New York (Arthur J. Ciampi of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Louis Crespo, Special Referee), entered January 14, 2010, after trial, in an action to dissolve a law partnership, dismissing defendants' affirmative defense and counterclaims, dissolving the subject partnership, and awarding plaintiff $331,860.67, inclusive of interest and costs, representing his share of the value of the partnership assets upon dissolution, unanimously affirmed, with costs. Order, same court (Richard B. Lowe, III, J.), entered February 22, 2010, which denied defendants' motion to vacate the above amended judgment, unanimously affirmed, without costs.

We reject defendants' contention that the Special Referee exceeded the authority conferred by the court's September 10,

2008 order of reference by awarding plaintiff a final money judgment. Defendants expressly consented to the order of reference (CPLR 4317[a]), which, as dictated on the record, plainly stated that the Special Referee was to hear and determine the issue of whether the remaining affirmative defense and counterclaims had been decided previously in the 2008 accounting trial; and, to the extent not disposed of, to hear and determine whatever claims and/or defenses remained; and, if necessary to facilitate such determination, to conduct an immediate trial of any issues pursuant to CPLR 3212(c) (*see* CPLR 4311). The Special Referee having all the powers of a court (CPLR 4301), and there being nothing in the action left to determine, correctly entered judgment in plaintiff's favor, and such judgment stands as the decision of the court (CPLR 4319).

Defendants' argument that the Special Referee erred in failing to consider their claim seeking a division in kind of the dissolved firm's assets pursuant to Partnership Law § 69(1) is an argument that could have and should have been raised in defendants' prior appeal of the Special Referee's order denying leave to amend the answer to add such claim, which prior appeal, following its consolidation with an earlier appeal, was dismissed for failure to timely perfect. We therefore decline to address the merits of this claim (*see Bray v Cox*, 38 NY2d 350 [1976];

Cardo v Board of Mgrs., Jefferson Vil. Condo 3, 67 AD3d 945, 945-946 [2009]).

Were we to address this argument on the merits, we would reject it. The Partnership Law permits a court or referee, in the absence of an agreement to the contrary, to order a buyout of a "retiring" or deceased partner's interest by the remaining partners when the firm continues to operate following the partner's withdrawal (Partnership Law §§ 73, 75). Thus, the Special Referee properly tallied the partnership's assets, deducted from the total the amount of the outstanding liabilities, divided the remaining amount in accordance with each partner's relative interest in the partnership, and awarded plaintiff a money judgment against defendants, the remaining partners, in an amount representing the value of his interest in the partnership's assets (*see Dawson v White & Case*, 88 NY2d 666, 669-670 [1996]). "Retiring . . . partners are those who cease to be partners in the business, which is carried on by others" *(Greidinger v Hoffberg*, 49 AD2d 549, 551 [1975] [internal quotation marks omitted]; *see also Shandell v Katz*, 217 AD2d 472, 472, 473 [1995]). Moreover, ample evidence in the record indicates that the remaining partners, Akabas and Sproule, continued the partnership's business under a different name.

Defendants' contention that the Special Referee erroneously

applied the clear and convincing standard of proof, rather than the preponderance of the evidence standard, to their affirmative defense is unavailing. Any minor, inadvertent misstatements notwithstanding, the Special Referee made clear in his discussion of the burdens of proof that defendants were required to establish their affirmative defense by a preponderance of the evidence. The Special Referee also held that the defense was not proven under either the clear and convincing or the less stringent preponderance of the evidence standard. Thus, any claimed error was harmless (*see* CPLR 2002).

The Special Referee's partial granting of plaintiff's motion to quash the subpoenas served on him and his new law firm was a proper exercise of discretion (*see Brady v Ottaway Newspapers*, 63 NY2d 1031, 1032-1033 [1984]).

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

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3798 The People of the State of New York, Ind. 2717/08
Respondent,

-against-

Leslie Alston,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B. F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), rendered April 1, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing her to concurrent terms of 6 months, with 5 years' probation and restitution in the amount of $3,000, unanimously affirmed.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]; *People v Walker*, 83 NY2d 455, 458-459 [1994]; *People v Pavao*, 59 NY2d 282, 292 [1983]). The probative value of defendant's theft-related convictions on the issue of credibility outweighed their prejudicial effect, which the court minimized by placing limits on the People's elicitation of underlying facts.

To the extent anything in the prosecutor's summation could be viewed as mischaracterizing defendant's theory of defense, the court took sufficient curative actions. Defendant's remaining summation claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3799 Maria Rosa-Diaz, Index 23536/06
Plaintiff-Appellant,

-against-

Maria Auto Corp.,
Defendant-Respondent,

Jane Doe, et al.,
Defendants.

_____

Greenstein & Milbauer, LLP, New York (Andrew W. Bokar of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Maryann Brigantti-Hughes, J.), entered on or about July 22, 2009, which, in this action seeking damages for personal injuries purportedly suffered by a pedestrian as the result of being struck by a metal object thrust up by a motor vehicle, granted defendants' motion for summary judgment dismissing the complaint on the ground of lack of serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their initial burden of establishing, prima facie, the absence of any triable questions of fact so as to entitle them to judgment as a matter of law (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 734 [2008]) by submitting the affirmed

reports of a neurologist and orthopedic surgeon, supported by specific tests that had been performed upon plaintiff, that the subject incident did not cause her to suffer a serious injury within the contemplation of Insurance Law § 5102(d) in the form of a permanent consequential limitation of a body organ or a significant limitation of use of a body function or system (*see Zhijian Yang v Alston*, 73 AD3d 562, 563 [2010]; *Santiago v Bhuiyan*, 71 AD3d 485 [2010]). Moreover, notwithstanding that the orthopedic surgeon did discern a minor deficit in a single aspect of plaintiff's lumbar motion, this slight limitation was insignificant for purposes of Insurance Law § 5102(d) (see *Cruz v Lugo*, 67 AD3d 495, 496 [2009]; *Eichinger v Jone Cab Corp.*, 55 AD3d 364 [2008]). Although plaintiff also argues that the failure of defendants' doctors to review her medical records mandated the denial of summary judgment, a prima facie showing of the absence of triable questions of fact does not require such a review as a condition for a grant of summary judgment (see *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [2010]; *DeJesus v Paulino*, 61 AD3d 605, 607 [2009]).

In opposition, plaintiff failed to raise a triable issue of fact. It is significant that plaintiff has admitted that she was involved in three other accidents in addition to the one at issue, two of which happened before the subject event, the third

having occurred in September 2006, but plaintiff's chiropractor totally ignored any effect of those accidents on the purported symptoms attributable to the one herein. Yet, "even where there is objective medical proof of an injury, summary dismissal of a serious injury claim may be appropriate when additional contributory factors, such as preexisting conditions, interrupt the chain of causation between the accident and the claimed injury" (*Farrington v Go On Time Car Serv.*, __ AD3d __, 2010 NY Slip Op 6538, ***1-2 [2010]; *see also Pommells v Perez*, 4 NY3d 566, 572 [2005]).

As for the 90/180-day category of serious injury, it is axiomatic that an individual's unsupported subjective claim of continuing pain and the inability to work for more than 90 days is not dispositive of the existence of a 90/180 category injury. In order to raise a question of fact there must be some objective proof, not here presented, substantiating the existence of such an injury (*see Nieves v Castillo*, 74 AD3d 535 [2010]; *Weinberg v*

Okapi Taxi, Inc., 73 AD3d 439 [2010]). Consequently, "the reference to plaintiffs' proof and deposition testimony sufficiently refuted the 90/180 day allegation of serious injury" (*DeJesus v Paulino* at 607).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3800 Schindler Elevator Corporation, Index 602553/08
Plaintiff-Appellant-Respondent,

-against-

388 Willis, LLC,
Defendant-Respondent-Appellant.

_____

Law Offices of Edward Weissman, New York (Jan Marcantonio of counsel), for appellant-respondent.

Rivelis Pawa & Blum, LLP, New York (Howard Blum of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (James A. Yates, J.), entered May 11, 2010, which, to the extent appealed from, after a nonjury trial, directed defendant to pay to plaintiff the sum of $75,000 over a period of three years in monthly payments of $2,083.34 each, and dismissed defendant's counterclaims, unanimously affirmed, without costs.

The trial court correctly found that the clause of the contract, "Balance to be financed up to a 60 month term coinciding with the execution of the Elevator Service Agreement," is ambiguous. In particular, the clause does not identify the terms of the financing or the financier. While logic would suggest that plaintiff will be the financier since the terms of a loan from a third party would be a matter between defendant and the third party, the clause does not so state.

Given these material gaps, the alleged oral representations of plaintiff's sales representative do not contradict, add to or modify the written agreement, but provide clarity as to the parties' intentions, and the court properly considered them in interpreting the meaning of the clause (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

The court correctly dismissed defendant's counterclaims alleging trespass and seeking punitive damages therefor, since the testimony of plaintiff's engineer was uncontradicted: he asked the security guard's permission to enter, obtained the key from the guard, went directly to the elevator, and recovered the motherboard.

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3802 Philip DeCarlo, Index 117221/04
Plaintiff-Appellant,

-against-

HSBC Bank USA,
Defendant-Respondent.

[And a Third-Party Action]

_____

Philip De Carlo, appellant pro se.

Phillips Lytle LLP, New York (Tamara A. Daniels of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered February 19, 2009, which, after a nonjury trial, dismissed the complaint, unanimously affirmed, without costs.

The court properly found that plaintiff failed to prove entitlement to payment on a bond that he found in 2004 among the possessions of his deceased sister, which bond had become payable in 1984. In light of defendant's proof that the bond in question was one of nine that had been reported stolen in 1985, plaintiff could make a claim thereto only if he could demonstrate that he had purchased the bond for value (*see Hartford Acc. & Indem. Co. v Walston & Co.*, 21 NY2d 219, 222 [1967]; *Goldstein v Engel*, 240 AD2d 280, 281 [1997]), and plaintiff acknowledged that he could

not make such a demonstration on either his own or his sister's behalf.

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: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3803 In re Juanita Matos, Index 402704/08
Petitioner-Appellant,

-against-

Tino Hernandez, as Chairman of the
New York City Housing Authority, et al.,
Respondents-Respondents.

_____

Legal Services NYC-Bronx, Bronx (Kathryn Neilson of counsel), for appellant.

Sonya M. Kaloyanides, New York (Byron S. Menegakis of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered June 11, 2009, denying the petition to vacate and annul a June 2008 determination of respondent Housing Authority (NYCHA), which, after a hearing, conditioned petitioner's eligibility for continued occupancy in public housing on the permanent exclusion of her son from the household, unanimously modified, on the law, the penalty of permanent exclusion vacated, and the matter remanded to respondent for imposition of a lesser penalty, and otherwise affirmed, without costs.

A finding of nondesirability may support the penalty of permanent exclusion of a tenant or household member who engages in criminal activity, particularly involving drugs or violence, which poses a serious threat of danger to the health or safety of

other residents or employees (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]; *Matter of McLurkin v Hernandez*, 44 AD3d 496 [2007]; *Matter of Gibson v Blackburne*, 201 AD2d 379 [1994]). In reviewing an administrative action, the court must uphold the sanction imposed unless it is so disproportionate to the offense as to shock the judicial conscience, thus constituting an abuse of discretion as a matter of law (*Featherstone*, 95 NY2d at 554 [2000]).

However, the hearing officer made no finding that Hernandez posed any threat to NYCHA's residents or employees, and specified that he would continue to be permitted to visit the apartment. The permission to visit was supported by the record that both petitioner, an elderly woman with disabilities, and Hernandez's own young son who is an authorized member of the household, rely on Hernandez to assist them in daily living. Hernandez is the sole custodian and primary caregiver for his child, who suffers from chronic asthma and a heart condition. Although Hernandez was convicted of two misdemeanors in 2007, he had no prior criminal record and has an unblemished record of compliance with NYCHA rules and regulations over the 23 years he has lived in public housing. Under these circumstances, the permanent exclusion of this crucial member of the household shocks the

conscience of the court (*see Matter of Vazquez v New York City Hous. Auth. [Robert Fulton Houses]*, 57 AD3d 360 [2008]; *Matter of Spand v Franco*, 242 AD2d 210 [1997], *lv denied* 92 NY2d 802 1998]). Some lesser sanction is warranted (*Matter of Peoples v New York City Hous. Auth.*, 281 AD2d 259 [2001]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3804 Freda Gates Pozefsky, Index 112478/07
Plaintiff-Appellant,

-against-

Richard T. Aulisi, etc., et al.,
Defendants-Respondents,

John Does, etc., et al.,
Defendants.

_____

McKenna McIlwain, LLP, New York (Keith A. McKenna of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Thomas W. Hyland of counsel), for respondents.

_____

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered June 15, 2009, which, in an action alleging legal malpractice, granted the motion of defendants-respondents to dismiss the complaint pursuant to CPLR 3211(a)(7), unanimously affirmed, without costs.

The motion court properly held that plaintiff could neither plead nor prove her claim of legal malpractice (*see McCoy v Feinman*, 99 NY2d 295, 301-302 [2002]; *Leder v Spiegel*, 31 AD3d 266, 267-268 [2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]), as she failed to demonstrate that but for defendants attorneys' negligence, she would have attained a more favorable result in her underlying federal court action (*Pozefsky*

v Baxter Healthcare Corp., US Dist Ct, ND NY, 92 Civ 314, 1992). The record demonstrates that plaintiff's proposed expert would not have been allowed to testify at the federal court trial in which plaintiff sought damages resulting from a breast implant rupture allegedly causing her to suffer systemic tissue disease and/or other autoimmune/rheumatic conditions, regardless of any negligence on the part of defendants in failing to produce the proposed expert for depositions, since his testimony on the issue of causation would not have survived a hearing pursuant to *Daubert v Merrell Dow Pharms., Inc.* (509 US 579 [1993]).

In granting a motion to preclude the testimony of two of plaintiff's designated experts, the federal court conducted a thorough *Daubert* analysis with respect to the issue of causation in the context of injuries purportedly caused by or associated with silicone breast implants. The court reviewed the reports of three groups of independent experts, as well as studies published by many well known national and international, medical and scientific organizations, which all concluded that there was insufficient evidence to support the allegation that silicone breast implants are associated with defined or atypical connective tissue diseases, or other autoimmune-rheumatic diseases or conditions in women with such implants (*see Pozefsky v Baxter Healthcare Corp.*, 2001 WL 967608, 2001 US Dist LEXIS

11813 [ND NY 2001]). The federal court also cited to cases where the proposed expert was precluded from testifying on the causation issue since his theory that silicone implants could cause undifferentiated connective tissue diseases was not based on scientifically valid methodologies and has not been accepted in the scientific community (*see Havard v Baxter Intl. Inc.*, 2000 US Dist LEXIS 21316, *12-13 [2000]; *Grant v Bristol-Myers Squibb*, 97 F Supp 2d 986, 992 [2000]).

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: DECEMBER 7, 2010

CLERK

Mazzarelli, J.P., Acosta, Richter, Abdus-Salaam, Román, JJ.

3805N Joshua Hannah, etc., et al., Index 6286/04
Plaintiffs-Appellants,

-against-

Gail Chorney, M.D., et al.,
Defendants-Respondents.

_____

Daniel P. Buttafuoco & Associates, PLLC, Woodbury (Ellen Buchholz of counsel), for appellant.

Ellenberg & Partners, LLP, New York (Michael A. Ellenberg of counsel), for Gail Chorney, M.D., respondent.

Mauro Goldberg & Lilling LLP, Great Neck (Anthony F. DeStefano of counsel), for New York Presbyterian Hospital and Columbia Presbyterian Medical Center, respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 30, 2009, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to strike defendants' answers as a sanction for spoliation, unanimously affirmed, without costs.

The absence of the operative report did not deprive plaintiff of means for establishing a prima facie case (*see e.g. Orloski v McCarthy*, 274 AD2d 633, 635-636 [2000], *lv denied* 95 NY2d 767 [2000]; *cf. Gray v Jaeger*, 17 AD3d 286 [2005]). Therefore, striking the answers would have constituted too

drastic a remedy. The court properly granted plaintiff's alternative request for dismissal of the action.

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

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3806-
3807 The People of the State of New York, Ind. 3304/04
Respondent, 27525/05
3232/06

-against-

Mario Escobar,
Defendant-Appellant.

_____

The Legal Aid Society, New York (Steven Banks of counsel), and Malvina Nathanson, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Megan Tallmer, J.), rendered May 18, 2007, as amended October 26, 2007, convicting defendant, after a jury trial, of assault in the second degree, and also convicting him, upon his plea of guilty, of attempted criminal possession of a controlled substance in the third degree and promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 7 years, unanimously affirmed.

Defendant did not preserve any of his arguments for appellate review. It is well established that "[t]he word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law (*People v Tevaha*, 84 NY2d 879, 881 [1994]). Defendant argues that this principle should not apply

because the trial court prohibited "speaking objections" and instructed counsel to make unelaborated objections. However, defense counsel made no effort to make a record, at any point in the trial, of the grounds for his objections. Moreover, the court specifically invited counsel to make such a record at the first recess following an objection, and offered to reconsider its rulings and take curative actions where appropriate.

Accordingly, we decline to review any of defendant's claims in the interest of justice. As an alternative holding, we find no basis for reversal. We conclude that all of the medical evidence at issue was properly admitted. With regard to defendant's claims of prosecutorial misconduct in cross-examination and summation, we conclude that the challenged questions and remarks were generally permissible (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), and that any improprieties were not so egregious as to deprive defendant of a fair trial, particularly in light of the court's curative actions.

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708,

713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). The fact that, with respect to matters defendant challenges on appeal, counsel either did not object or made inadequate objections did not deprive defendant of a fair trial, affect the outcome of the case, or cause defendant any prejudice.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3808 Boris Furlender, Index 602984/08
Plaintiff-Appellant,

-against-

Sichenzia Ross Friedman Ference LLP,
Defendant-Respondent,

American Bicycle LLC, et al.,
Defendants.

[And a Third-Party Action]

_____

Krol & O'Connor, New York (Igor Krol of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh of counsel), for respondent.

_____

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered October 20, 2009, which granted defendant-respondent law firm's (defendant) motion pursuant to CPLR 3211(a)(1) to dismiss the action as against it, unanimously affirmed, without costs.

The affidavit of defendant's attorney was a proper vehicle for the submission of acceptable attachments providing "'evidentiary proof in admissible form', e.g., documents," even though the attorney had no first-hand knowledge of the underlying facts (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Those documents, prepared by defendant in connection with the establishment of an enterprise between plaintiff and defendant

Sherman, a nonparty to this appeal, conclusively show that defendant structured the enterprise pursuant to plaintiff's instructions, refuting plaintiff's contrary allegation. Specifically, the authenticated documents show that defendant, as instructed by plaintiff, structured the enterprise so as to establish a parent corporation owned by plaintiff and Sherman, which corporation in turn owned a subsidiary LLC holding ownership rights to a patent formerly owned by Sherman. The authenticated documents also conclusively show that when attempting to exercise his rights under a stock purchase agreement prepared by defendant, plaintiff failed to follow the procedures and mechanisms clearly set out therein, refuting his claim that such failure was due to defendant's professional negligence. As plaintiff does not address Supreme Court's dismissal of his cause of action for breach of fiduciary duty based on an alleged conflict of interest, we deem the issue abandoned on appeal (*McHale v Anthony*, 41 AD3d 265, 266-267 [2007]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3810 In re Afshin Zartoshti, Index 104231/09
Petitioner-Appellant,

-against-

Columbia University,
Respondent-Respondent.

_____

Clement H. Berne, New York, for appellant.

Morrison & Foerster LLP, New York (Jack C. Auspitz of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered August 18, 2009, denying the petition to annul respondent's determination, dated January 13, 2009, which directed that petitioner receive an "F" grade in two courses and that he be suspended from the Institute of Human Nutrition for two years, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner contends that respondent failed to comply with its own procedural rules as set forth in the Student Handbook. However, petitioner received sufficient notice of the charges, evidence and proceedings against him. The record shows that petitioner was informed at the first hearing of the material allegations and evidence leading to the charges and was thereafter afforded a second hearing to answer the charges.

While the initiation of the proceedings and the makeup of the committee were not in literal compliance with the Student Handbook, the record supports the finding that the Office of the Dean of Students was involved in the procedure and that one of the committee members, Dr. Lewis, had served as Associate Dean of Students for many years. Petitioner demonstrated no prejudice resulting from the deviation from literal compliance with the Student Handbook procedures. The record thus supports the court's conclusion that respondent substantially complied with its own guidelines (*see Tedeschi v Wagner Coll.*, 49 NY2d 652, 660 [1980]; *Matter of Fernandez v Columbia Univ.*, 16 AD3d 227 [2005]; *Matter of Trahms v Trustees of Columbia Univ. in City of N.Y.*, 245 AD2d 124 [1997]).

We have considered petitioner's remaining contention and find it unavailing.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3811 Julias A. Nasso & Associates Concrete Corp., Plaintiff-Respondent, Index 600137/09

-against-

Trataros Construction, Inc., et al., Defendants-Appellants.

_____

Michael C. Marcus, Long Beach, for appellants.

McLaughlin & Stern, LLP, New York (Aimee E. Saginaw of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered December 3, 2009, which, in an action alleging breach of contract, denied defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

The motion court properly determined that plaintiff's breach of contract claims were not time-barred. According to the complaint, payment for the work plaintiff performed under the subcontract with defendants was conditioned upon the processing and disposition of payment claims with the owner of the construction project. The breach of contract claims therefore did not accrue until 2006, when the payment claims were finally processed and defendants failed to pay the liquidated amounts, and not, as defendants contend, when plaintiff initially

completed the work (*see John J. Kassner & Co. v City of New York*, 46 NY2d 544, 550 [1979]).

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: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3812 The People of the State of New York, Ind. 4223/99
Respondent,

-against-

Andre Riddick, also known as
Xavier Binghampton,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, Bronx County (John P. Collins, J.), entered June 18, 2009, as amended, July 1, 2009, resentencing defendant, as a second felony offender, to an aggregate term of 12 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was lawful in all respects (*see People v Murrell*, 73 AD3d 598 [2010], *lv granted* 15 NY3d 854 [2010]; *People v Thomas*, 68 AD3d 514, 515 [2009], *appeal withdrawn* 14 NY3d 845 [2010]).

The resentencing only involved PRS, and did not present the sentencing court with an occasion to revisit the original prison sentence. Regardless of any procedural considerations, we perceive no basis to reduce defendant's prison sentence.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3813 Mark Hardesty, Index 112200/06
Plaintiff-Appellant,

-against-

Slice of Harlem, II, LLC,
Defendant-Respondent.

_____

Scott A. Wolinetz, P.C., New York (Scott A. Wolinetz of counsel), for appellant.

Lewis, Brisbois, Bisgaard & Smith, LLP, New York (Gregory S. Katz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered February 17, 2009, which, in an action for personal injuries allegedly sustained when the chair in which plaintiff was sitting collapsed causing him to hit his head against the wall, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion properly found that plaintiff failed to present triable issues of fact for application of the theory of res ipsa loquitur. The record is devoid of evidence that defendant's control of the chair, located in a restaurant open to the public where innumerable patrons had access to the chair, was sufficiently exclusive "to fairly rule out the chance that the defect . . . was caused by some agency other than defendant's

negligence" (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 228 [1986]; *see Loiacano v Stuyvesant Bagels, Inc.*, 29 AD3d 537 *Rivera-Emerling v M. Fortunoff of Westbury Corp.*, 281 AD2d 215, 217 [2001]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3814 Lidia Hughes, Index 36544/05
Plaintiff-Respondent,

-against-

Andre Hughes,
Defendant-Appellant.

_____

Law Office of Sandra M. Prowley and Associates, LLC, Bronx (Sandra M. Prowley of counsel), for appellant.

_____

Judgment of divorce, Supreme Court, Bronx County (Ellen Gesmer, J.), entered May 8, 2009, which, to the extent appealed as limited by defendant's brief, (1) ordered him to (a) pay plaintiff maintenance of $1100 per month for 24 months, followed by $500 per month for 24 months, (b) pay child support of $619.21 per month for 24 months, followed by $721 per month for 24 months, followed by $806.21 per month, (c) pay 69% of the child's unreimbursed health, medical, pharmaceutical, optical, orthodontic, dental, therapy, child care, and camp costs, (d) obtain life insurance with a benefit of at least $500,000 naming plaintiff as beneficiary, and (e) pay plaintiff $17,847.50 as her distributive share of the parties' financial accounts, (2) awarded plaintiff 50% of defendant's pension, including pre- and post-retirement survivor benefits, (3) gave defendant a credit of $45 as his distributive share of plaintiff's Banco

Popular account in the Dominican Republic, (4) awarded plaintiff property in San Francisco de Macoris in the Dominican Republic, (5) ordered the marital property to be distributed as set forth in the court's orders dated April 17, 2008 and January 22, 2009, and (6) granted plaintiff an order of protection against defendant for five years, unanimously modified, on the law and the facts, to reduce defendant's child support obligation to $544.62 per month for the first 24 months, $648.91 per month for the second 24 months, and $730.02 per month thereafter, to reduce defendant's share of unreimbursed expenses to 47% during the first 24 months, 56% during the second 24 months, and 63% thereafter, to reduce the amount of life insurance that defendant is required to maintain to $200,000, to reduce the distributive award to $15,584.97, and to award defendant an equitable share of plaintiff's pension, and otherwise affirmed, without costs.

The trial court denied defendant's request for an equitable share of plaintiff's pension because he failed to prove that she had vested rights in a pension plan as of the date this divorce action was commenced. However, "nonvested pensions are subject to equitable distribution" (*Burns v Burns*, 84 NY2d 369, 376 [1994]). Since both parties have New York City pensions, we modify the judgment to add the following paragraph, which is modeled on the paragraph distributing defendant's pension:

> "The Defendant shall be entitled to and shall be paid a share of the total account balance of the Plaintiff under the pension plan of the New York City Employees' Retirement System equal to fifty percent of the total account balance multiplied by a fraction, the numerator of which shall be the number of years (or fraction thereof) of the marriage of the Plaintiff and the Defendant during which Plaintiff participated in the pension plan, and the denominator of which shall be the number of years of employment by New York City of the Plaintiff pursuant to *Majauskas v Majauskas*, 61 NY2d 481 (1984), plus all increases to such amount from the date of commencement to the date of distribution."

Defendant correctly contends that, in distributing the parties' assets, the court erred by using the Ameritrade statement for the period 8/27/05-9/30/05 instead of the one for the period 11/26/05-12/30/05. "The valuation date or dates may be anytime *from the date of commencement of the action* to the date of trial" (Domestic Relations Law § 236[B][4][b] [emphasis added]). This action was commenced on December 29, 2005.

It is true that, in distributing the parties' assets, the court may consider "any transfer . . . made in contemplation of a matrimonial action without fair consideration" (Domestic Relations Law § 236[B][5][d][13]). However, the parties did not separate until December 1, 2005, and the court found there was no reason to believe that defendant knew that plaintiff intended to start the divorce action. Therefore, it was internally

inconsistent for the court to conclude that transfers back to October 1, 2005 were in contemplation of this action.

Looking only at the period from December 1, 2005, we find withdrawals from the Ameritrade account of $12,610.24 on December 7 and $19.05 on December 20. Both amounts went to the parties' MCU account, from which there are payments to American Express of $125 on December 20 and $206 on December 22. Therefore, defendant owes a credit to plaintiff of $6149.14 on the Ameritrade account: withdrawals of $12,629.29, minus payments of marital debt of $331, then divide the result by two.

The balance in one of defendant's Banco Popular accounts was $780.78 as of December 31, 2005, and the balance in his other Banco Popular account was $148.42 as of December 16, 2005. Defendant withdrew $16,000 from one of those accounts on December 9, 2005, and he failed to prove that he used that money to pay marital debt. Therefore, plaintiff is entitled to a credit of $8464.60 (half of $16,929.20) on defendant's Banco Popular accounts.

On December 6, 2005, defendant wrote a $17,000 check on his NetValue account. However, he later stopped payment on that check. Therefore, plaintiff is entitled to a credit of $8500 (half of $17,000) on the NetValue account.

Contrary to defendant's claim, the remaining marital credit

card debt is not $26,000; he incorrectly includes a $5000 breach of contract claim and an education loan. According to the documents in the record, the remaining marital credit card debt was $15,057.54.

During the trial, the court said it would divide the parties' marital credit card debt, but it failed to do so in either of its orders or in the judgment. The court also said it would divide the parties' property equally. Therefore, $7528.77 (half of $15,057.54) should be subtracted from the amount that defendant owes plaintiff (*see e.g. McKeever v McKeever*, 8 AD3d 702 [2004]; *Nielsen v Nielsen*, 256 AD2d 1173 [1998]).

To summarize, defendant owes plaintiff $6149.14 plus $8464.60 plus $8500 minus $7528.77, for a total of $15,584.97.

As noted in one of the cases cited by defendant, "The amount and duration of maintenance are left mainly to the trial court's discretion, as long as the court considers the statutory factors and sets forth bases for its conclusions" (*Carman v Carman*, 22 AD3d 1004, 1008 [2005]). Defendant's contention that plaintiff was not emotionally supportive during the marriage depends on statements made in his post-trial affidavit that the trial court was free to disbelieve. (The court found plaintiff more credible than defendant.) As for defendant's argument that he will become a public charge if he has to pay maintenance in the amount set by

the trial court, his income will be above the self-support reserve even after paying maintenance, as will be shown when calculating his income for child support purposes, *infra*.

As relevant to the instant case, income for the purpose of child support is defined as gross income as it should have been reported on the most recent federal tax return, minus New York City and FICA taxes and maintenance (*see* Domestic Relations Law § 240[1-b][b][5]). The court's order setting maintenance is dated April 17, 2008. Therefore, the most recent tax return would be for 2007. The record does not contain defendant's tax return for 2007, but it does contain his W-2 for that year. It shows his gross income as $58,572.34, his Social Security withholding as $3962.65, his Medicare withholding as $926.75, and his New York City taxes as $2115.16. Thus, his annual income for child support purposes is $51,567.78 ($58,572.34 minus $7004.56) before maintenance. His annual maintenance obligation for the first 24 months ($1100 per month x 12) is $13,200. This brings defendant's income down to $38,367.78. According to defendant, the self-support reserve is $14,040. Even after paying maintenance, defendant's income is above the self-support reserve.

Plaintiff's income for the first 24 months is $43,428.14 (gross pay of $33,531.15, plus maintenance of $13,200, minus

Social Security withholding of $2031.51, Medicare withholding of $475.12, and New York City tax of $796.38). Thus, the combined parental income is $81,795.92. The child support percentage for one child is 17% (Domestic Relations Law § 240[1-b][b][3][i]).

As of the date of the order setting the child support award (January 22, 2009), the Child Support Standards Act cap was $80,000 (*see* Domestic Relations Law § 240[1-b][c][2]). A distributive award may be considered for amounts over the CSSA cap (*see Holterman v Holterman*, 3 NY3d 1, 14 [2004]). However, since the amount exceeding the CSSA cap in the instant case ($1795.90) is not substantial, the trial court properly applied the CSSA percentage to all of the combined parental income.

Seventeen percent of $81,795.92 is $13,905.30. Defendant's share of the combined parental income is 47%. Therefore, defendant's share of child support is $6535.49 per year (47% of $13,905.30), or $544.62 per month, during the time that his maintenance obligation is $1100 per month.

When defendant's maintenance obligation decreases to $500 per month, his child support income becomes $45,567.78 ($51,567.78 minus $6000), and plaintiff's becomes $36,228.14 (gross pay of $33,531.15, plus maintenance of $6000, minus withholdings of $3303.01). The combined parental income is still $81,795.92, but now defendant's share is 56%. Therefore,

defendant's child support obligation is $7786.96 per year (56% of $13,905.30), or $648.91 per month.

After defendant stops paying maintenance, his child support income will be $51,567.78, and plaintiff's will be $30,228.14. Defendant's share of the combined parental income will be 63%. Therefore, his child support obligation will be $8760.33 per year, or $730.02 per month.

Add-on expenses such as child care and unreimbursed medical expenses are to be prorated in the same proportion as each parent's income is to the combined parental income (*see* Domestic Relations Law § 240[1-b][c][4],[5][v]). Therefore, defendant's obligation for unreimbursed costs is reduced from 69% to 47% during the first 24 months, 56% during the second 24 months, and 63% thereafter.

It appears that the trial court ordered defendant to obtain a $500,000 life insurance policy to secure his maintenance and child support obligations. However, his obligations will not reach that sum. His maintenance obligations total $38,400 ([$1100 x 24] + [$500 x 24]). His child support obligations total $91,427.25 ([$6535.49 per year for 2 years] + [$7786.96 per year for 2 years] + [$8760.33 per year for 7 years and 2 months]). (The parties' child was born on July 23, 1999.) Even if one adds defendant's share of unreimbursed expenses, $500,000

is excessive; we reduce that amount to $200,000.

Some of defendant's remaining arguments are unpreserved, and we decline to consider them in the interest of justice. With respect to defendant's preserved arguments, we find them unavailing.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3815 The People of the State of New York, Ind. 3792/06
Respondent,

-against-

Christopher Seymore,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered October 25, 2007, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him, as a second felony offender, to a term of 15 years, unanimously affirmed.

The court properly exercised its discretion in permitting a witness with expertise in boxing to testify that if a person held a heavy object while striking a blow, the power of the blow would be enhanced (*see generally People v Cronin*, 60 NY2d 430, 433 [1983]). At trial it was undisputed that defendant struck the victim once in the eye, causing the loss of the eye. Defendant was charged with first-degree assault under the theory of intentionally causing serious physical injury by means of a dangerous instrument (Penal Law § 120.10[1]), as well as under

the theory of intentionally causing permanent disability (Penal Law § 120.10[2]). Among the issues before the jury were whether defendant had an unidentified dangerous instrument concealed in his fist, and whether defendant intended to disable the victim's eye. An eyewitness to the incident who happened to be an experienced boxer and trainer of boxers was permitted to testify, over objection, that a punch delivered while holding a heavy object would be more effective than an empty-handed punch. Given the trial issues, this testimony was relevant and helpful to the jury, and the witness did not give an opinion on any ultimate issue. In any event, we find that any error in receiving this testimony was harmless.

Defendant also claims he was deprived of a fair trial when a witness blurted out defendant's inflammatory nickname. Since defendant did not request any further relief after the court sustained his objection and struck the offending testimony, the court's curative actions "must be deemed to have corrected the error to the defendant's satisfaction" (*People v Heide*, 84 NY2d 943, 944 [1994]; *see also People v Medina*, 53 NY2d 951, 953

[1981]). Accordingly, defendant's claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the curative actions were sufficient to prevent any undue prejudice.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3816 John Hamill, et al., Index 104153/07
Plaintiffs-Appellants-Respondents, 590699/07

-against-

Mutual of America Investment Corporation,
Defendant-Respondent-Appellant.
- - - - - - - -
Mutual of America Investment Corporation,
Third-Party Plaintiff,

-against-

Jones Lang LaSalle,
Third-Party Defendant-Respondent.

_____

Hach & Rose, LLP, New York (Philip S. Abate of counsel), for appellants-respondents.

Mischel & Horn, P.C., New York (Naomi M. Taub of counsel), for respondent-appellant.

Fiedelman & McGaw, Jericho (Ross P. Masler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 11, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment on the Labor Law § 240(1) cause of action and granted so much of defendant's cross motion for summary judgment as sought to dismiss that cause of action, sub silentio denied so much of the cross motion as sought summary judgment dismissing the Labor Law §§ 241(6) and 200 and common-law negligence causes of action,

and denied so much of the cross motion as sought summary judgment on the third-party complaint for contractual indemnification, unanimously modified, on the law, to deny so much of the cross motion as sought to dismiss the Labor Law § 240(1) cause of action and to grant so much of the cross motion as sought summary judgment dismissing the Labor Law §§ 241(6) and 200 and common-law negligence causes of action, and otherwise affirmed, without costs.

Plaintiff John Hamill was injured while working as a building engineer employed by third-party defendant Jones Lang LaSalle Americas in a commercial building owned by defendant Mutual of America. The accident occurred while plaintiff was standing on a ladder replacing acoustic ceiling tiles.

Plaintiff established prima facie his entitlement to summary judgment on the Labor Law § 240(1) cause of action through his own testimony that he fell to the ground when the ladder on which was standing to perform his work shifted and fell (*Hart v Turner Constr. Co.*, 30 AD3d 213 [2006]; *Siegel v RRG Fort Greene, Inc.*, 68 AD3d 675, 675 [2009]). He was not required to offer proof that the ladder was defective (*Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 290-291 [2002]).

In opposition, and in support of its cross motion, defendant contended that plaintiff was not engaged in repair work, or any

other type of work covered by Labor Law § 240(1), at the time of the accident, but was engaged in mere routine maintenance, which is not covered (*see Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]; *Santiago v Fred-Doug 117, L.L.C.*, 68 AD3d 555 [2009]). Defendant relied on testimony by a Jones Lang executive that plaintiff was simply replacing 3 to 12 water-stained tiles with acoustic tiles that are kept in stock, which is routine maintenance (*see Cullen v Uptown Stor. Co.*, 268 AD2d 327 [2000]). Plaintiff, however, described the project as involving the replacement of a large portion of the drop ceiling, which had been badly damaged by leaks, including parts of the tracking system that had been rusted. Work such as plaintiff described may constitute a repair of a building or system, within the ambit of § 240(1) (*see Turisse v Dominick Milone, Inc.*, 262 AD2d 305 [1999]), even if it was not part of a larger renovation project (*see e.g. Collins v West 13th St. Owners Corp.*, 63 AD3d 621 [2009]). The differing versions of the facts preclude a determination, as a matter of law, whether plaintiff was engaged in repair work or routine maintenance when he was injured.

Defendant also contended that plaintiff's conduct was the sole proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280 [2003]). Defendant relied on plaintiff's testimony that the ladder appeared to be in good

condition, and submitted the testimony of one witness who stated that plaintiff told him he fell because he missed a step while descending the ladder, and another who saw the ladder standing erect after plaintiff fell. The conflict between these witnesses' testimony and plaintiff's testimony that the ladder itself shifted and fell presents a triable issue of fact whether plaintiff's injury was attributable to defendant's failure to provide adequate protective devices or was caused solely by plaintiff's own conduct (*see Petrocelli v Tishman Const. Co.*, 19 AD3d 145, 145 [2005]).

Defendant established prima facie its entitlement to summary judgment dismissing the Labor Law §§ 241(6) and 200 and common-law negligence causes of action, and plaintiffs did not oppose those portions of defendant's cross motion.

With respect to the third-party complaint for contractual indemnification, defendant failed to submit any evidence of a

"wrongful act or gross negligence" on the part of Jones Lang, which is required to trigger the contractual indemnification provision (*see Gomez v Sharon Baptist Bd. of Directors, Inc.*, 55 AD3d 446 [2008]).

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeney, DeGrasse, Román, JJ.

3817 The People of the State of New York, Ind. 5194/08
Respondent,

-against-

Lamont Cooley, etc.,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about June 4, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 7, 2010

CLERK

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

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3819 Jack J. Grynberg, et al., Index 602058/07
Plaintiffs-Appellants,

-against-

Advance Nanotech, Inc., etc., et al.,
Defendants-Respondents,

Tom Black, et al.,
Defendants.

_____

Daniel L. Abrams, New York, for appellants.

Sills Cummis and Gross P.C., New York (Kenneth R. Schachter of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 27, 2009, which granted defendant Advance Nanotech's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Contrary to plaintiffs' contention, the subject liquidated damages clause provides the exclusive remedy for breach of the provision requiring defendants to register certain shares with the Securities and Exchange Commission within 60 days (*see Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]; *X.L.O. Concrete Corp. v Brady & Co.*, 104 AD2d 181, 184-185 [1984], *affd* 66 NY2d 970 [1985]), and is not rendered nugatory by the general remedies clause in the agreement. The damages to be covered were those arising from a decline in the value of the

shares before they were registered, which would make them difficult to sell while unregistered. The record supports the finding that the liquidated amount is a reasonable estimate of the possible decline in share price (*see Truck Rent-A-Ctr.*, 41 NY2d at 425).

Because the penalty represented reasonable compensation, the contract was not illusory. Nor did the liquidated damages clause function as an exculpatory clause. Nor can plaintiffs avoid the effect of the express provisions of the clause by characterizing the breach as a breach of the covenant of good faith (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).

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

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3820 Brian Schantz, Index 104720/06
Plaintiff-Appellant-Respondent,

-against-

Irving Fish, M.D.,
Defendant-Respondent-Appellant.

_____

Cascione, Purcigliotti & Galluzzi, P.C., New York (Thomas G. Cascione of counsel), for appellant-respondent.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan B. Carey, J.), entered December 23, 2009, which granted plaintiff's motion to sanction defendant for the spoliation of evidence to the extent of ruling that a negative inference charge would be given to the jury, and denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly imposed a lesser sanction than striking defendant's answer, based on its finding that the spoliation of plaintiff's medical records does not completely deprive plaintiff of the means of establishing a prima facie case (*compare Gray v Jaeger*, 17 AD3d 286 [2005]; *Herrera v Matlin*, 303 AD2d 198 [2003]).

In opposition to defendant's motion for summary judgment, plaintiff submitted medical records and properly supported

experts' opinions in conflict with the opinions of defendants' experts, thereby raising issues of fact whether defendant departed from good and accepted medical malpractice in his treatment of plaintiff.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3823-
3824N& Jacob Ahroner, Index 602192/03
M-5198 Plaintiff-Appellant-Respondent,

-against-

Israel Discount Bank of New York,
etc., et al.,
Defendants-Respondents-Appellants.

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Fred Ehrlich, Scarsdale, for appellant-respondent.

Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., New York (Peter Chavkin of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 13, 2009, which, insofar as appealed from, granted spoliation sanctions to the extent of granting plaintiff an adverse inference instruction at trial with respect to e-mails on defendant Bastante's hard drive, permitting plaintiff to seek a missing documents charge with respect to certain "employee lists" at the time of trial, and directing defendants to reimburse plaintiff for the amount he paid to a forensic expert to examine Bastante's hard drive along with related attorneys' fees, unanimously affirmed, without costs. Order, same court and Justice, entered March 10, 2010, which granted defendants' motion for a protective order, struck plaintiff's notice to admit, and denied plaintiff's cross motion for further discovery,

unanimously affirmed, without costs.

On a motion for spoliation sanctions involving the destruction of electronic evidence, the party seeking sanctions must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," and (3) the destroyed evidence was "relevant" to the moving party's claim or defense. A "culpable state of mind," for purposes of a spoliation inference, includes ordinary negligence (*Zubulake v UBS Warburg LLC*, 220 FRD 212, 220 [SD NY 2003]).

Spoliation sanctions were properly granted. The record evidence demonstrated that defendants controlled Bastante's hard drive, were aware of their obligation to preserve it, and were subsequently directed by the court to do so. Defendants informed the court that they would comply with their obligations and would produce the hard drive for inspection by a forensic expert. However, the hard drive was erased before plaintiff was able to inspect it. More specifically, one day before the scheduled inspection, plaintiff was informed that the hard drive had been erased and an image of it had been taken. However, the forensic expert later learned that no image of the hard drive had in fact been taken, leaving him nothing to inspect.

The record evidence is unclear as to when the hard drive was

erased or whether it was preserved, and defendants never explained what happened. The motion court was understandably "deeply disturbed," and fairly inferred that defendants either intentionally erased the drive or that the drive was destroyed as the result of gross negligence. Furthermore, since the drive was destroyed either intentionally or as the result of gross negligence, the court properly drew an inference as to the relevance of the e-mails stored on the drive (*see Sage Realty Corp. v Proskauer Rose*, 275 AD2d 11, 16-17 [2000]).

The court also properly exercised its discretion in limiting its sanction against defendants to an adverse inference charge (*see Metropolitan N.Y. Coordinating Council on Jewish Poverty v FGP Bush Term.*, 1 AD3d 168 [2003]; *Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]). Furthermore, we find the sanction to be proportionate as it did not permit the jury to infer that any e-mails on the drive would support plaintiff's claims, but only that any e-mails would not support defendants' defense or contradict plaintiff's claims.

There was no evidence presented regarding the hard drives of the other individual defendants, and plaintiff never sought to inspect them. Nor did defendants admit that they destroyed these other hard drives. Similarly, there was no evidence regarding the data on defendants' servers. Supreme Court thus correctly

declined to grant a sanction regarding these drives.

The issue of employee lists containing descriptions of the duties of the employees in the Bookkeeping Department was properly deferred to trial. While there was some evidence that these lists were used in determining which employees would be terminated, there was no evidence regarding whether the lists were destroyed in the ordinary course of business or after defendants had received notice of plaintiff's claims. Therefore, there was insufficient information regarding these lists to warrant a sanction.

Supreme Court correctly granted defendants' motion for a protective order, since plaintiff's notice to admit regarding defendants' other hard drives "appears to be merely a subterfuge for obtaining further discovery" (*Hodes v City of New York*, 165 AD2d 168, 171 [1991]). Indeed, the notice to admit, served after plaintiff filed his note of issue and certificate of readiness, would not serve to exclude factual issues from trial, and would only raise new issues that should have been resolved during the six years of discovery in this matter. Significantly, plaintiff had the opportunity to obtain information about these other hard drives but chose to pursue discovery regarding only Bastante's hard drive.

Contrary to plaintiff's contention, he did not demonstrate

any unusual or unanticipated circumstances that would warrant permitting him to conduct discovery following the filing of the note of issue and certificate of readiness (22 NYCRR 202.21 [d]); *see Schroeder v IESI NY Corp.*, 24 AD3d 180, 181-182 [2005]).

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

M-5198 ***Ahroner v Israel Discount Bank of New York, etc., et al.***

Motion to strike reply brief granted to the extent of striking the arguments raised for the first time in reply brief and striking the references to the September 30, 2010 decision of the motion court, and otherwise denied.

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

ENTERED: DECEMBER 7, 2010

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3825N Maria Dolores Tanpinco, et al., Index 114600/08
Plaintiffs-Appellants,

-against-

Royal Caribbean International, et al.,
Defendants,

Corporate Travel Services, et al.,
Defendants-Respondents.

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Eric Schneider, Kingston, for appellants.

Law Offices of Charles J. Siegel, New York (Peter E. Vairo of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered June 16, 2009, which, upon plaintiff's motion for a default judgment against defendants Corporate Travel Services and Corporate Travel Services, Inc., and said defendants' motion to dismiss the complaint for failure to state a cause of action, directed defendants to serve their answer within 20 days, unanimously affirmed, without costs.

Defendants demonstrated a reasonable excuse for their delay in answering the complaint, i.e., that their insurance carrier

failed to forward the complaint to counsel (*see Heskel's W. 38th St. Corp. v Gotham Constr. Co. LLC*, 14 AD3d 306, 307 [2005]). The record shows no willful default on defendants' part and no prejudice to plaintiffs as a result of the delay (*see Pagan v Four Thirty Realty LLC*, 50 AD3d 265 [2008]).

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

ENTERED: DECEMBER 7, 2010

CLERK

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

2183 Testwell, Inc., doing business as Testwell Laboratories, Inc., Petitioner-Respondent, Index 111801/09

-against-

The New York City Department of Buildings, et al., Respondents-Appellants.

_____

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for appellants.

Tarter Krinsky & Drogin, LLP, New York (David J. Pfeffer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered September 1, 2009, reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

Opinion by Andrias, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
James M. Catterson
Dianne T. Renwick
Leland G. DeGrasse
Sallie Manzanet-Daniels, JJ.

2183
Index 111801/09

_____x

Testwell, Inc., doing business as
Testwell Laboratories, Inc.,
Petitioner-Respondent,

-against-

The New York City Department of
Buildings, et al.,
Respondents-Appellants.
_____x

Municipal respondents appeal from an order of the Supreme Court, New York County (Jane S. Solomon, J.), entered September 1, 2009, which granted the petition to the extent of annulling respondent New York City Department of Buildings' August 12, 2009 and August 18, 2009 determinations.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer, Stephen J. McGrath and Teresita V. Magsino of counsel), for appellants.

Tarter Krinsky & Drogin, LLP, New York (David J. Pfeffer of counsel), for respondent.

ANDRIAS, J.P.

At issue in this article 78 proceeding is the propriety of the determination of respondent the New York City Department of Buildings (the Department), which denied renewal of petitioner Testwell, Inc. d/b/a Testwell Laboratories, Inc.'s concrete testing laboratory license. Because we conclude that Testwell was afforded the reasonable notice and opportunity to be heard to which it was entitled under Administrative Code of the City of New York § 28-401.12, and that the denial of renewal was rationally based and not arbitrary or capricious, the Department's determination should have been confirmed.

Testwell provides inspection, testing, and quality control services for the construction industry. Since 1994, it has held a concrete testing laboratory license issued by the Department.

By indictment filed in New York County and dated October 29, 2008, Testwell, its sole shareholder Vidyasagar Reddy Kancharla, and certain Testwell employees were charged with enterprise corruption, scheme to defraud, grand larceny, attempted grand larceny, offering a false instrument for filing, and falsifying business records. The indictment, to which all defendants pleaded not guilty, was based, among other things, on allegations that Testwell prepared and offered false mix design reports to

both public and private entities.[1]

Based on the indictment, by letter dated October 30, 2008, the Department, pending a hearing, suspended Testwell's license and Kancharla's site-safety manager license and his professional certification and filing privileges. In a report and recommendation dated December 2, 2008, an Administrative Law Judge found that while the prehearing suspension of the licenses and Kancharla's professional certification privileges were proper, the indictment was insufficient evidence to support further suspensions and Testwell was deprived of due process. By decision and order dated January 20, 2009, the Department's Commissioner rejected that finding and reinstated, pending resolution of the criminal charges, the suspension of the licenses and Kancharla's professional certification privileges.

Testwell commenced an article 78 proceeding challenging the Commissioner's determination. By order and judgment entered on or about March 12, 2009, Supreme Court (Martin Shulman, J.), granted the petition on the grounds that no regulatory or statutory authority empowered the Department to suspend the license based on the indictment alone, which did not suffice to

[1]Testwell, Kancharla and Victor Barrone (a Testwell employee) were later convicted of enterprise corruption and related counts and have appealed to this Court.

satisfy the Department's burden at the hearing of establishing Testwell's alleged misconduct by a preponderance of the evidence.

Meanwhile, Testwell moved to dismiss the indictment. In its memorandum of law in support, Testwell admitted that it "did not perform the compressive [strength] testing that the Building Code prescribes as one of the ways for a testing laboratory to ensure that a mix meets specifications." However, Testwell claimed that the Building Code also authorized the use of the "previously accepted mix" method, and that "[a]lthough Testwell may not have followed this latter approach precisely, its intent was to do so." Insofar as the indictment alleged that Testwell filed false mix design reports stating that it had performed compressive strength testing (the "test batch" method) and falsified records, Testwell questioned, among other things, whether there was proof that: (1) Kancharla and the other individual defendants knew that the reports contained false statements and acted with intent to defraud a public entity; (2) the defendants offered and presented the reports to a public agency to become part of their records; and/or (3) the reports made their way into the business records of clients and, if so, that the defendants intended them to be entered there.

While the motion was sub judice, by letter dated April 21, 2009, Testwell applied to renew its license, which was due to

expire on June 17, 2009. In May 2009, Testwell filed for Chapter 11 bankruptcy protection. By order entered on or about June 29, 2009, Supreme Court (Edward J. McLaughlin, J.) found that the Grand Jury minutes provided legally sufficient evidence to show fraud in that Testwell, among other things, had issued reports stating that it used the test batch method, whereas "the evidence presented to the Grand Jury demonstrated that Testwell created most of its mix design reports without conducting any laboratory testing of concrete."

By letter dated July 8, 2009, the Department informed Testwell that it would "consider" renewing its license subject to certain conditions, including that Testwell: (1) be placed on probation for two years, during which time the Department could revoke the license without a hearing for any violation of the terms of the renewal; (2) provide proof that indicted persons were not engaged by Testwell in technical or managerial positions related to concrete testing; and (3) retain the services of an independent third party, acceptable to the Department and qualified to assess and evaluate concrete testing operations during the probationary period, to oversee technical operations, including development of a new quality assurance/quality control plan for monitoring and auditing technical activities. The Department requested that Testwell indicate whether it would

accept the conditions within 30 days and advised Testwell that:

> "In the interim, Testwell may continue to perform services provided that Testwell is directly supervised by an independent, licensed concrete testing laboratory acceptable to the Department. This independent concrete testing laboratory shall be capable of overseeing the technical aspects of Testwell's concrete testing operations, both in the laboratory and at the job site."

By letter dated July 10, 2009, Testwell, by counsel, replied that "[w]hile [it] was willing to accept and immediately implement the Department's conditions during its post-renewal probationary period, Testwell requests that the Department remove the interim condition that a third-party testing laboratory be retained to oversee Testwell's operations." As an alternative, Testwell proposed that it retain Irwin Cantor P.E. or an engineer, acceptable to the Department, to assess and evaluate Testwell's concrete testing operations, and to implement the Department's other conditions. Testwell also argued that the denial of its motion to dismiss the indictment, like the indictment itself, had no impact on whether Testwell met the qualifications for renewal.

By letter dated July 15, 2009, the Department accepted Testwell's modification of the interim condition, stating that it would accept a third-party entity, "such as an engineering firm

or other entity with the technical expertise to oversee concrete testing operations, to oversee Testwell's operations in the interim in place of a independent concrete testing laboratory." The Department disagreed with Testwell's assessment of the legal significance of the order denying the motion to dismiss the indictment and advised Testwell that it was "available to meet with Testwell and any proposed third-parties as described in the terms of renewal to resolve this issue."

By letter dated August 12, 2009, the Department informed Testwell of its determination to deny renewal of Testwell's license pursuant to Administrative Code §§ 28-401.12, 28-401.19(5), 28-401.19(7), and § 28-401.19(13) on the grounds that "Testwell's actions and inactions violate the terms of the Commissioner's order, constitute fraudulent dealings, and reflect poor moral character that adversely reflects on its fitness to conduct the regulated work." Although the Department ordered Testwell to cease and desist all concrete testing immediately, it advised Testwell that "[i]n accordance with Administrative Code § 28-401.12, Testwell is hereby afforded the opportunity to demonstrate why renewal of its concrete testing laboratory license should not be denied on the additional grounds of fraudulent dealings and poor moral character. Such submission must be received by Friday, August 14, 2009, noon."

By letter dated August 14, 2009, Testwell protested all aspects of the Department's denial, contending that "the stated grounds are not a proper basis upon which the Commissioner should deny renewal of the license. Rather, the facts demonstrate that Testwell has acted in compliance with the orders of the Department, according to the terms that were communicated to Testwell." In support, Testwell asserted that it had acted in good faith to satisfy the Department's terms for a renewal license, which were not made subject to a deadline and had not engaged in fraudulent conduct and did not display poor moral character. In this regard, Testwell contended that the July 8th letter asked only that Testwell indicate its willingness to accept the proposed conditions within 30 days, not that it satisfy all of the conditions within that time period. Testwell also reiterated that an indictment is not a finding of guilt and argued that in any event, the Department "has mistakenly conflated the alleged misconduct of the former management of Testwell with the question of whether the company, as operated and managed today, is a worthy recipient of a renewed [l]icense." Thus, Testwell asserted that denial of a renewal license was not compelled by the facts, was not necessary to protect the public and would impose and undue and unnecessary hardship.

By letter dated August 18, 2009, the Department adhered to

its decision to deny renewal and restated its order that Testwell cease and desist all concrete testing operations immediately. The Department explained that Testwell's

> "point that the July 8 letter did not require that all of the conditions be satisfied within thirty (30) days is . . . correct, but irrelevant. Testwell's failure to comply with the requirement that, during the thirty (30) day period commencing July 8, 2009, it obtain independent technical oversight acceptable to the Department, of its concrete testing laboratory operations during this period, coupled with the evidence of its operation on August 11, 2009 at 795 Columbus Avenue, warrants the Department's determination to deny the renewal for failure to comply with the Commissioner's order."

The Department rejected Testwell's argument that changes in management and the appointment of a restructuring officer by the Bankruptcy Court justified renewal of the license, in that

> "[y]our letter pointedly makes no mention of Testwell's ownership and the Department has no evidence suggesting that the lab's ownership has changed since the indictment. Morever, although Testwell's guilt or innocence will be determined in the upcoming trial, the trial court's indication on the omnibus motion regarding the nature of the reports Testwell produced and the admissions Testwell made in that motion constitute a basis for the Department's determination that Testwell engaged in fraudulent dealings and displayed poor moral character that adversely reflects on Testwell's fitness to conduct regulated work."

Testwell then commenced this article 78 proceeding seeking

to annul the Department's August 12, 2009 decision not to renew its license. The Department cross-moved to dismiss the petition. On September 1, 2009, Supreme Court amended the petition to include a challenge to the Department's August 18, 2009 determination and granted the amended petition to the extent of vacating the Department's August 12th and August 18th determinations on the grounds that: (1) the Department did not provide adequate notice to Testwell of the prohibited conduct and an opportunity to be heard because the July 8 2009 letter, by its terms, was an offer to renew, not an order, and (2) "even an undismissed indictment, cannot be used as a basis to terminate a license, the decision of Justice Shulman never having been set aside and it carries through the decision by Justice McLaughlin on the indictment."[2] We now reverse.

"Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood . . . In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment"

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[2]The court did not order the Department to renew Testwell's license. Instead, the court stated that the parties were "status quo ante, which means you don't know whether you have a license or not unless the City wants to rely on the July 8th letter, at which point you need to stop negotiating terms of engagement and simply engage quickly, because there is nothing before me on the July 8th letter."

(*Bell v Burson*, 402 US 535, 539 [1971]; *Matter of Daxor Corp. v State of N.Y. Dept of Health*, 90 NY2d 89, 98 [1997] *cert denied* 533 US 1074 [1998]). Accordingly, due process may prevent the revocation or suspension of a license without notice and a hearing. However, Testwell's license was not revoked or suspended. Rather, the license expired on June 17, 2009, after which the Department issued its July 8, 2009 letter setting forth the interim condition for Testwell's continued operations pending renewal. Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing (*see Daxor Corp.*, *supra*, 90 NY2d at 97-98 [finding a clinical laboratory had no property right in an initial or renewed license even though the lab had operated for years under a City license and provisional State licenses]; *Matter of M.S.B.A. Corp. v Markowitz*, 23 AD3d 390 [2005]; *Matter of Active Appliance Corp. v County of Suffolk*, 251 AD2d 659 [1998]).

Although Testwell had no constitutional right to notice and a hearing regarding the renewal of its license, it did have a statutory right to "notice and an opportunity to be heard" under New York City Administrative Code § 28-401.12, which provides that "[t]he department may, following notice and an opportunity to be heard, refuse to renew a license or certificate of

competence on any grounds on the basis of which it could deny, suspend or revoke such license." Under this section, Testwell was entitled to reasonable notice and a fair opportunity to be heard with respect to the reasons for the denial of renewal (*see e.g. Torres v New York City Taxi & Limousine Commn.*, 268 AD2d 340 [2000] [revocation of license upheld where petitioner was given reasonable notice and opportunity to be heard]). The record amply demonstrates that these requirements were satisfied.

First, the Supreme Court erred when it found that the Department did not give Testwell sufficient notice of the prohibited conduct and an opportunity to be heard because its July 8, 2009 letter did not constitute an order for Testwell to take specific action by a "drop dead" date or it would be "at risk," and therefore the Department's August 12, 2009 letter rested on the faulty assumption that Testwell had defied a Department order. Testwell received reasonable notice in the Department's July 8, 2009 letter of the interim condition placed on its continued operations after the expiration of its license. While that letter proposed the terms on which the Department was willing to consider renewing Testwell's license, which Testwell had 30 days to accept, it separately and unequivocally gave Testwell notice that "[i]n the interim, Testwell may continue to perform services provided that Testwell is directly supervised by

an independent, licensed concrete testing laboratory acceptable to the Department." In its July 10, 2009 letter, Testwell expressly acknowledged this "interim condition" and requested that it be amended to allow Testwell to retain an engineer, acceptable to the Department, "to assess and evaluate Testwell's concrete testing operations and implement the other conditions proposed by the Department." In its July 15, 2009 letter, the Department accepted Testwell's amendment of the interim condition.

This correspondence demonstrates that Testwell received adequate notice of and in fact agreed to accept the interim condition, as modified, providing that after the expiration of its license, and during the 30 day period it was given to accept the Department's conditions, it could not continue to perform services under its expired license unless Testwell retained an engineer, acceptable to the Department, "to assess and evaluate Testwell's concrete testing operations and implement the other conditions proposed by the Department." Accordingly, the requirements set forth in the Department's July 8, 2009 for Testwell's continued operations pending renewal, as modified by the parties' subsequent correspondence, could and did serve as a predicate for the future action taken by the Department in its August 12th and August 18th determinations.

Second, Testwell received adequate notice of the charges against it and an opportunity to be heard. In its August 12, 2009 letter, the Department informed Testwell of the specific reasons for the denial of renewal and advised Testwell that, in accordance with Administrative Code § 28-401.12, it had the opportunity to demonstrate why renewal should not be denied. By letter dated August 14, 2009, Testwell availed itself of that opportunity, contesting all of the stated grounds for denial, setting forth its position in detail. By letter dated August 18, 2009, the Department adhered to its decision to deny renewal, responding to each of Testwell's points.

Because Testwell received the due process to which it was entitled, and because no hearing was held, the issue before us is whether respondents' determination is supported by a rational basis and was not arbitrary and capricious (CPLR 7803[3]; *Matter of M.S.B.A. Corp v Markowitz*, 23 AD3d at 391).[3]

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[3]The substantial evidence test of CPLR 7803(4) applies only where a hearing has been held and evidence taken pursuant to direction by law (*Matter of Colton v Berman*, 21 NY2d 322, 329 [1967]). However, it may be noted that even if the test applied, the substantial evidence standard requires "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). This is "less than a preponderance of the evidence" (*id.*) and, "as a burden of proof, it demands only that a given inference is reasonable and plausible, not necessarily the most probable" (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997] [internal quotation marks and

An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *see also Matter of Arrocha v Board of Educ. of City of N.Y.*, 93 NY2d 361, 363-364 [1999]). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*see Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.,* 72 NY2d 753, 763 [1988], *cert denied* 490 US 1080 [1989]; *Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363 [1987]).

The first ground for the Department's determination was that Testwell violated Administrative Code § 28-401.19(7) ("[f]ailure to comply with this code or any order, rule, or requirement lawfully made by the commissioner"). This violation was based on Testwell's failure to abide by the "requirement [contained in the July 8, 2009 letter] that, during the thirty (30) day period commencing July 8, 2009, it obtain independent technical

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citation omitted]), which may be predicated on both hearsay and circumstantial evidence (*see generally Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 281 [2007]).

oversight of its concrete testing laboratory operations acceptable to the Department."

A license, being a personal privilege and not a vested right, is subject to reasonable restrictions by an issuing authority (*eee Big Apple Food Vendors' Assn. v City of New York*, 228 AD2d 282 [1996], *appeal dismissed* 88 NY2d 1064 [1996], *lv denied* 89 NY2d 807 [1997]; *Lap v Axelrod,* 95 AD2d 457 [1983], *lv denied* 61 NY2d 603 [1984]). Here, Testwell's alleged misconduct was directly related to the work for which it was issued a concrete testing laboratory license, and the Department had the authority to impose the interim condition pending the renewal of Testwell's expired license in the interest of public safety (*see Matter of K.C.B. Bakeries v Butcher*, 144 AD2d 894 [1988], *lv denied* 73 NY2d 705 [1989]). The Commissioner rationally found that Testwell failed to comply with the interim condition by "performing such operations during this time without satisfying the oversight requirement, as evidenced by its collection of test samples at 795 Columbus Avenue, New York, New York on August 11, 2009." On this basis alone, it was not arbitrary or capricious for the Department to deny renewal of Testwell's license.

The second ground for the Department's determination was Administrative Code § 28-401.19(5) ("Fraudulent dealings") and § 28-401.19(13) ("Poor moral character that adversely reflects on

his or her fitness to conduct work regulated by this code”). The Supreme Court found that this ground was not proved because the Department "is bound by the notion that an indictment, even an undismissed indictment, cannot be used as a basis to terminate a license, the decision of Justice Shulman never having been set aside, and it carries through the decision by Justice McLaughlin on the indictment." This too fails to appreciate that we are now reviewing the denial of renewal of a license, not a suspension or revocation which requires a due process hearing, and that the Department did not rely solely on the indictment in reaching its determination.

The discretion of the Department extends to the determination of what constitutes untrustworthy conduct (*see Matter of Gold v Lomenzo*, 29 NY2d 468, 476-477 [1972]). In finding that Testwell violated sections 28-401.19(5) and 28-401.19(13), the Department relied on Testwell’s admissions that it filed mix design reports that falsely alleged they were based on the test batch method, as well as Justice McLaughlin’s analysis of the evidence before the Grand Jury, which led him to find that

> “[a]ccording to the evidence, Testwell did not create four trial batches of concrete, and did not conduct compressive strength tests on any trial batches. Instead, the evidence showed that Testwell learned which

> mix recipe the concrete contractor, as opposed to the building's owner or project engineer, desired to be approved, and that, virtually always, Testwell used a computer program to create a false mix design report showing that the desired mix recipe had passed compressive strength testing. The fraudulent test report was presented to a Testwell engineer, who certified the false report to be genuine and recommended one of the four mix recipes for use in the building project."

In this regard, Justice McLaughlin noted that 64 false mix design reports from at least nine different construction projects had been introduced into evidence before the Grand Jury. Further, as to Testwell's claim that it had used an alternate, acceptable method for testing the strength of concrete, Justice McLaughlin observed:

> "This alternate method is called the previously accepted mix method, but the evidence before the Grand Jury does not suggest that Testwell used that alternate method. The evidence showed that the reports purported to show that Testwell had used the test batch method, not the previously accepted mix method, and that a test batch report does not resemble a previously accepted mix method report. Moreover, the evidence showed that Testwell did not follow any of the procedures or testing required under the test batch method, but that Testwell used a computer program to generate the reports. From this evidence, the Grand Jury was entitled to infer that the defendants who prepared and approved of those reports knew that the reports were false and acted with intent to defraud the engineers, builders, and building owners who rely on

> those reports to plan and build a construction project."

Based on the foregoing, the Department rationally found:

> "In denying Testwell's omnibus motion, the trial court found the grand jury evidence sufficient to show that Testwell's reports purported to show that Testwell had used one method of generating a concrete mix design when in fact it had used another . . . In fact, Testwell's motion papers in that case admit that it did not use the method purportedly reflected in the reports . . . [T]he finding of the trial court regarding the nature of the reports Testwell produced, coupled with its admissions, constitutes fraudulent dealings and poor moral character that adversely reflects on Testwell's fitness to conduct regulated work."

As to Testwell's claim that its past conduct should be excused due to its alleged change in management, the issue here is not whether Testwell "corrected any earlier deficiencies, or how well their facilities function now" (*Daxor Corp.*, 90 NY2d at 101). The Department denied the applications because Testwell's fraudulent dealings and poor moral character in the course of the work for which it was granted a concrete testing laboratory license adversely reflects on Testwell's fitness to conduct the regulated work, a determination that is entitled to deference (*id.*). Further, as the Department noted, Testwell made "no mention of Testwell's ownership and the Department has no evidence suggesting that the lab's ownership has changed since

the indictment."

Accordingly, the order of the Supreme Court, New York County (Jane S. Solomon, J.), entered September 1, 2009, which granted the petition to the extent of annulling the Department's August 12, 2009 and August 18, 2009 determinations, should be reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

All concur.

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

ENTERED: DECEMBER 7, 2010

CLERK