SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 21, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10017 In re Aidan Doorley, Index 114925/10
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

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Jeffrey L. Goldberg, P.C., Port Washington, (Jeffery L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Cynthia S. Kern, J.), entered June 10, 2011, which denied the CPLR article 78 petition seeking to annul respondent Board of Trustees' July 14, 2010 determination denying petitioner's application for accident disability retirement benefits (ADR) based on his psychological condition and dismissed the proceeding, unanimously affirmed, without costs.

An applicant for ADR benefits "has the burden of establishing that the disability is causally connected to a line-of-duty accident" (*Matter of Evans v City of New York*, 145 AD2d

361, 361 [1st Dept 1988]). The Board of Trustees' determination of whether petitioner met this burden and established causation only need be based on credible evidence in the record (*see Matter of Wahl v Board of Trustees of N.Y. City Fire Dept.*, 89 NY2d 1065, 1067 [1997]; *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]). The denial of ADR by the Board of Trustees based on a tie vote, as occurred here, can only be set aside on judicial review if the court concludes that the applicant is entitled to the increased benefits as a matter of law based on the record because "the disability was the natural and proximate result of a service-related accident" (*Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. Of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]; *see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. I-B Pension Fund*, 90 NY2d 139, 145 [1997]).

Here, the Board of Trustees' denial of petitioner's ADR application was made on a rational basis supported by the record, and therefore was not arbitrary and capricious (*see Borenstein*, 88 NY2d at 760). The evidence submitted by petitioner in support of his application failed to establish that his psychological disability was caused by the 2004 accident. The hospital report made in the emergency room on the day of the accident does not

indicate that petitioner needed medical treatment for a head injury, but rather it states that petitioner had an abrasion under his eye and blurred vision. In petitioner's first application for ADR, made in 2005, he makes no claim of psychological disabilities as the application refers only to physical pain and dizziness.

In an evaluation of petitioner, psychologist Dr. Bochicchio noted that in 2006 the NYPD staff surgeon "found the officer to have no objective medical findings to explain his symptoms." Dr. Bochicchio does not conclude that petitioner's psychological condition was caused by the accident. Although another psychologist, Dr. Robins, finds that petitioner's psychological condition was caused by the accident, his conclusion is unsupported by any medical evidence. When there are differing medical opinions concerning the cause of an applicant's disability, the Board of Trustees has the authority to reach its own decision as long as it is based on credible evidence (*see*

Matter of D'Angelo v Ward, 159 AD2d 425, 426 [1st Dept 1990]). Therefore, as petitioner did not meet his burden, denial of the petition was proper (*see Evans*, 145 AD2d at 361).

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

ENTERED: MAY 21, 2013

CLERK

Andrias, J.P., Friedman, DeGrasse, Manzanet-Daniels, Gische, JJ.

8779- Ind. 1304/09
8780 The People of the State of New York,
Appellant,

-against-

David Snipes,
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Katharine Skolnick of counsel), for respondent.

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Judgment of resentence, Supreme Court, New York County (Ruth Pickholz, J.), rendered September 23, 2011, resentencing defendant as a second violent felony offender, and bringing up for review an order of the same court and Justice, entered on or about May 16, 2011, which granted defendant's CPL 440.20 motion to set aside his sentence as a persistent felony offender, and an order, entered on or about August 1, 2011, which, upon reargument, adhered to the May 16, 2011 order, unanimously reversed, on the law, and the matter remanded to the sentencing court for proceedings to determine whether defendant may be adjudicated a persistent violent felony offender based on a 1999

conviction for robbery in the first degree. Appeal from the May 16, 2011 order unanimously dismissed as subsumed in the appeal from the judgment.

In granting defendant's motion to set aside his sentence on the ground that his adjudication as a persistent violent felony offender was unlawful, the court erred in failing to consider the People's alternative argument that defendant could be adjudicated a persistent violent felony offender based on a 1999 conviction for first-degree robbery. "There is nothing in the Penal Law to indicate that a resentencing necessarily resets the controlling sentencing date for purposes of sequentiality" (*People v Davis*, 93 AD3d 524, 524 [1st Dept 2012], *lv denied* 19 NY3d 995 [2012]). This Court, citing *People v Acevedo* (17 NY3d 297 [2011]), has held that where a defendant's resentencing was at the behest of the Division of Parole for purpose of imposing a period of postrelease supervision, the resentencing date controls whether a conviction meets the sequentiality requirement for sentencing as a persistent violent felony offender (*see People v Butler*, 88 AD3d 470 [1st Dept 2011], *lv denied* 18 NY3d 992 [2012]; *see also People v Sanders*, 99 AD3d 575 [2012]; *but see* People v *Boyer*, 91 AD3d 1183 [3d Dept 2012], *lv granted* 19 NY3d 1024 [2012]). However, this rule does not apply where, as here, the resentence

was a nullity under *People v Williams* (14 NY3d 198 [2010], *cert denied* 562 US __, 131 S Ct 125 [2010]), and was thus ineffective to alter the relevant sentencing sequence (*see Acevedo*, 17 NY3d at 302 [opinion of Lippman, C.J.]).

The Decision and Order of this Court entered herein on December 11, 2012 is hereby recalled and vacated (*see* M-5956 decided simultaneously herewith).

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

ENTERED: MAY 21, 2013

CLERK

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

9402 Arrowgrass Master Fund Ltd., et al., Index 651497/10

Plaintiffs-Respondents-Appellants,

-against-

The Bank of New York Mellon,
Defendant-Appellant-Respondent.

_____

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Leslie Gordon Fagen of counsel), for appellant-respondent.

Kasowitz Benson Torres & Friedman, New York (Sheron Korpus of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered February 28, 2012, which granted so much of defendant's motion to dismiss the complaint as sought to dismiss the cause of action for breach of fiduciary duty, unanimously modified, on the law, to dismiss so much of plaintiffs' remaining claims as challenges the 2007 Intercreditor Agreement, and otherwise affirmed, without costs.

Plaintiffs, noteholders under a trust indenture, commenced this action to recover hundreds of millions of dollars in losses they allege were caused by defendant, The Bank of New York Mellon, in its capacity as indenture trustee. Defendant is correct that plaintiffs may not challenge the 2007 Intercreditor Agreement in the instant action because the settlement agreement

states, "Upon the occurrence of the Payment Date, the 2015 Notes Trustee will waive, with prejudice, *all* challenges to the December 20, 2007 Intercreditor Agreement" (emphasis added). It is undisputed that the Payment Date has occurred. Furthermore, the 2015 Notes Trustee's execution of the settlement agreement bound the 2015 Noteholders. If plaintiffs had wished to limit their waiver of their challenge to that agreement, "it would have been a simple matter to include language to that effect" (*Hack v United Capital Corp.*, 247 AD2d 300, 302 [1st Dept 1998]).

Indeed, our broad interpretation of the word "all" in the release is consistent with the language of the release which expressly released the "2015 Note Trustees" and each of its "predecessors." Contrary to plaintiff's allegations, there is nothing in the language of the release indicating that the term "predecessors" means anything less than its ordinary meaning as referring to "[o]ne who precedes another in an office or position" (*see* Black's Law Dictionary [9th Ed 2009]). Certainly, if the parties intended the release not to cover the 2015 Note Trustees's predecessors (i.e. defendant) they would not have used the word "all," which we view as broadly releasing "*all* challenges to the December 20, 2007 Intercreditor Agreement." "'Single clauses cannot be construed by taking them out of their context and giving them an interpretation apart from the contract

of which they are a part'" (*Analisa Salon, Ltd. v Elide Props., LLC*, 30 AD3d 448, 448-449 [1st Dept. 2006], *quoting Aimco Chelsea Land v Bassey*, 6 AD3d 367, 368 [1st Dept 2004]). Thus, in the context of this broad release, it makes perfect sense that "predecessor" means Wilmington's predecessor as trustee (i.e., defendant) and not just the corporate predecessor.

In light of our finding that plaintiffs may not challenge the 2007 Intercreditor Agreement, we need not address defendant's contentions that section 9.10(11) of the indenture authorized it to enter into the 2007 Intercreditor Agreement without the noteholders' consent and that it reasonably believed that it was authorized to execute that agreement without such consent or plaintiffs' contention that defendant breached the indenture by failing to obtain an officer's certificate and opinion of counsel before executing the 2007 Intercreditor Agreement.

We have considered plaintiffs' argument that the complaint

sufficiently alleges defendant's actual knowledge of a Default or Event of Default (as those terms are defined in the indenture) and find it unavailing.

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

ENTERED: MAY 21, 2013

CLERK

Moskowitz, J.P., DeGrasse, Richter, Gische, JJ.

9610-
9611 Index 651939/10

Maya NY, LLC,
Plaintiff-Appellant,

-against-

Daryl Hagler, et al.,
Defendants-Respondents.

_____

Peter R. Ginsberg Law, LLC, New York (Christopher R. Deubert of counsel), for appellant.

Goldberg & Rimberg PLLC, New York (Steven A. Weg of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 5, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the third, sixth and ninth (in part) causes of action in the amended complaint, unanimously modified, on the law, to the extent of reinstating the third and ninth causes of action, and otherwise affirmed, without costs. Order, same court and Justice, entered July 17, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for leave to amend the fifth and eleventh causes of action in the amended complaint, unanimously affirmed, without costs.

Plaintiff alleges that defendants breached contractual obligations, or were unjustly enriched, in connection with two

transactions. In its third cause of action, plaintiff alleges that defendants were unjustly enriched by a $250,000 "loan" made by plaintiff's predecessor-in-interest to the corporate defendant N.E. Development, LLC, at the recommendation of defendant Hagler, the predecessor's accountant and financial tax planner. Hagler formed N.E. Development as an investment vehicle/tax shelter for his clients. The $250,000 loan was made in June 2004 and, according to plaintiff, defendants orally agreed to repay the loan, with interest at the rate of 13% per annum, to plaintiff's predecessor-in-interest. Repayment was due June 2005, 12 months after the loan was made. Defendants did not, however, repay the loan in full and plaintiff alleges that it was never notified by Hagler that the money was actually being treated by him as an investment in N.E. Development. Although the motion court applied a six-year statute of limitations, it held that the cause of action was time barred because it accrued on the date that plaintiff made its initial payment in June 2004.

In its ninth cause of action, plaintiff alleges that defendants were unjustly enriched when plaintiff's predecessor-in-interest, at Hagler's recommendation, "invested" a total of $202,500 (made in three payments across three years) in defendant Washington Partners, LLC, another entity in which Hagler had an interest. Although the motion court determined that plaintiff

had sufficiently pleaded its prima facie case for unjust enrichment, and that the third investment payment made on December 15, 2008 was actionable, it found, by applying a three-year statute of limitations, that claims based on the first $180,000 transfer of investment funds, in November 2005, and the $7,500 transfer of investment funds, in June 2007, were time-barred.

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit that in "equity and good conscience" should be paid to the plaintiff *(Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] internal quotation marks omitted). It is available only in unusual situations when the defendant has not breached a contract nor committed a recognized tort, but circumstances create an equitable obligation running from the defendant to the plaintiff (*see Markwica v Davis*, 64 NY2d 38 [1984]). Under New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment, but where, as here, the unjust enrichment and breach of contract claims are based upon the same facts and pled in the alternative, a six-year statute of limitations applies (*see Knobel v Shaw*, 90 AD3d 493, 495 [1st Dept 2011]).

Plaintiff alleges that the use of its monies by defendants,

after not fully repaying the money loaned pursuant to an oral contract, bestowed an unintended benefit upon them. The alleged wrongful act occurred in June 2005, when the monies should have been repaid to plaintiff and not when plaintiff first advanced the funds. This action was commenced in November 2010, within six years of June 2005, so that the third cause of action was timely brought and should not have been dismissed.

Like the third cause of action, the ninth cause of action for unjust enrichment is specifically pleaded in the alternative to the breach of contract claims and was also timely brought in November 2010. As a result, the Court erroneously dismissed Maya's unjust enrichment claims arising out of the November 2005 and June 2007 transfers by applying a three-year statute of limitations when this cause of action is governed by a six-year statute of limitations. In arguing that a three-year limitations period applies to the ninth cause of action, defendants rely on cases involving allegations for unjust enrichment stemming from tortious conduct, which is not the case here (*cf. Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010]).

An action for conversion is subject to a three-year limitation period (*see* CPLR 214[3]; *Sporn v MCA Records,* 58 NY2d 482, 488-489 [1983]). The cause of action normally accrues on

the date the conversion takes place and not the date of discovery or the exercise of diligence to discover (*Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44-45 [1995]). In its sixth cause of action, plaintiff alleges that Hagler was obligated to use the funds it entrusted to him as a loan, but Hagler invested them instead. The latest date for the accrual of an action for a conversion claim would be June 2005, the date plaintiff alleges that repayment of the loan was due. The conversion claim is untimely as it was brought more than three years after the cause of action accrued.

Plaintiff's fifth and eleventh causes of action alleging accountant malpractice with respect to the loan and investment transactions were properly dismissed as untimely. A three-year statute of limitations applies (*see* CPLR 214[6]; *Williamson v PricewaterhouseCoopers LLP*, 9 NY3d 1 [2007]), and such causes of action accrued at the time the negligent investment advice was given, or, at the very latest, when Hagler, without apparent explanation, failed to pay both the loan when due (on or about June 23, 2005), and the initial payment on the investment that was due on or about November 28, 2006 (*see Ackerman v Price Waterhouse*, 84 NY2d 535, 541-542 [1994]).

Furthermore, neither the amended complaint, nor the proposed second amended complaint, offered any allegations to show that

Hagler continuously represented plaintiff's predecessor with respect to the two transactions (*see Zaref v Berk & Michaels*, 192 AD2d 346, 347-348 [1st Dept 1993]), or that the parties had a "mutual understanding of the need for further representation on the specific subject matter" (*McCoy v Feinman*, 99 NY2d 295, 306 [2002]). There were no allegations as to how Hagler advised plaintiff's predecessor once the due dates of the two transactions were reached. By plaintiff's own allegations, its predecessor was left perpetually "in the dark" about everything that had to do with the transactions, including the fact that no written instruments were involved and Hagler had autonomy to handle the transactions as he desired. The one-sided handling of these investments does not support a finding of continuous representation.

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: MAY 21, 2013

CLERK

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

9927- Index 114134/08
9928-
9929 Peter Keenan, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Simon Property Group, Inc., et al.,
Defendants,

Alert Glass & Architectural Metals Corp.,
Defendant-Respondent,

The Retail Property Trust, et al.,
Defendants-Respondents-Appellants.

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Kelner and Kelner, New York (Gail S. Kelner of counsel), for appellants-respondents.

Law Offices of Richard A. Fogel, P.C., Islip (Richard A. Fogel of counsel), for respondents-appellants.

Mirando Samburksy Slone Sklarin Verveniotis LLP, Mineola (Ondine Slone of counsel), for respondent.

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Orders, Supreme Court, New York County (Richard F. Braun, J.), entered October 16, 2012, which, insofar as appealed from, denied defendants The Retail Property Trust (RPT) and The Art of Shaving-NY, LLC's (Art of Shaving) motion for summary judgment dismissing the complaint as against them and for summary judgment on their cross claim for common law indemnification as against defendant Alert Glass & Architectural Metals Corp. (Alert Glass), and denied plaintiffs' motion for partial summary judgment on

their Labor Law 240(1) cause of action, unanimously modified, on the law, to grant plaintiff's motion, and otherwise affirmed, without costs. Order, same court, Justice and date, which, insofar as appealed from, granted defendant Alert Glass's motion for summary judgment dismissing the complaint and defendants RPT and Art of Shaving's cross claim seeking common law indemnification as against it, unanimously affirmed, without costs.

Plaintiff sustained injuries when he fell from a ladder while installing vinyl lining in a store front window frame. This work was part of a renovation project being done at the behest of the store occupant, defendant Art of Shaving. Defendant RPT owned the mall where the Art of Shaving store is located. Art of Shaving contracted with nonparty M.D. Collins to act as the general contractor of the renovation project. Collins then subcontracted a portion of the work, specifically, the installation of the windows and doors to defendant Alert Glass. Thereafter, Alert Glass subcontracted with Proper Construction to install the glass.

On the date of the accident, plaintiff, who was employed by Proper Construction, was working outside the store. Specifically, he used a 12-foot aluminum A-frame ladder available at the work site to install vinyl lining around the edges of the

storefront window. Other workers had already inserted the storefront windows in their frames. Plaintiff was installing the vinyl lining in order to secure the windows. He was working in a four-foot wide area between the storefront and a "wood barrier" that was constructed to surround the storefront and keep the public away from the work zone. Because debris had been left in the enclosed work zone, plaintiff was precluded from opening up the A-frame ladder. Instead, he kept the ladder in its folded state and alternated leaning it against the storefront window, or against a column to the storefront, depending on where he was inserting the vinyl lining. Only two feet of the folded ladder's four feet were in contact with the ground while the folded ladder leaned against the storefront. Plaintiff placed his tool bag at the base of the ladder, against its feet, to prevent the ladder from slipping.

Over the course of three hours, plaintiff moved the ladder several times, and leaned it against the storefront. The ladder appeared "wobbly" and "shook" at times. Plaintiff had complained about the ladder's instability to his supervisor, and asked for another ladder, but none was given. Plaintiff stood on the ladder and inserted the vinyl lining in the window frame. Plaintiff also cut a piece of vinyl from a roll while on the ladder. He then used a pry bar and the handle of a mallet to

insert the vinyl material into the window frame. Just prior to falling, plaintiff had a half-used vinyl roll, which weighed approximately ten pounds, hanging on his shoulder. He was "coming down the ladder," using both hands to hold on, but his foot became "stuck" on the raised sharp points, or spikes, that were on the steps. He tried to pull his shoe off the spikes, at which time he lost his balance and fell.

In or about October 2008, plaintiff commenced this action alleging negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The complaint also asserted a cause of action by plaintiff's wife for loss of society. Thereafter, Supreme Court denied plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) cause of action, and granted defendant Alert Glass's motion for summary judgment dismissing the complaint and cross claim against it. The court denied RPT and Art of Shaving's motion for summary judgment dismissing the complaint against them, or alternatively for summary judgment on their cross claim for common law indemnification as against defendant Alert Glass.

Initially, we find that plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action should have been granted. Labor Law § 240(1) imposes liability on contractors and owners for the existence of certain

elevation-related hazards and the failure to provide an adequate safety device of the kind enumerated in the statute (*see Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35, 39 [2004]). To establish a claim under this provision, a plaintiff must "show that the statute was violated and that the violation proximately caused his injury" (*Cahill*, 4 NY3d at 39).

Plaintiff established prima facie entitlement to summary judgment on his Labor Law § 240(1) claim as against defendants RPT and Art/Shaving by his testimony that: (1) the ladder was the only one available; (2) the ladder could not be properly opened into an A-frame stance due to excess debris in his narrowly confined work space; (3) he asked his foreman for another ladder, to no avail; (4) the ladder was unusual in that the step treads contained spikes which unexpectedly caught hold of his shoe as he was descending the improperly leaning ladder; (5) he was caused to fall backwards, from a height of approximately six feet; and (6) his right shoulder was injured when it struck the wooden work-zone barrier as he fell.

In opposition, defendants failed to raise a triable issue of fact. Contrary to defendants' contention that plaintiff was the sole proximate cause of his accident, the record shows that the ladder was inadequate for the nature of the work performed and

the gravity-related risks involved (*see Lipari v AT Spring, LLC*, 92 AD3d 502 [1st Dept 2012]). Moreover, defendants did not show that another safety device was available, but went unused, that plaintiff failed to heed instructions on how to perform his assigned task of installing vinyl lining, or that the cause of plaintiff's injury was unrelated to the ladder's collapse (*see Gallagher v New York Post,* 14 NY3d 83, 88-89 [2010]; *Lipari*, 92 AD3d at 504; *Romanczuk v Metropolitan Ins. & Annuity Co.*, 72 AD3d 592 [1st Dept 2010]).

Conversely, plaintiffs' Labor Law §§ 240(1) and 241(6) claims were properly dismissed as against Alert Glass. There was no evidence to support a finding that Alert Glass was delegated "plenary authority" to control and supervise the work site (including plaintiff's work), that it exercised such broad authority, or that Alert Glass was a statutory agent of the owner or general contractor on the project, and thus subject to vicarious liability under Labor Law §§ 240(1) and 241(6) (*see generally Walls v Turner Constr. Co.*, 4 NY3d 861 (2005); *Muriqi v Charmer Indus. Inc.*, 96 AD3d 535 [1st Dept 2012]). The subcontract between the project's general contractor and Alert Glass did not state, or even reasonably imply, that the general contractor was delegating its responsibilities for supervising and controlling the work at the project to Alert Glass. Alert

Glass, a glass fabricator and installer, did not remain on site to supervise and control the glass installation, but rather, subcontracted the responsibility for overseeing the glass installation to a third party, Proper Construction, that hired plaintiff, a union glazer, since union labor was required on the project. Proper Construction's foreman acknowledged that it was his responsibility to ensure that the union workers were using the proper equipment in a safe manner. There was no evidence to show that Alert Glass undertook the overall responsibility for ensuring safety at the project.

Finally, we find that the Labor Law § 200 and common law negligence claims, as well as the cross claim for indemnification, asserted against Alert Glass, were properly dismissed. As Alert Glass was not an owner, general contractor or statutory agent, and given that it also lacked authority to control the activity which produced the injury, it cannot be held liable under Labor Law § 200 and common law negligence for injuries that did not arise from Alert Glass's work (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]). As no

factual issues remain as to whether plaintiff's injuries arose from Alert Glass's work, that branch of Alert Glass's motion which sought dismissal of RPT and Art of Shaving's cross claim for indemnification was also properly granted.

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

ENTERED: MAY 21, 2013

CLERK

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

10112 The People of the State of New York, Respondent, Ind. 905/09 4285/09

-against-

Robert Parris, etc., Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J. at speedy trial motion; Eugene Oliver, J. at plea and sentencing), rendered November 21, 2011, as amended November 28, 2011, convicting defendant, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of three years, unanimously affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. Although there was a delay of 33 months between defendant's arrest and conviction, and defendant was incarcerated for that entire period, the charges involved multiple undercover sales, including two class A-1 felonies, made over the course an extensive investigation. Furthermore, defendant has not asserted

that the delay caused any specific prejudice.

The most significant factor supporting denial of the motion is that defendant has not shown what, if any, portion of the delay was attributable to the People. On the contrary, the record indicates that most of the delay was caused by motion practice, adjournment requests by defense counsel and by defendant's own actions in filing 15 pro se motions and repeatedly obtaining new counsel. Defendant suggests that the justices presiding over his case should have exercised their discretion under *People v Rodriguez* (95 NY2d 497, 501-503 [2000]) to curtail his pro se motion practice. However, to use delay plainly attributable to a defendant as a basis for dismissal, under a theory that the court should have prevented the defendant from delaying his or her own case, would only encourage defendants to attempt to delay their cases in hope of being rewarded with dismissals.

In addition, there was no unlawful prearrest delay. Although the first undercover sale was made more than 15 months before defendant's arrest, there were nine additional drug transactions during that period. Since defendant was a suspect in an ongoing undercover narcotics investigation, the People had a good faith reason to delay his prosecution on the first drug sale (*see People v Decker*, 13 NY3d 12 [2009]).

Defendant's excessive sentence claim is properly before this court, notwithstanding defendant's purported waiver of his right to appeal, because we find the waiver invalid. Although defendant signed a written waiver, there was not the requisite oral colloquy to confirm defendant's understanding of its contents (*see e.g. People v Bradshaw*, 18 NY3d 257 [2011]). However, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2013

CLERK

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

10113 Calogera Villanti, Index 301402/10
Plaintiff-Appellant,

-against-

BJ's Wholesale Club, Inc.,
Defendant-Respondent.

_____

Diamond & Diamond, LLC, New York (Stuart Diamond of counsel), for appellant.

Torino & Bernstein, P.C., Mineola (Ellie S. Konstantatos of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered January 7, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when her foot became caught on the leg of the vertical support of a bumper that ran along the bottom of a display case in defendant's store, causing her to fall to the floor. Defendants submitted photographic and testimonial evidence showing that the alleged defective condition was open and obvious, and not inherently dangerous (*see Lazar v Burger Heaven*, 88 AD3d 591 [1st Dept 2011]; *Matthews v Vlad Restoration Ltd.*, 74 AD3d 692 [1st Dept 2010]; *Schulman v Old Navy/Gap, Inc.*,

45 AD3d 475 [1st Dept 2007]).

In opposition, plaintiff failed to raise a triable issue of fact. The fact that the support became obscured from plaintiff's view after she walked to a point where she was inches in front of the fruit display did not render the condition one which was hidden or obscured (*compare Lehr v Mothers Work, Inc.*, 73 AD3d 564 [1st Dept 2010]).

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

ENTERED: MAY 21, 2013

CLERK

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

10114 In re Misba Uddin, Index 102739/12
Petitioner-Appellant,

-against-

New York City Taxi and Limousine Commission,
Respondent-Respondent.

_____

Misba Uddin, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered September 7, 2012, denying the petition seeking to annul the determination of respondent, dated April 30, 2012, which affirmed the revocation of petitioner's Taxicab Driver's License, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to administratively appeal two of the six adverse determinations by administrative law judges, including the one that resulted in the revocation of his license. Accordingly, petitioner failed to exhaust his available

administrative remedies, warranting denial of his petition (*see Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; *Matter of Contest Promotions-NY LLC v New York City Dept. of Bldgs.*, 93 AD3d 436, 437 [1st Dept 2012]).

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

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

ENTERED: MAY 21, 2013

CLERK

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

10115 The People of the State of New York, Ind. 2975/09
Respondent,

-against-

Melissa Fonseca,
Defendant-Appellant.

_____

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

Cyrus R. Vance, District Attorney, New York (Philip Morrow 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 (Charles H. Solomon, J.), rendered on or about December 7, 2010,

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

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

ENTERED: MAY 21, 2013

CLERK

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

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

10116 Glenford McDonald, Index 112282/07
Plaintiff-Respondent,

-against-

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

Sanitary Plumbing & Heating Corp., et al.,
Defendants.

_____

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

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

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 26, 2011, after a jury trial, awarding plaintiff $100,000 for past pain and suffering and $250,000 for future pain and suffering over 29 years, unanimously affirmed, without costs.

The jury's finding that plaintiff sustained a significant limitation of use and permanent consequential limitation of use of a body function or system (*see* Insurance Law § 5102[d]) is not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]; *Nicastro v Park*, 113 AD2d 129, 132-133 [2d Dept 1985]). The jury award is not excessive (*see Sow v Arias*, 21 AD3d 317 [1st Dept 2005], *lv denied* 5 NY3d 716 [2005]; *Rountree v Manhattan & Bronx Surface Tr. Operating Auth.*, 261

AD2d 324 [1st Dept 1999], *lv denied* 94 NY2d 754 [1999]; *Adams v Romero*, 227 AD2d 292 [1st Dept 1996]). We have reviewed defendants' various challenges to the court's rulings during trial and find them unpreserved or unavailing.

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

ENTERED: MAY 21, 2013

CLERK

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

10117 In re Anthony Pellicane, Index 111176/11
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, Port Washington, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered March 20, 2012, denying the petition to annul respondents' determination, which denied petitioner's application for accident disability retirement benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The statutory presumption of General Municipal Law § 207-k (Heart Bill) was overcome by credible medical evidence that petitioner's disabling heart condition is congenital and not related to occupational stress (*see Matter of Goodacre v Kelly*, 96 AD3d 625 [1st Dept 2012], *lv denied* 20 NY3d 860 [2013]). Although petitioner's physician opined that petitioner's hypertension and asymmetric left ventricular hypertrophy were induced by stress and exacerbated by the duties of petitioner's

job, credible medical evidence supports the finding that the hypertension presented as relatively mild, and had not "caused its signature disease, generalized left ventricular hypertrophy" (*Matter of Knorr v Kelly*, 35 AD3d 326, 327 [1st Dept 2006]; *compare Matter of Lunt v Kelly*, 227 AD2d 200 [1st Dept 1996], *lv denied* 90 NY2d 803 [1997]).

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

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

ENTERED: MAY 21, 2013

CLERK

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

10118 J.P. Morgan Investment Management Inc., et al., Plaintiffs/Counterclaim Defendants-Appellants, Index 651167/11

-against-

AmCash Group, LLC, et al., Defendants/Counterclaim Plaintiffs-Respondents.

_____

Levi Lubarsky & Feigenbaum LLP, New York (Howard B. Levi of counsel), for appellants.

Kasowitz Benson Torres & Friedman LLP, New York (Jed I. Bergman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 9, 2012, which, insofar as appealed from, denied plaintiffs' motion for summary judgment on their declaratory relief claim, and denied their motion for summary judgment dismissing defendants' first and second counterclaims, unanimously reversed, on the law, with costs, the motion granted, and it is declared that the JPMorgan Current Yield Money Market Mutual Fund is not a "Current Yield ETF" within the meaning of the Termination Agreement and therefore defendants are not entitled to any Termination Agreement payments relating to the fund.

Pursuant to the Termination Agreement, plaintiffs were obligated to make payments to defendants in the event plaintiffs served as an investment advisor to a "Current Yield ETF," which, as defined in a prior asset purchase agreement, requires, among other things, that a covered fund has shares "listed on an organized securities market."

Summary judgment granting the requested declaration and dismissing the counterclaims should have been granted. Although the phrase "listed on an organized securities market" is not defined in the relevant agreements, summary judgment may be granted where, as here (1) there is no question as to the credibility of the extrinsic evidence, which is of such a definitive nature as to establish, as a matter of law, the meaning of that term to the industry (*see e.g. Dorel Steel Erection Corp. v Seaboard Sur. Co.*, 291 AD2d 309, 309 [1st Dept 2002]; *see also NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 58 [1st Dept 2008]); (2) it has been shown either that the parties are actually aware of the established usage of the term, or that "the usage in the business to which the transaction relates is so notorious that a person of ordinary prudence in the exercise of reasonable care would be aware of it" (*Matter of Reuters Ltd. v Dow Jones Telerate*, 231 AD2d 337, 343 [1st Dept 1997]; and (3) there is no question that the intention

of the parties was to follow, rather than depart from, the particular industry custom at issue (*see Executive Off. Network v 666 Fifth Ave. Ltd. Partnership*, 294 AD2d 166, 168 [1st Dept 2002]).

Here, definitive extrinsic evidence of industry custom and usage establishes, as a matter of law, that plaintiffs' fund does not fall within the meaning of the phrase "listed on an organized securities market," which requires that a covered fund's shares have been accepted for trading by an organized securities market or exchange. No reasonable party in the investment industry would consider the mere "informational listing" of a fund's day-end, per-share Net Asset Value data on certain electronic trading sites as satisfying the requirement, even assuming those sites themselves could qualify as organized securities markets, which is the only manner in which the shares of plaintiffs' fund are allegedly "listed."

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

ENTERED: MAY 21, 2013

CLERK

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

10119 Fawwaz Ali, Index 112384/11
Plaintiff-Appellant,

-against-

Blair Effron, et al.,
Defendants,

Irwin Cohen, et al.,
Defendants-Respondents.

_____

The Orlow Firm, Roslyn Harbor (Louis A. Badolato of counsel), for appellant.

Hoey, King, Epstein, Prezioso & Marquez, New York (Andrew G. Sfouggatakis of counsel), for Irwin Cohen, respondent.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for Abbylara Service, Corp., respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Jeffrey R. Beitler of counsel), for Vandeberg Architects, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 2, 2012, which, insofar as appealed from as limited by the briefs, granted defendant Abbylara Service, Corp.'s (Abbylara) motion to transfer venue from New York County to Suffolk County for consolidation with another action pending there, and denied as premature plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against defendants Abbylara and Irwin Cohen without prejudice and with

leave to renew in Suffolk County, unanimously affirmed, without costs.

Plaintiff's cross motion for partial summary judgment was properly denied as premature in light of the incomplete state of discovery, including the lack of any depositions (*see Wilson v Yemen Realty Corp.*, 74 AD3d 544 [1st Dept 2010]; *McGlynn v Palace Co.*, 262 AD2d 116 [1st Dept 1999]).

In this action alleging violations of the Labor Law resulting in personal injuries sustained by plaintiff while he was performing construction work at a house located in Suffolk County, plaintiff's contention that the motion court improperly granted a transfer of venue to Suffolk County and consolidation with a case pending there is unavailing. The Suffolk County action was commenced prior to this one, both actions arose from the same accident and plaintiff fails to demonstrate any prejudice to the parties or inconvenience to material witnesses (*see Velasquez v C.F.T., Inc.*, 240 AD2d 178 [1st Dept 1997]).

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

ENTERED: MAY 21, 2013

CLERK

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

10120
10121- In re Sean Michael N., and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Lydia T.,
Respondent-Appellant,

Shawn N.,
Respondent,

Edwin Gould Services for Children
Petitioner-Respondent.
- - - - -
In re Sean Michael N., and Others,

Dependent Children Under the Age
of Eighteen Years, etc.,

Shawn N.,
Respondent-Appellant,

Lydia T.,
Respondent,

Edwin Gould Services for Children
Petitioner-Respondent.

_____

Elisa Barnes, New York, for Lydia T., appellant.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Shawn N., appellant.

John R. Eyerman, New York, respondent.

Andrew J. Baer, New York, attorney for the children.

_____

Order, Family Court, Bronx County (Fernando H. Silva, J.), entered on or about May 2, 2012, which denied respondents

parents' motions to vacate an order of disposition, same court and Judge, entered on or about September 28, 2011, upon their default, which, upon findings of permanent neglect, terminated their parental rights to their children and committed the custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Respondents failed to demonstrate a reasonable excuse for their absence from the proceeding and a meritorious defense to the petition (*see Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]; *Matter of Bibianamiet L.-M. [Miledy L.N.]*, 71 AD3d 402 [1st Dept 2010]). Contrary to their assertions, they were responsible for knowing the time of the hearing. Their bare assertions that their respective attorneys would have presented evidence countering the allegations of permanent neglect were insufficient to establish a meritorious defense (*see Matter of Gloria Marie S.*, 55 AD3d 320, 321 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]).

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

ENTERED: MAY 21, 2013

CLERK

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

10123 Mark Carey, Index 107410/09
Plaintiff, 590500/10

-against-

Capital Cleaning Contractors, Inc., et al.,
Defendants-Respondents,

New York Foundling Hospital for
Pediatric, Medical and Rehabilitative
Care, Inc., et al.,
Defendants-Appellants,

New York Foundling Charitable Corporation,
Defendants.

- - - - -

Capital Cleaning Contractors, Inc., et al.,
Third-Party Plaintiffs-Respondents,

-against-

7 Ocean Group, Inc.,
Third-Party Defendant-Respondent.

_____

Biedermann Hoenig Semprevivo, New York (Elaine N. Chou of counsel), for appellants.

Catalano Gallardo & Petropoulos, LLP, Jericho (June D. Reiter of counsel), for Capital Cleaning Contractors, Inc., and Capital Cleaning Contractors, Inc., of New York, respondents.

Hirshfield & Costanzo, P.C., White Plains (Joel A. Hirshfield of counsel), for 7 Ocean Group, Inc., respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 18, 2012, which, to the extent appealed from as limited by the briefs, denied the motion of defendant New York Foundling Hospital for Pediatric, Medical, and Rehabilitative

Care (the Hospital) for summary judgment dismissing plaintiff's complaint against it on the ground that it was not the owner of the property in question, and denied the motion of the Hospital and the Vincent J. Fontana Center for Child Protection (the Center) for summary judgment on their cross claims for indemnification from codefendants Capital Cleaning Contractors Inc., Capital Cleaning Contractors Inc. of New York, and 7 Ocean Group Inc., unanimously modified, on the law, to dismiss the complaint as against the Hospital, and otherwise affirmed, without costs.

The parties having conceded that there is no issue of fact concerning the ownership of the premises at 27 Christopher Street, the complaint is dismissed as to the hospital. Accordingly, it is the Center that is responsible, under New York City Administrative Code § 7-210, for keeping the sidewalks clear of snow and ice.

The motion court correctly denied the Center's motion for summary judgment on its cross claims for indemnification against its codefendants, Capital Cleaning Contractors, Inc. and 7 Ocean Group, Inc. There is no basis for 7 Ocean to contractually indemnify the Center, as its contract was with Capital Cleaning, not the Center. On the issue of common law indemnification, the

motion court properly determined that issues of fact exist precluding summary judgment.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MAY 21, 2013

CLERK

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

10124 Resource Finance Company, et al., Index 650142/11
Plaintiffs-Respondents,

-against-

Cynergy Data LLC, et al,
Defendants,

Card Payment Services, LLC, et al.,
Defendants-Appellants.

_____

Reiss Sheppe LLP, New York (Robert J. Grand of counsel), for appellants.

Foley & Lardner LLP, New York (Akiva M. Cohen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 26, 2011, which denied the motion of defendants Card Payment Services, LLC and Seymour Weissman to dismiss the complaint as against them, unanimously modified, on the law, to grant the motion to the extent of dismissing the second, fifth, sixth, seventh and eighth causes of action as against Card Payment Services and Weissman, and otherwise affirmed, without costs.

Because neither plaintiffs nor their debtors ever obtained the required consent from defendant Card Payment Systems of New York, LLC (CPS LLC) to grant plaintiffs a security interest in CPS LLC's assets, no such interest was created *(see Richard T.*

Blake & Assoc. v Aetna Cas. & Sur. Co., 255 AD2d 569 [2d Dept 1998]). Although plaintiffs can enforce debtors' rights under various noncompetition agreements entered into by Weissman, the breach of such contracts does not support a claim for conversion of wrongfully diverted accounts *(see Peters Griffin Woodward, Inc. v WCSC, Inc.*, 88 AD2d 883, 884 [1st Dept 1982]). Accordingly, plaintiffs' claims based on the existence of a security interest in CPS LLC's assets must be dismissed.

Plaintiffs however do state a claim for unjust enrichment. Plaintiffs allege that Weissman essentially stole back the business that he was paid some $2 million to give to (and not take back from) debtors. The fact that there are express agreements does not bar the pleading of a quasi-contract claim, where, as here, defendants contest the validity of those agreements *(see Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011], *lv dismissed* 17 NY3d 778 [2011]). As the only argument against the claim for a constructive trust was the failure of the unjust enrichment claim, that claim was also

properly sustained. Moreover, while Weissman and Card Payment Services are not fiduciaries of plaintiffs, Weissman is a fiduciary of one of the debtors, and thus dismissal of the accounting claim was properly denied.

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

ENTERED: MAY 21, 2013

CLERK

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

10125-
10126-
10127 Index 650778/11

Cammeby's Equity Holdings LLC,
Plaintiff-Respondent,

-against-

Mariner Health Care, Inc., et al.,
Defendants-Appellants.

_____

Latham & Watkins LLP, Wasington, DC (Daniel Meron of the bar of the District of Columbia, admitted pro hac vice, of counsel), for Mariner Heath Care, Inc., appellant.

Davidoff Hutcher & Citron LLP, New York (Martin H. Samson of counsel), for National Senior Care, Inc. and Harry Grunstein, appellants.

Dechert LLP, New York (Steven A. Engel of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 16, 2012, which, inter alia, granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Orders, same court and Justice, entered September 20, 2012 and November 13, 2012, which, to the extent appealable, denied defendants' respective motions to renew, unanimously affirmed, with costs, and appeal from the November 13, 2012 order otherwise dismissed, without costs, as taken from a nonappealable paper.

Plaintiff's option agreement unambiguously provided that the option was granted in exchange for mutual covenants, and therefore parol evidence was inadmissible to show that a loan was the actual consideration. Moreover, had the sophisticated parties intended to make the loan a condition to enforceability of the option, they could have included a provision to that effect (*see Schron v Troutman Saunders LLP*, 20 NY3d 430 [2013]). Contrary to defendants' contention, it makes no difference that, unlike the circumstance in *Schron*, the issue was resolved after disclosure, because whether an agreement is ambiguous is a question of law to be resolved by the court (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Plaintiff established prima facie that the loan debt that was to be extinguished as consideration for exercise of the option remained outstanding. In opposition, although the parol evidence rule does not preclude the defense of failure of consideration (*see Sharon v American Health Providers*, __ AD3d __, 2013 NY Slip Op 02476 [1st Dept 2013]), defendants failed to submit evidence to support their defense that the debt did not exist because the loan was never advanced (*see Schron v Grunstein*, __ AD3d __, 2013 NY Slip Op 02197 [1st Dept 2013]). That the loan was funded is demonstrated by the explicit admission by defendant Grunstein, the president of both corporate

defendants, in a June 2006 letter that he later explained insufficiently by claiming that he had not read it before signing (*see Pimpinello v Swift & Co.*, 253 NY 159, 162-163 [1930]) and by the conclusive inclusion of the note as an outstanding debt on the lender's books (*see Schron v Grunstein*, __ AD3d at __).

As in *Fundamental Long Term Care Holdings, LLC v Cammeby's Funding LLC* (20 NY3d 438 [2013]), defendants cannot make the option agreement subject to the terms of other agreements; the pledges of defendant corporations' stock to a third-party lender merely created security interests and did not void the option agreement.

Defendants' "new" evidence in support of renewal was merely cumulative and would not have changed the prior determination (*see* CPLR 2221[e]). Defendants also offered no justification for the failure to submit it on the prior motion (*see id.*). The

denial of reargument is not appealable (*see* CPLR 5701[a][2][vii]).

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: MAY 21, 2013

CLERK

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

10128 The People of the State of New York, Ind. 3809/11
Respondent,

-against-

Jose Vasquez, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis J. Boyle, J.), rendered on or about January 5, 2012,

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

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

ENTERED: MAY 21, 2013

CLERK

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

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

10131 Tania Adley, et al., Index 302135/10
Plaintiffs-Respondents, 84129/11

-against-

Kansas Fried Chicken, Inc., et al.,
Defendants-Appellants,

Sneaker Q LLC, et al.,
Defendants-Respondents.

- - - - -

Kansas Fried Chicken, Inc., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Louis S. Hong,
Third-Party Defendant-Respondent.

_____

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for appellant.

Popkin & Popkin, LLP, Brooklyn (Steven J. Popkin of counsel), for Tania Adley and Gary Adley, respondents.

Law Offices of Michael E. Pressman, New York (Tod S. Fichtelberg of counsel), for Sneaker Q LLC, and Louis S. Hong, respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 10, 2012, which, insofar as appealed from as limited by the briefs, denied defendants/third-party plaintiffs' cross motion for summary judgment dismissing the complaint and cross claims asserted against them or, in the alternative, for summary judgment on their common-law indemnification claim against defendant/third-party defendant

Louis S. Hong, unanimously reversed, on the law, without costs, and the cross motion granted. The Clerk is directed to enter judgment in favor of defendants/third-party plaintiffs (Kansas and Bullard) dismissing the amended complaint and cross claims asserted against them.

In this action, plaintiffs seek to recover for injuries allegedly sustained in a slip and fall on an icy condition located on a shoveled pathway in front of premises owned by Kansas and/or Bullard and leased to Hong.

In the absence of any evidence of a duty to remove snow and ice or that Kansas and Bullard, the out-of-possession landlords, were involved in creating the subject pathway in the snow, summary judgment should have been granted in their favor (*see Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [1st Dept 2008]). While plaintiffs have come forward with evidence that an unidentified male created the pathway the night before the accident and shoveled the pathway again that morning, there is no

indication in the record that the man is affiliated with the landlords. Moreover, it is undisputed that, by lease, the landlords delegated the responsibility to remove snow and ice to Hong.

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

ENTERED: MAY 21, 2013

CLERK

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

10132 Angelica Cecora, Index 112787/11
Plaintiff-Appellant,

-against-

Oscar De La Hoya,
Defendant-Respondent.

_____

The Law Offices of Evans and Al-Shabazz, LLP, New York (Robert Anthony Evans, Jr. of counsel), for appellant.

Judd Burstein, P.C., New York (Judd Burstein of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 4, 2012, which, inter alia, granted defendant's motion to dismiss the complaint and for the imposition of sanctions against plaintiff and her attorney, and denied plaintiff's motion to disqualify defendant's attorney, unanimously affirmed, without costs.

The court properly dismissed the cause of action for battery since the claimed offensive contact made during defendant's attempts to resume sexual contact with plaintiff was not "wrongful under all the circumstances," and was belied by the allegations of the complaint (*Messina v Alan Matarasso, M.D., F.A.C.S., P.C.*, 284 AD2d 32, 35 [1st Dept 2001] [internal quotation marks omitted]). The court also properly dismissed the assault claim because, like the battery claim, plaintiff's

assertion that she was placed in imminent apprehension of harmful contact by defendant's sexual advances was contradicted by the allegations of the complaint (*see Holtz v Wildenstein & Co.*, 261 AD2d 336 [1st Dept 1999]).

The court properly determined that plaintiff's claims of false imprisonment and intentional infliction of emotional distress were without merit. Plaintiff did not allege that defendant intended to confine her and there is nothing in the complaint suggesting that defendant did anything to lead her to believe that she could not leave (*see Arrington v Liz Claiborne, Inc.*, 260 AD2d 267 [1st Dept 1999]). Nor did plaintiff allege conduct that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress or a causal connection between the alleged conduct and plaintiff's claimed distress (*see Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]).

In view of plaintiff's baseless claims alleging false imprisonment and intentional infliction of emotional distress, as well as the conduct of plaintiff and her attorney undertaken primarily to harass or maliciously injure defendant, the court properly granted defendant's motion for sanctions (*see* 22 NYCRR 130-1.1[a], [c]; 130-1.2). Plaintiff and her attorney were afforded a reasonable opportunity to be heard on the motion for

sanctions, and the court's written decision appropriately set forth the conduct on which the imposition of sanctions was based, the reasons why the conduct was frivolous, and the reasons why the amount of sanctions imposed was appropriate (*see* 22 NYCRR 130-1.1[d], 130-1.2; *Benefield v New York City Hous. Auth.*, 260 AD2d 167 [1st Dept 1999]).

The court did not abuse its discretion in refusing to disqualify defendant's attorney (*see S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 445-446 [1987]).

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

We do, however, decline to impose sanctions against plaintiff and her attorney for pursuing this appeal.

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

ENTERED: MAY 21, 2013

CLERK

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

10133N Marisol Echevarria, as Administratrix of the Estate of David Barriera, etc., Plaintiff-Respondent, Index 309808/11

-against-

Robin Sadker, M.D., et al., Defendants,

Beth Israel Medical Center, Defendant-Appellant.

_____

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for appellant.

Leav & Steinberg, LLP, New York (Philip R. Papa of counsel), for respondent.

_____

Amended order, Supreme Court, Bronx County (Stanley B. Green, J.), entered June 7, 2012, which, after a hearing, denied defendant Beth Israel Medical Center's motion to change venue from Bronx County to New York County, unanimously affirmed, without costs.

In opposition to defendant's prima facie showing that plaintiff resided in Orange County, based, inter alia, on her verified answer in another action, plaintiff raised issues of fact warranting a hearing by submitting a detailed affidavit explaining that, after her husband died in November 2009, she went to live with her sister and brother-in-law in Orange County,

and that since January 2010, when she returned to work in New York County, she had also resided on weekdays in an apartment they maintained in Bronx County, so that she would have a shorter commute to work. In addition, plaintiff submitted supporting affidavits from her roommate and her sister and brother-in-law, and some documentation. The record also contains plaintiff's verified petition for issuance of letters of administration, which lists the Bronx County address as her residence. Since a party may have two residences for venue purposes (*see* CPLR 503[a]), and plaintiff's submissions raised factual issues dependent on credibility determinations as to her claimed residence in the Bronx, the motion court properly held a hearing on the issue (*see Collins v Glenwood Mgt. Corp.*, 25 AD3d 447 [1st Dept 2006]).

We find no basis for disturbing the court's finding, made after the hearing, that plaintiff was a bona fide Bronx County resident when she commenced this action (*see Blake v Massachusetts Mut. Life Ins. Co.*, 22 AD3d 230 [1st Dept 2005]).

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

ENTERED: MAY 21, 2013

CLERK

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

10135 Ind. 3782/07
[M-1880 &
M-2033] In re Anna Ciano,
Petitioner,

-against-

Hon. Maxwell J. Wiley, etc., et al.,
Respondents.

Anna Ciano, petitioner pro se.

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

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

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

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

ENTERED: MAY 21, 2013

CLERK

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

10035 Ind. 3782/07
[M-1880 &
M-2033] In re Anna Ciano,
Petitioner,

-against-

Hon. Maxwell J. Wiley, etc., et al.,
Respondents.

_____

Anna Ciano, petitioner pro se.

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

_____

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

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

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10136 The People of the State of New York, Respondent, Ind. 3989/08

-against-

Celso Alvarez, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Susan H. Salomon of counsel), for appellant.

Celso Alvarez, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 22, 2010, convicting defendant, after a jury trial, of murder in the second degree, robbery in the first degree (three counts) and robbery in the second degree, and sentencing him to an aggregate term of 22 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, and its rejection of defendant's theory that he was a victim of the robbery rather than a participant. The testimony of the cooperating accomplice was amply supported by the testimony of other witnesses, as well as other evidence, including, among

other things, the telephone records of defendant and his accomplices from the night of the robbery.

Defendant's claim that his counsel rendered ineffective assistance by permitting defendant to choose whether to assert the felony murder affirmative defense (*see* Penal Law § 125.25[3]) is unreviewable on direct appeal because it involve matters not reflected in, or not fully explained by, the trial record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). The record is unclear as to whether counsel waived this defense solely at defendant's request, or "after consulting with and weighing the accused's views along with other relevant considerations" (*People v Colville*, 20 NY3d 20, 32 [2012]). On the existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Even assuming counsel deferred to defendant's wishes with regard to asserting the affirmative defense, it was objectively reasonable for counsel to do so, given the nature of an affirmative defense (*see People v Petrovich*, 87 NY2d 961, 963 [1996]; *see also Colville*, 20 NY3d at 31-32 [2012]).

Defendant's pro se ineffective assistance arguments are likewise unreviewable because they turn on matters outside the

record; to the extent the record permits review of these arguments, we find them to be without merit. We have considered and rejected defendant's other pro se claims.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10137 Leslie Westreich, et al., Index 102906/09
Plaintiffs-Appellants,

-against-

George G. Bosler, et al.,
Defendants-Respondents.

_____

Law Office of Mark R. Kook, New York (Mark R. Kook of counsel), for appellants.

Jan Levien, P.C., New York (Jan Levien of counsel), for respondents.

_____

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered July 28, 2011, which denied plaintiffs' motion for summary judgment and, upon searching the record, granted summary judgment to defendants dismissing the complaint, unanimously affirmed, with costs.

The February 11, 2009 letter from defendant Levien to plaintiffs' counsel was sufficient to make the closing on the sale of defendant Bosler's apartment to plaintiffs time of the essence. Regardless of whether the notice to plaintiffs was reasonable, plaintiffs did not voice their objections prior to the closing date, and thus acquiesced, as a matter of law, in the reasonableness of the closing date (*see Zev v Merman*, 134 AD2d 555, 558 [2d Dept 1987], *affd* 73 NY2d 781 [1988]). Plaintiff Leslie Westreich owns hundreds of apartments and was represented

by counsel, yet inexplicably failed to respond to the February 11 notice (*see id.*).

Plaintiffs' argument that the notice provided by defendants did not explicitly state that time was of the essence, is unavailing. "A party need not state specifically that time is of the essence, as long as the notice specifies a time on which to close and warns that failure to close on that date will result in default" (*Karamatzanis v Cohen*, 181 AD2d 618, 618 [1st Dept 1992] [internal quotation marks omitted], *lv denied* 80 NY2d 754 [1992]). Levien's February 11, 2009 letter warned, "[I]n the event you do not close, I shall release the escrow funds to [Bosler]." Such language informs a buyer that he risks default by not appearing at the closing (*see Nehmadi v Davis*, 63 AD3d 1125, 1126-1127 [2d Dept 2009]). Accordingly, because this was a time-of-the-essence closing, plaintiffs defaulted by failing to appear, and defendant Bosler was entitled to keep the down payment (*see Palmiotto v Mark*, 145 AD2d 549 [2d Dept 1988], *lv denied* 74 NY2d 608 [1989]).

We have considered plaintiffs' remaining contentions, including that defendants breached the contract by designating a closing date, and find them unavailing.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10138 In re Koteswara Rao Alla, Index 111155/11
Petitioner-Appellant,

-against-

American University of Antigua,
College of Medicine,
Respondent-Respondent.

Scoppetta Seiff Kretz & Abercrombie, New York (Roland R. Acevedo of counsel), for appellant.

Leonard A. Sclafani, New York, for respondent.

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 3, 2012, denying the petition seeking to annul respondent medical school's determination, dated May 30, 2011, that petitioner remain on a leave of absence until he submitted a required psychiatric evaluation, and granting respondent's cross motion to dismiss the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court providently exercised its discretion in dismissing the petition on the ground of forum non conveniens (*see* CPLR 327; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]). The court properly balanced the appropriate factors (*Pahlavi*, 62 NY2d at 479), including the nonresidency of both parties, and the location of the events giving rise to the action and of the potential witnesses and

documents, which center almost entirely in Antigua, and correctly concluded that respondent met its burden of showing that New York was an inconvenient forum and that it lacks a substantial nexus to the matter (*see Viking Global Equities, LP v Porsche Automobil Holding SE*, 101 AD3d 640 [1st Dept 2012]). The evidence does not support petitioner's contention that respondent has its principal office in New York.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10139-
10140 Index 350622/09

Edgardo Robles, an Infant by
his Mother and Natural Guardian
Maria Soto, et al.,
Plaintiffs-Respondents,

-against-

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

_____

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

Kafko Schnitzer, LLP, Bronx (Neil R. Kafko of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 21, 2012, which, to the extent appealed from as limited by the briefs, upon granting defendants' motion for renewal and reargument, adhered to the prior determination granting plaintiffs' motion for partial summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion for partial summary judgment denied. Appeal from order, same court and Justice, entered on or about March 27, 2012, unanimously dismissed, without costs, as superseded by the appeal from the September 21, 2012 order.

The injured plaintiff testified that he was hit by defendant's car as he was crossing the street, in the crosswalk,

with a pedestrian walk signal in his favor, and submitted an affidavit of his cousin supporting his version of the accident. Defendant testified that he observed a green light as he entered the intersection, and did not see anyone in the crosswalk prior to the impact. Even without considering hearsay evidence suggesting that the teenage plaintiff suddenly ran or skateboarded into the street, the conflicting versions of the accident preclude the grant of summary judgment (*see Carswell v Banda*, 88 AD3d 604, 604-605 [1st Dept 2011]). Although defendant also testified that the light was "possibly" green at the moment of impact and that he did not look at the traffic light the entire time he was driving down the street, at this procedural posture, "where the court's duty is to find issues rather than determine them," the truth of the nonmovant driver's testimony that he observed the green light in his favor is presumed (*Marte v City of New York*, 92 AD3d 618 [1st Dept 2012]; *see also Wein v Robinson*, 92 AD3d 578, 579 [1st Dept 2012]).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10142 & M-2350 Northern Source, LLC, Plaintiff-Appellant, Index 650325/08

-against-

James Kousouros, Defendant-Respondent.

_____

Claude Castro & Associates PLLC, New York (Claude Castro of counsel), for appellant.

Allan L. Brenner, Freeport, for respondent.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered February 24, 2012, which, in this action alleging legal malpractice, denied plaintiff's motion to vacate an order, same court and Justice, entered February 11, 2010, granting, on plaintiff's default, defendant's motion to dismiss the complaint for failure to prosecute after service of a 90-day notice to resume prosecution of the action and to file a note of issue, unanimously affirmed, without costs.

The motion court providently exercised its discretion in finding, pursuant to CPLR 5015(a)(1), that plaintiff did not provide a reasonable excuse for its failure to timely prosecute this action, and did not demonstrate that it had a meritorious cause of action (*see e.g. Carroll v Nostra Realty Corp.*, 54 AD3d 623 [1st Dept 2008], *lv dismissed* 12 NY3d 792 [2009]; *see also*

Johnson v Minskoff & Sons, 287 AD2d 233, 236 [1st Dept 2001]).

In seeking to establish a reasonable excuse, plaintiff relied on an affirmation from its new counsel, who did not represent plaintiff when it received the 90-day demand, when defendant moved to dismiss, or when the motion court dismissed the matter. Thus, plaintiff's counsel had no personal knowledge of the facts regarding plaintiff's default, and his affirmation did not suffice to establish a reasonable excuse (*see Incorporated Vil. of Hempstead v Jablonsky*, 283 AD2d 553 [2d Dept 2001]).

Plaintiff similarly failed to set forth any valid excuse for its failure to move to vacate the judgment within one year, as required by CPLR 5015(a)(1) (*see Rosendale v Aramian*, 269 AD2d 209, 210 [1st Dept 2000]). Plaintiff's affirmation from recent counsel contains no personal knowledge of any facts relating to the 16-month delay in moving to vacate.

Furthermore, plaintiff failed to submit sufficient evidence showing that it had a meritorious legal malpractice claim. Again, the affirmation from plaintiff's counsel contains no firsthand knowledge regarding the claim, and while plaintiff also submitted the affidavit of its president, prepared in 2008 in support of plaintiff's unsuccessful motion for summary judgment,

plaintiff failed to submit key exhibits referenced in the affidavit to show that it had a meritorious claim.

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

M-2350 - *Northern Source LLC v Kousouros*

Motion to append exhibits denied.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10143 Miskenia Santana, Index 302644/10
Plaintiff-Appellant,

-against-

Tic-Tak Limo Corp., et al.,
Defendants-Respondents.

_____

Antin Ehrlich & Epstein, LLP, New York (Kimberly S. Edmonds of counsel), for appellant.

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Stacy R. Seldin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 6, 2012, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), and denied plaintiff's cross motion for summary judgment on the issues of liability and the serious injury threshold, unanimously modified, on the law, to deny defendants' motion to the extent it seeks dismissal of plaintiff's claim of a permanent consequential or significant limitation to her cervical spine, to grant plaintiff's cross motion to the extent it seeks summary judgment on the issue of liability, and otherwise affirmed, without costs.

Plaintiff alleges she suffered injury to her cervical and lumbar spine, and missed 90 out of 180 days of work, following an accident in which defendant owner's car rear-ended her car.

Defendants made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitation to her spine by offering the affirmed reports of their orthopedist and neurologist, who found normal ranges of motion in plaintiff's cervical and lumbar spine, and of their radiologist, who found degeneration and no injury in plaintiff's cervical spine (*see Ramos v Rodriguez*, 93 AD3d 473, 473-474 [1st Dept 2012]).

In opposition, plaintiff raised an issue of fact with respect to her claimed cervical spine injury by submitting the affidavit of her treating chiropractor, who found continuing deficits in range of motion, which were caused by the accident, and the affirmed report of her radiologist, who opined that the MRI report of her cervical spine showed a disc bulge (*see Ramos*, 93 AD3d at 474). In light of defendants' prima facie showing, plaintiff is not entitled to summary judgment on the threshold serious injury issue. Moreover, plaintiff offered no objective evidence of injury to her lumbar spine.

Defendants met their initial burden with respect to plaintiff's 90/180-day claim, by submitting plaintiff's testimony that she was able to resume her normal activities two or three weeks after the accident. In opposition, plaintiff failed to raise an issue of fact. Her chiropractor's affidavit, stating that plaintiff was "totally disabled," was too general to raise

an issue of fact (*see Blake v Portexit Corp.*, 69 AD3d 426, 426-427 [1st Dept 2010]). Further, plaintiff's testimony established that she was not prevented from "performing substantially all of the material acts which constitute [her] usual and customary daily activities" (Insurance Law § 5102[d]; *Blake*, 69 AD3d at 427).

Plaintiff established her entitlement to judgment as a matter of law on the issue of liability. When, as here, a rear-end collision occurs, the driver of the front vehicle is entitled to summary judgment on liability, unless the driver of the following vehicle can provide a nonnegligent explanation for the collision (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]). Defendant driver's testimony that plaintiff "stopped short" and that he could not see her brake lights "is insufficient to rebut the presumption of negligence" (*id.* at 553; *see Farrington v New York City Tr. Auth.*, 33 AD3d 332 [1st Dept 2006]).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10144 In re Bernadette Camacho, Index 105656/11
Petitioner-Appellant,

-against-

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

_____

Glass Krakower LLP, New York (Bryan D. Glass of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 16, 2012, which, inter alia, denied the petition to vacate a post-hearing award sustaining specifications of verbal abuse of students and imposing the penalty of termination of petitioner's employment as a New York City schoolteacher, unanimously affirmed, without costs.

Adequate evidence in the record supports the determination that petitioner was guilty of the specifications charging her with using language that constituted verbal abuse of her students as prohibited by the regulations of respondent Department of Education (DOE) (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563 [1st Dept 2008]). There exists no basis to disturb the Hearing Officer's decision to credit the testimony of multiple students and the principal over that of

petitioner (*see Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856 [1st Dept 2011]).

The penalty of termination does not shock one's sense of fairness. Upon settlement of prior disciplinary charges, petitioner, on the advice of counsel, entered into a stipulation with the DOE wherein she agreed that, if she were to be found guilty after a hearing of verbally abusing students, she would be terminated. There is no allegation that petitioner did not knowingly and voluntarily agree to these terms, and thus she is bound by the penalty (*see Pagan v Board of Educ. of City School Dist. of City of N.Y.*, 56 AD3d 330 [1st Dept 2008]; *see also Matter of Abramovich v Board of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 NY2d 450, 455 [1979], *cert denied* 444 US 845 [1979]). In any event, the penalty imposed was appropriate, where despite petitioner's attempts to deal with her problems, including her adherence to therapy and medication in

accordance with the terms of the prior stipulation, petitioner was unable to control her emotional outbursts, which resulted in her targeting special education students for insult and ridicule.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10147-
10147A In re Vallery P.,

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

Jondalla P.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Center for Family Representation, Inc., New York (Rebecca Horwitz of counsel), for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about March 23, 2012, which, upon on a fact-finding determination, after a hearing, that respondent father had neglected the subject child, granted custody to the mother on consent of the parties, unanimously reversed, on the facts, and in the exercise of discretion, without costs, the finding of neglect vacated, and the petition dismissed. Appeal from the order of fact-finding, same court and Judge, entered on or about March 23, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Although the issue is not preserved, we conclude the court improperly based its determination on claims of medical neglect not raised in the petition, without affording appellant father a reasonable opportunity to prepare to answer this claim (*see* Family Court Act § 1051[b]; *Matter of Crystal S. [Elaine S.]*, 74 AD3d 823, 825 [2d Dept 2010]). Moreover, the petitioner failed to demonstrate by a preponderance of the evidence that the child was impaired or at risk of impairment by the father's failure to seek immediate medical attention for a bump on the child's head, which was not shown to be a significant injury (*see Matter of Hofbauer,* 47 NY2d 648, 655-656 [1979]; *Matter of Samantha M.,* 56 AD3d 299, 300 [1st Dept 2008]).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10148 Chestnut Holdings of New York, Inc., Index 300395/11
Plaintiff-Respondent,

-against-

LNR Partners, LLC,
Defendant-Appellant.

_____

Schwartz, Lichtenberg LLP, New York (Barry E. Lichtenberg of counsel), for appellant.

Vandenberg & Feliu, LLP, New York (John C. Ohman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered May 3, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the first, third, fourth and fifth causes of action, unanimously reversed, on the law, with costs, and the causes of action dismissed. The Clerk is directed to enter judgment dismissing the complaint.

Defendant, which is not affiliated with any signatory of the agreement that plaintiff alleges was breached, but was merely the agent of a non-signatory who was party to a related transaction, cannot be held liable for breach of the agreement (*see Dember Constr. Corp. v Staten Is. Mall*, 56 AD2d 768 [1st Dept 1977]). Defendant cannot be held liable for negligent misrepresentation, since it had no special knowledge with respect to the alleged

misrepresented facts, which were all a matter of public record (*see Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). The tortious interference cause of action must be dismissed because no party breached the agreement (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]). The cause of action for tortious interference with prospective business relations must be dismissed because no issue of fact exists whether defendant engaged in unlawful or improper means of interference (*see Carvel Corp. v Noonan*, 3 NY3d 182 [2004]).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10149 Tower Insurance Company of New York, Index 106315/09
Plaintiff-Appellant,

-against-

Metro Property Group, LLC, et al.,
Defendants-Respondents,

Bruce Wittenberg, et al.,
Defendants.

_____

Mound Cotton Wollan & Greengrass, New York (Labe C. Feldman of counsel), for appellant.

Goldberg & Carlton, PLLC, New York (Gary M. Carlton of counsel), for Metro Property Group LLC, 2710 Valentine LLC, JC Neptune, LLC and 718 West 178th St. LLC, respondents.

Shapiro Law Offices, Bronx (Ernest S. Buonocore of counsel), for Momodou Camara, respondent.

_____

Order, Supreme Court, New York County (Cynthia Kern, J.), entered April 26, 2012, which denied plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants Metro Property Group, LLC, 2710 Valentine LLC, JC Neptune LLC, and 718 West 178th St. LLC (collectively Metro) in the underlying action and for default judgments against defendants Camara and Rex Management Corp., and dismissed the complaint against Camara and Rex as abandoned, unanimously modified, on the law, the complaint reinstated against Camara and Rex, and otherwise affirmed, without costs.

Plaintiff's disclaimers were based on the August 2007 Commissioner of Health Order to Abate Nuisance, which was insufficiently specific to trigger the insured's obligation to notify plaintiff of a potential claim (*see Scharf v Generali-U.S. Branch*, 259 AD2d 349 [1st Dept 1999]; *Public Serv. Mut. Ins. Co. v AYFAS Realty Corp.*, 234 AD2d 226 [1st Dept 1996], *lv dismissed* 90 NY2d 844 [1997]).

In support of its motion for summary judgment, plaintiff submitted a statement given by the building superintendent to an investigator plaintiff hired after receiving a notice of claim on behalf of Metro. The superintendent stated that in 2007 Camara told him that his son had an elevated blood lead level and that he was "making a claim." However, plaintiff did not mention this statement in its disclaimer. In any event, issues of fact exist as to the reliability of the statement, which did not comply with the requirement of CPLR 2101(b) as to affidavits in a foreign language. Moreover, while the building superintendent's knowledge of the events relevant to the claim is imputable to the building owners, his own statement dates his knowledge to the time when the building was owned and managed by defendants Wittenberg and Rex, not Metro (*see Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465 [1st Dept 2011]).

We find that since plaintiff did not intend to abandon its action against Camara and Rex – it engaged in discovery and motion practice against them – and neither Camara nor Rex has been prejudiced in any way, the complaint should not have been dismissed as against them.

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

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, Degrasse, Richter, JJ.

10151 The People of the State of New York, Ind. 5437/10
Respondent,

-against-

Ikeem Alexander,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 (Ronald A. Zweibel, J.), rendered on or about August 18, 2011,

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

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

ENTERED: MAY 21, 2013

CLERK

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

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10152 Peter's Necessities for Pets, L.P., et al., Plaintiffs-Appellants-Respondents, Index 111011/10

-against-

Pet's Necessities, Ltd., Defendant-Respondent-Appellant,

Center for Veterinary Care, P.C., et al, Defendants-Respondents.

_____

Kilhenny & Felix, New York (James M. Felix of counsel), for Peter's Necessities for Pets, L.P., appellant-respondent.

Rosenberg Feldman Smith, LLP, New York (Richard B. Feldman of counsel), for Peter's Emporium for Pets 1 LLC, appellant-respondent.

Caplan & Ross, LLP, New York (Richard L. Caplan of counsel), for respondent-appellant and respondents.

_____

Order and judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 6, 2012, which, to the extent the appealed from, granted defendants' motion for summary judgment declaring that plaintiffs have no leasehold interest in the subject premises after August 30, 2013, and, upon a search of the record, granted plaintiff Peter's Emporium for Pets 1 LLC (Emporium) summary judgment on the issue of liability on the claim for breach of fiduciary duty as against defendant Pets

Necessities, Ltd. (PNL), unanimously modified, on the law, to deny defendants' motion, the declaration vacated, and otherwise affirmed, without costs.

On April 1, 2001, PNL and Emporium entered into a written partnership agreement forming plaintiff Peter's Necessities for Pets, L.P. (Partnership), which would operate until the end of 2040. As part of the partnership agreement, PNL contributed its rights and interests in the retail space it was subletting from defendant Center for Veterinary Care, P.C. (CVC); defendants Schwartz and Solomon owned CVC, as well as PNL.

In 2004, following a sale of the building, the parties prepared a formal sublease pursuant to which CVC would sublet the retail space to the Partnership until August 30, 2013. Sometime after the sublease was executed, Emporium learned that its partner in the venture, PNL, was making a profit from the sublease, as the sublease rent did not account for reductions in the rent as set out in the prime lease.

This action ensued, with the parties exchanging allegations of, inter alia, breach of contract and breach of fiduciary duty. Defendants also sought a declaration that the Partnership's rights to the retail space will terminate with the sublease due to expire on August 30, 2013.

CVC is no longer the sublessor, and therefore it was not

entitled to declaratory relief with respect to the duration of the sublease. The motion court properly searched the record and granted Emporium summary judgment on the breach of fiduciary duty claim. The failure of PNL to disclose the reductions in rent hints at self dealing by PNL. At a minimum, it is a clear conflict of interest (*see Birnbaum v Birnbaum*, 73 NY2d 461, 466-467 [1989]).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10153 The People of the State of New York, Respondent, Ind. 5441/10

-against-

Frederick Young, Defendant-Appellant.

_____

Kirkland & Ellis LLP, New York (David Abramowicz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered April 26, 2011, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's arrest, which led to the recovery of a gravity knife in his possession, was supported by probable cause (*see People v McRay*, 51 NY2d 594, 602-604 [1980]). Defendant was arrested based on an experienced officer's observation of a transaction in which defendant gave money to another individual in exchange for a small plastic bag containing a brown substance that the officer believed to be marijuana. We reject defendant's assertion that the officer was insufficiently experienced to recognize, as a

drug transaction, the events he observed. Moreover, as in *People v Graham* (211 AD2d 55, 60 [1995], *lv denied* 86 NY2d 795 [1995]), even without police training, "any person observing defendant . . . using good common sense" would have concluded that he had purchased drugs.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10154 Jonathan Ullman, Index 110068/11
Plaintiff-Appellant,

-against-

Kazuko Hillyer,
Defendant-Respondent.

_____

Jonathan Ullman, appellant pro se.

Cornicello, Tendler & Baumel-Cornicello, LLP, New York (David B. Tendler of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered October 16, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The court properly dismissed plaintiff's complaint pursuant to CPLR 3211(a)(3). Plaintiff improperly brought this action in his individual capacity to recover damages on behalf of the nonparty not-for-profit corporation he founded (*see generally Abrams v Donati*, 66 NY2d 951 [1985]). In any event, to the extent that plaintiff alleges an individual harm, defendant's representations concerning her future intent to perform or her opinions were not actionable as fraud (*see Laura Corio, M.D., PLLC v R. Lewin Interior Design, Inc.*, 49 AD3d 411, 412 [1st Dept 2008]; *Jacobs v Lewis*, 261 AD2d 127, 127-128 [1st Dept 1999]). Similarly, defendant's emails containing her opinions, considered

as part of the text of the communications in which they appear, were not actionable as libel (*see Brian v Richardson*, 87 NY2d 46, 50-51 [1995]).

Plaintiff's proposed amendment to the complaint does not cure his lack of capacity to sue and standing, or render his claims actionable (*see Kocourek v Booz Allen Hamilton, Inc.*, 71 AD3d 511, 512 [1st Dept 2010]).

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: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10156 Harry M. Pierson, Index 105088/06
Plaintiff-Appellant,

-against-

New York City Department of Education,
Defendant-Respondent.

_____

Michael G. O'Neill, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered December 12, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although plaintiff made out a prima facie case of age-based discrimination, defendant met its burden of proffering legitimate, nondiscriminatory reasons for failing to hire plaintiff as a teacher in the New York City Teaching Fellows program (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]), including plaintiff's stereotyping statement, made during a hiring interview, that parents in a particular ethnic group are more successful in communicating the importance of education to their children, resulting in superior academic performance. In

response, plaintiff failed to show that defendant's proffered reasons were pretexts for discrimination (*id.*).

Similarly, although plaintiff made out a prima facie case of retaliation, defendant met its burden of proffering legitimate, nondiscriminatory reasons for declining to accept plaintiff into the SMART teaching certification program (*Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553-554 [1st Dept 2010]), including plaintiff's expressed intention to focus his teaching energies on students "willing and interested" in learning. In response, plaintiff again failed to show that defendant's reasons were pretextual (*see id.* at 554).

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

ENTERED: MAY 21, 2013

CLERK

Tom, J.P., Acosta, Renwick, DeGrasse, Richter, JJ.

10157N Helene Gottlieb, Index 601546/04
Plaintiff-Respondent,

-against-

Northriver Trading Company LLC, et al.,
Defendants-Appellants,

Ariel Wolfson, et al.,
Defendants.

- - - - -

Northriver Trading Company LLC,
Counterclaimant,

-against-

Philip Gottlieb, etc.,
Counterclaimant-Respondent.

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

Garson Segal Steinmetz Fladgate LLP, New York (Chris Fladgate of counsel), for respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 3, 2012, which granted plaintiff's motion to vacate a default judgment dismissing the action, and restored the case to the calendar, unanimously affirmed, without costs.

The motion to vacate was timely. The record contains no proof of service of the notice of entry of the default judgment; therefore, the one-year deadline of CPLR 5015 was not triggered

(*see* CPLR 5015[a][1]; *Donnelly v Treeline Cos.*, 66 AD3d 563, 564 [1st Dept 2009]).

Plaintiff demonstrated a reasonable excuse for her default. Indeed, the record shows that she and her husband, defendant on the counterclaim (together the Gottliebs), were misled by their former counsel concerning the status of the case (*see* CPLR 2005; *Wilson v Misericordia Hosp.*, 244 AD2d 163 [1st Dept 1997]). The court properly exercised its discretion by conducting an in camera review of the withheld emails between plaintiff's husband and their former attorney (*see PSKW, LLC v McKesson Specialty Arizona, Inc.*, 82 AD3d 567 [1st Dept 2011]). Defendants-appellants failed to show that it was necessary to invade the attorney-client privilege to ascertain the truth of the Gottliebs' assertions that they were misled by their former counsel regarding the default (*see Credit Suisse First Boston v Utrecht-America Fin. Co.*, 27 AD3d 253 [1st Dept 2006]). Indeed, the Gottliebs' former counsel did not deny their allegations in his affirmation or state when he notified them about the default.

Plaintiff has demonstrated that she has a potentially meritorious cause of action. Plaintiff submitted an affidavit from her expert, who opined that based on his review of defendant Northriver Trading Company LLC's financial documents, plaintiff did not receive all the distributions to which she was entitled

(*see generally Reyes v New York City Hous. Auth.*, 236 AD2d 277, 279 [1st Dept 1997]). Furthermore, on a prior appeal in this action, this Court found issues of fact precluding summary judgment dismissing the complaint (58 AD3d 550 [1st Dept 2009]).

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

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

ENTERED: MAY 21, 2013

CLERK

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

10134 Ind. 3782/07
[M-1879 &
M-2032] In re Douglas Latta,
Petitioner,

-against-

Hon. Maxwell J. Wiley, etc., et al.,
Respondents.

Douglas Latta, petitioner pro se.

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

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

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

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

ENTERED: MAY 21, 2013

CLERK

Gonzalez, P.J., Tom, Sweeny, Richter, JJ.

9525 In re Albert Prince, Index 403135/11
Petitioner-Appellant,

-against-

City of New York,
Respondent-Respondent.

_____

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

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

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Judgment, Supreme Court, New York County (Cynthia Kern, J.), entered March 9, 2012, modified, on the law, to grant the petition to the extent of vacating the $2,000 fine, and otherwise affirmed, without costs.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
Rosalyn Richter, JJ.

9525
Index 403135/11

_____x

In re Albert Prince,
Petitioner-Appellant,

-against-

City of New York,
Respondent-Respondent.

_____x

Petitioner appeals from the judgment of the Supreme Court, New York County (Cynthia Kern, J.), entered March 9, 2012, denying the petition to annul the New York City Environmental Control Board's decision, dated October 27, 2011.

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

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon, Kristin M. Helmers and Ilyse Sisolak of counsel), for respondent.

RICHTER, J.

On February 23, 2011, petitioner Albert Prince removed a single television antenna from the top of some curbside garbage bags, placed it in his vehicle, and drove away. Shortly thereafter, the New York City sanitation police pulled Prince over, and issued him a summons for unauthorized removal of residential recyclable material using a motor vehicle (*see* Administrative Code of City of NY § 16-118[7][b][1]). The summons carried with it a mandatory $2,000 fine for a first offense (*see* Administrative Code § 16-118[7][f][1][i]). The police also impounded Prince's vehicle, which was not to be released until the fine and applicable storage fees were paid (*see* Administrative Code § 16-118[7][g][1]). In this appeal, Prince challenges the penalty as an excessive fine in violation of the state and federal constitutions. We agree and conclude that, under the specific facts of this case, the fine imposed is grossly disproportional to the gravity of the offense and must be vacated.

On the morning in question, a sanitation police lieutenant was patrolling in Brooklyn looking for individuals removing metal from recyclable trash placed out by homeowners. The lieutenant observed Prince take a television antenna made of recyclable metal, place it in his van, and drive away. Prince took the

discarded antenna from the curb in front of a one or two-family house, where it was resting on top of black garbage bags. Prince is a carpenter and sculptor who belongs to a group of artists who use recyclable construction material for art installations at the Brooklyn Art Exchange. Prince believed that the antenna was garbage and intended to use it in his artwork.

After Prince drove away, the lieutenant activated the lights and siren on his vehicle and pulled Prince's van over. He issued Prince a $2,000 Notice of Violation for "remov[ing] recyclable metal . . . from residential premise[s]" and placing it into his van, in violation of § 16-118(7)(f)(1)(i) of the Administrative Code. The lieutenant also instructed Prince to relinquish the keys to the van, and impounded the vehicle pending payment of the $2,000 fine. Prince was unable to continue working because he needed the van for his carpentry job. On March 23, 2011, a month after the incident and while the vehicle was still under impoundment, a hearing was held before an Administrative Law Judge of the Office of Administrative Trials and Hearings. After taking testimony from the lieutenant and Prince, the Judge sustained the violation, finding that Prince "removed [a] metal antenna from [the] location and placed it in his vehicle,

intending to use it for his artwork."[1] The Judge found both the lieutenant and Prince credible, but concluded that Prince's testimony did not establish any valid defense to the charge. Concluding that she had no discretion to reduce the penalty, the Judge imposed the mandatory $2,000 fine.

Prince appealed the decision to the New York City Environmental Control Board (ECB) contending, inter alia, that the mandatory $2,000 penalty enforced by vehicle impoundment was an unconstitutionally excessive fine.[2] By decision dated October 27, 2011, the ECB upheld the Notice of Violation and the $2,000 fine, concluding that it lacked the authority to rule on the constitutional issue. Prince then commenced the instant article 78 proceeding against respondent City of New York contending that the fine was unconstitutionally excessive, and that his due process rights were violated because he did not receive a prompt hearing. The petition sought vacatur of the $2,000 fine and return of the $500 storage fee. In a judgment entered March 9, 2012, Supreme Court denied the petition and dismissed the

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[1] Although the hearing record reflects that Prince may also have taken "some cans" from the garbage, the Judge's finding was that he removed only the metal antenna.

[2] On June 24, 2011, four months after being impounded, and while the administrative appeal was pending, the Department of Sanitation agreed to release Prince's vehicle upon payment of $500 in storage fees.

proceeding, finding no constitutional violations. Prince now appeals.[3]

Section 16-118(7)(b)(1) of the Administrative Code provides that, except for authorized employees of the Department of Sanitation, "it shall be unlawful for any person to disturb, remove or transport by motor vehicle any amount of recyclable materials that have been placed by owners . . . of residential premises . . . adjacent to the curb line . . . for collection or removal by the [sanitation] department unless requested by the owner." Section 16-118(7)(f)(1)(i) provides that anyone who violates this provision using a motor vehicle shall be assessed a $2,000 fine for the first offense. The statute does not allow for the discretionary imposition of any lesser penalty. In addition, any motor vehicle used to commit the violation must be impounded by the sanitation department and not be released until the fine, along with storage fees, has been paid, or a bond posted (Administrative Code § 16-118[7][g][1]).

The New York City Council enacted these provisions to provide harsher penalties for those who use motor vehicles to

[3] ECB had previously found that Prince did not have to prepay the fine during pendency of the administrative appeal due to financial hardship. The City has agreed not to pursue collection of the $2,000 fine pending the determination of the appeal before this Court.

remove recyclable materials from the curbside. Previously, the maximum fine for violators was $100. The legislative history of the current law indicates that the City Council did not believe the $100 fine was a sufficient deterrent to those individuals who appropriate recyclables and sell them for financial gain (*see* Rep of Comm on Sanitation and Solid Waste Management, 2007 NY City Legis Ann, at 318). The Council was concerned that trucks with out-of-state license plates were taking recyclables from curbsides the evening before the regular sanitation department pickup, thereby depriving the City of recycling revenue (*id.*).

Thus, the Council's intent in passing the statute was to prevent people from making "a quick profit [from] tak[ing] recyclable materials in large quantities" (*id.* at 320; *see also* Testimony of Sanitation Director of Enforcement Todd Kuznitz, Sep 25, 2007 Hearing of the Comm on Sanitation and Solid Waste Management, at 12 [legislation aimed at those removing recyclables "for commercial purposes, for serious business reasons, and in great bulk"]; Statement in support of legislation by The Natural Resources Defense Council, Inc. ["legislation is targeted at commercial enterprises that are stealing recyclables on a high-volume basis and in a business context"]). Indeed, at the City Council hearing on the proposed law, several Council members expressed concerns about the potential sweep of the

proposed $2,000 fine, suggesting that such a penalty would be excessive if imposed on individuals taking items for personal use (Sep 25, 2007 Hearing of the Comm on Sanitation and Solid Waste Management, at 10-12). Despite these reservations, and the stated intent of the legislation, the statute, as enacted, applies broadly to individuals who take "any amount" of recyclable materials, no matter how small (Administrative Code § 16-118[7][b][1]).

It is undisputed that Prince violated the relevant Administrative Code provision — he removed and transported a recyclable object using a motor vehicle. Nevertheless, under the specific circumstances here, we conclude that the mandatory $2,000 penalty amounts to an unconstitutionally excessive fine. The Eighth Amendment of the United States Constitution forbids the imposition of "excessive fines." The New York State Constitution contains the same prohibition (art I, § 5). The Excessive Fines Clause "'limits the government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense'" (*County of Nassau v Canavan*, 1 NY3d 134, 139 [2003], quoting *Austin v United States*, 509 US 602, 609-610 [1993]). A fine is unconstitutionally excessive if it "notably exceeds in amount that which is reasonable, usual, proper or just" (*People v Saffore*, 18 NY2d 101, 104 [1966]). Thus, the Excessive Fines

Clause is violated where the fine is "grossly disproportional to the gravity of [the] offense" (*United States v Bajakajian*, 524 US 321, 334 [1998]; *see Canavan*, 1 NY3d at 140).

We reject the City's contention that the Excessive Fines Clause does not apply to the civil penalty at issue here. The City points out that *Bajakajian* dealt with criminal forfeiture of property involved in the offense of failing to report more than $10,000 in currency when leaving the country. The City also notes that, although *Austin* and *Canavan* are civil cases, they involved forfeiture of property as the instrumentality of a crime. Thus, the City argues that because no criminal conduct took place here, the administrative penalty assessed is not subject to excessive fines jurisprudence.

The City too narrowly views the scope of the Excessive Fines Clause. Although Eighth Amendment claims often arise in the criminal context, civil fines may also fall within reach of the amendment (*see Korangy v United States FDA*, 498 F3d 272, 277 [4th Cir 2007], *cert denied* 552 US 1143 [2008]; *Towers v City of Chicago*, 173 F3d 619, 623-624 [7th Cir 1999], *cert denied* 528 US 874 [1999]). This Court recognized as much in *Matter of Street Vendor Project v City of New York* (43 AD3d 345 [1st Dept 2007], *lv denied* 10 NY3d 709 [2008]). In that case, a group representing street vendors challenged as unconstitutional a

schedule of civil fines adopted by the ECB. Although we found that the record was insufficient to permit review of the group's constitutional claim, we concluded that individual street vendors could raise such a challenge in future lawsuits where the facts of each separate case could be developed (*id.* at 346).

The relevant inquiry is not whether the fine arises in the civil or criminal context, but whether the fine constitutes punishment (*see Austin*, 509 US at 610 ["The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law"] [internal quotation marks omitted]). Civil penalties serving solely remedial purposes do not fall under the rubric of the Eighth Amendment (*Austin*, 509 US at 621-622). But where a civil fine "serves, at least in part, deterrent and retributive purposes," it is considered punitive and subject to the Excessive Fines Clause (*Canavan*, 1 NY3d at 139-140; *see Austin*, 509 US at 621 [sanction that serves deterrent purpose is punishment]; *Bajakajian*, 524 US at 329 [deterrence has traditionally been viewed as a form of punishment]).

The statute's requirement of a mandatory $2,000 fine cannot fairly be viewed as solely remedial. This sizeable sanction is assessed regardless of the amount, or value, of the recyclable materials taken, and bears no relationship to the actual loss

sustained by the City as a result of the violation (*see Bajakajian*, 524 US at 329 [forfeiture did not serve the remedial purpose of compensating the government for a loss]; *Towers v City of Chicago*, 173 F3d at 624 [civil fines at issue serve little or no remedial purpose because they do not compensate the City for any loss sustained as a result of the violations]). Particularly where the value of the item taken is minimal, the $2,000 fine undeniably has a punitive element.

The legislative history of the statute makes clear that the $2,000 fine was established to serve as a deterrent. The September 25, 2007 Report of the City Council's Committee on Sanitation and Solid Waste Management (the Committee) explained that the fine was being increased to $2,000 because the previous fine of $100 "does not seem to have deterred the efforts of those wishing to take [recyclable materials] for their own financial gain" (2007 NY City Legis Ann, at 318). In written testimony submitted to the Committee, John Doherty, Commissioner of the Department of Sanitation, stated that "increasing the fines for this violation will deter individuals from interfering with the Department's recycling collection operations" (Testimony of Sanitation Commissioner John J. Doherty, Sep 25, 2007 Hearing of the Comm on Sanitation and Solid Waste Management, at 2). Indeed, the City's brief on appeal repeatedly points out that the

increased penalties were enacted to deter violators. Because the fine here, at least in part, serves a deterrent purpose, it cannot be considered solely remedial and thus is subject to Eighth Amendment analysis (*see State of New York v Town of Wallkill*, 170 AD2d 8, 11 [3d Dept 1991] [civil penalty contained in Environmental Conservation Law is punitive in nature, serving purposes of both retribution and deterrence, in addition to restitution]; *United States v Mackby*, 261 F3d 821, 830 [9th Cir 2001] [civil sanctions under the False Claims Act are subject to the Excessive Fines Clause because the sanctions represent a payment to the government, at least in part, as punishment]).[4]

This Court's decision in *OTR Media Group, Inc. v City of New York* (83 AD3d 451 [1st Dept 2011]) involves a different type of statutory scheme. In *OTR*, the plaintiff challenged the fine schedule for violating regulations restricting outdoor advertising signs situated within view of arterial highways and public parks. In rejecting the constitutional excessive fine claim, we found that the sanctions there served only a remedial purpose. The regulations at issue in *OTR* did not entirely bar

[4] There is no merit to the City's argument that the Eighth Amendment is not applicable because Prince had the ability to avoid the fine by not taking the antenna. Under that rationale, no penalty could ever be subject to the Excessive Fines Clause because any potential violator could always avoid a fine by not committing the charged conduct in the first place.

outdoor advertising, but simply required that when signs were erected, they complied with zoning regulations. Here, in contrast, the Administrative Code provision constitutes a complete bar to removing recyclable materials, making the fines punitive, not remedial.

Having concluded that the sanction here falls within reach of the Excessive Fines Clause, we now turn to whether it is "grossly disproportional" to the gravity of Prince's offense (*Bajakajian*, 524 US at 334). "The touchstone of [this] constitutional inquiry . . . is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish" (*id.*). In determining gross disproportionality, a court should consider the seriousness of the offense, the severity of the harm caused and the potential harm had the defendant not been apprehended, the maximum fine to which the defendant could have been subject, and the defendant's economic circumstances (*Canavan*, 1 NY3d at 140).

Applying these factors, we find that the imposition of a $2,000 fine for removal of a discarded television antenna from the garbage is grossly disproportional to the offense charged. The seriousness of the offense is relatively minor, as it involves taking a single piece of metal, abandoned by its owner,

which likely had little value to the City.[5] There was no significant harm caused by Prince's conduct, and certainly no potential harm to the owner of the antenna, or anyone else in the area, had Prince not been caught. Moreover, because the statute contains no discretion and mandates a $2,000 fine in all circumstances, Prince was essentially subject to the maximum punishment for the offense, even though he took a minimal amount of material. The City cannot persuasively argue that a penalty in an amount less than $2,000 would not be an adequate deterrent to a first-time offender like Prince, who is neither a commercial dealer nor someone taking items in bulk. Finally, the record established that, as an artist and carpenter, Prince had limited financial resources, as evidenced by the financial hardship waiver granted by ECB.

To the extent Prince contends that the impoundment of his van also constitutes an excessive fine, that issue is moot. Although the protracted loss of a vehicle for someone who, like Prince, is unable to pay the fine could raise excessive fine implications, we need not reach that issue because the vehicle has been returned to him. We reject Prince's due process claim seeking return of the $500 storage fee paid to release his

[5] The record contains no evidence of the antenna's actual recycling value.

vehicle. Prince had the right to request an earlier hearing (*see* 48 RCNY 3-51[b]), and when he did request an expedited hearing, he received one.

Accordingly, the judgment of the Supreme Court, New York County (Cynthia Kern, J.), entered March 9, 2012, denying the petition to annul the New York City Environmental Control Board's decision, dated October 27, 2011, should be modified, on the law, to grant the petition to the extent of vacating the $2,000 fine, and otherwise affirmed, without costs.

All concur.

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

ENTERED: May 21, 2013

CLERK