SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 28, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Nardelli, McGuire, Abdus-Salaam, JJ.

3413 Claire Segree, Index 118958/06
Plaintiff-Respondent,

-against-

St. Agatha's Convent, et al.,
Defendants,

The New York Foundling Hospital,
Defendant-Appellant.

_____

Biedermann, Reif, Hoenig & Ruff, P.C., New York (Philip C. Semprevivo, Jr. of counsel), for appellant.

Jonathan Rice, Dobbs Ferry (Andrew Chiway Chan of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 16, 2010, which, to the extent appealed from as limited by the briefs, denied defendant New York Foundling Hospital's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

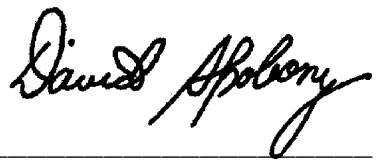
Viewing the evidence in the light most favorable to plaintiff (*see Mullin v 100 Church LLC*, 12 AD3d 263 [2004]; *O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996]), and drawing all reasonable inferences in her favor, we agree with the

IAS court that the evidence presented by plaintiff raises material questions of fact as to whether defendant hospital breached its duty to maintain its property in a reasonably safe condition so as to prevent foreseeable accidents (*see Basso v Miller*, 40 NY2d 233 [1976]), and whether it had notice of the hazardous condition that precipitated plaintiff's injury (*see Boyd v Rome Realty Leasing L.P.*, 21 AD3d 920, 921 [2005]; *cf. Gordon v American Museum of Natural History*, 67 NY2d 836, [1986]).

We have considered this defendant's other arguments and, under the particular circumstances before us, find them unavailing.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Andrias, McGuire, Manzanet-Daniels, JJ.

1919 & M-5592 Federated Retail Holdings, Inc., et al., Plaintiffs-Respondents,

-against-

Weatherly 39th Street, LLC., etc., Defendant-Appellant.

Index 604104/06

Siller Wilk LLP, New York (M. William Scherer of counsel), for appellant.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 3, 2009, which, inter alia, denied defendant landlord's motion for partial summary judgment on its first through sixth counterclaims on the issue of whether plaintiff tenant breached the subject lease by failing to purchase proper insurance naming landlord as an additional insured, without a self-insured retention, as allegedly required by the lease, and granted the cross motion of tenant and co-plaintiff subtenant for summary judgment dismissing the first through sixth counterclaims, unanimously reversed, on the law, with costs, the cross motion denied, the motion granted, and tenant's remaining time to cure will commence to run upon service on tenant of a

copy of this order with notice of entry.

The court erroneously determined that section 7.02 of the lease, which requires tenant to maintain insurance coverage for the benefit of itself and landlord "in limits of at least One Million ($1,000,000) Dollars for injury to any one individual and Three Million ($3,000,000) Dollars for any one accident . . . plus an umbrella policy of $5,000,000," was not violated by tenant's use of self-insured retentions in the amount of $1,000,000 each for both the primary and umbrella policies. In construing the lease, the court improperly declined to consider the reasonable expectations of the parties and purpose of this business contract (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]; *Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 28 [2009]), incorrectly concluding that to do so was tantamount to consideration of parole evidence -- to the contrary, it is a proper approach to contract construction. Moreover, the court's reading of the unambiguous insurance provision would permit tenant to render meaningless the requirement that it purchase the specified amounts of insurance (*see Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64, 69 [1999]).

As landlord correctly notes, clarity and predictability are important considerations in contract interpretation (*see Sport*

Rock Intl., Inc., 65 AD3d at 28). Although our interpretation of the contract is consistent with those considerations, the motion court's reading would leave the issue of insurance uncertain, as tenant could simply choose to buy a policy with such a high self-insured retention (and concomitantly low premium) as to render insubstantial or even illusory the benefits of the insurance coverage for which landlord bargained. Such a reading does not comport with well settled precepts of contract interpretation that require a court to "endeavor to give the [contract] construction most equitable to both parties instead of the construction which will give one of them an unfair and unreasonable advantage over the other" (*Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 438 [1994] [internal quotation marks omitted]) and that disfavor "[l]anguage in contracts placing one party at the mercy of the other" (*id.* [internal quotation marks omitted]).

Subtenant's insurance does not cure this defect, as landlord is not required to accept subtenant's performance in lieu of tenant's (*see 185 Madison Assoc. v Ryan*, 174 AD2d 461 [1991]; *214 W. 39th St. Corp. v Miss France Coats, Inc.*, 274 App Div 597, 599-600 [1948]). Subtenant could choose, at any time, to discontinue its insurance naming landlord as an additional insured, and landlord would have no recourse, as it is not in

privity with subtenant. Nor does tenant's fronting policy, purchased after the instant action was commenced, cure the defect. The fronting policy purportedly provides "first dollar" coverage, so that the issuer of the policy generally would be responsible for paying the self-insured retention for the primary policy. Tenant concedes that the issuer of the fronting policy would not be required to pay the $1,000,000 self-insured retention provided for in the umbrella policy if the primary coverage were to be exhausted, but argues that the possibility of exhaustion of the primary policy is remote. However, whether or the extent to which that possibility is remote is irrelevant to the issue of whether tenant complied with the insurance provision in the lease. Landlord did not bargain for insurance protection against only non-remote risks.

M-5592 - *Federated Retail Holdings, Inc., et al. v Weatherley 39th Street LLC, etc.*

Motion to strike brief denied.

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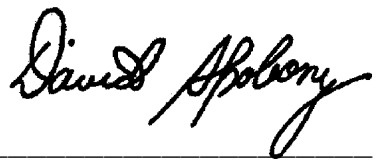

CLERK

Mazzarelli, J.P., McGuire, DeGrasse, Freedman, Richter, JJ.

2921 UBS Securities LLC, etc., Index 603057/07
Plaintiff-Appellant-Respondent,

-against-

Red Zone LLC, etc.,
Defendant-Respondent-Appellant.

_____

O'Melveny & Myers LLP, New York (Daniel L. Cantor of counsel), for appellant-respondent.

Quinn Emmanuel Urquhart & Sullivan, New York (Robert L. Raskopf of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 5, 2010, which denied plaintiff's motion for partial summary judgment on its first cause of action, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for further proceedings, including the calculation of expenses payable under the parties' agreement and interest. Cross appeal from same order, to the extent it denied defendant's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, for failure to perfect in the proper manner.

This appeal calls for the interpretation of an agreement by which plaintiff UBS, an investment bank, was engaged to act as the exclusive financial advisor to defendant Red Zone in the

latter's effort to acquire control of Six Flags, Inc., a Delaware corporation. In 2004, Red Zone purchased approximately 8.76% of Six Flags' voting stock for $34.5 million. Daniel Snyder, Red Zone's managing member, believed Six Flags was operated poorly, and that his experience with other enterprises gave him insight into improving the company's performance. Accordingly, in September 2004, Snyder and David Pauken, another Red Zone member, met with Six Flags' nonmanagement directors to present ideas for managerial and operational changes. At the meeting, Red Zone asserted that Six Flags should (1) appoint Snyder and two other nominees to its seven-person board of directors, (2) name Snyder as Six Flags' chair, (3) permit Snyder to select a CEO with marketing expertise and (4) adopt certain operational changes modeled on those Snyder had successfully employed as the chair and principal owner of a major sports franchise. Six Flags' directors, however, rejected all of these proposals for improving the business. Following the directors' rejection and some disappointing financial results, Red Zone decided to end its investment in Six Flags. The company's low stock price and trading volume, however, made it impossible for Red Zone to dispose of its sizeable stake in Six Flags on favorable terms. As a result, Red Zone decided to explore its own ways of fixing Six Flags.

In April 2005, Red Zone met with UBS to discuss its Six Flags investment. The parties considered several options, including seeking to influence Six Flags' board to take steps to maximize stock value, seeking Red Zone's representation on the board, or encouraging a sale of assets or a business combination such as Red Zone's acquisition of Six Flags. In May 2005, Snyder told Andrew Sriubas, a UBS managing director, that Red Zone "would like to control the board." On June 7, 2005, the parties entered into the advisory agreement that is the subject of this action.

The agreement designated UBS as Red Zone's exclusive financial and capital markets advisor in connection with a potential Six Flags "acquisition transaction," which provided for Red Zone's payment of UBS's expenses in addition to three separate fees. These fees included a transaction fee of $10 million, payable at the closing of an acquisition transaction, net of fees already paid. The transaction fee was payable if an acquisition transaction occurred within 18 months of the agreement's execution, i.e., by December 7, 2006. The term "acquisition transaction" was defined as follows:

> As used in this Agreement, the term "Acquisition Transaction" means, whether effected directly or indirectly or in one transaction or a series of transactions: (a) any merger, consolidation, reorganization or other business combination pursuant

> to which [Red Zone] and [Six Flags] and/or all or a significant portion of their respective businesses, divisions or product lines are combined, or (b) the acquisition by [Red Zone] of 50% or more of the capital stock or assets of [Six Flags] by way of tender or exchange offer, option, negotiated purchase, leveraged buyout, minority investment or partnership, joint or collaborative venture or otherwise, or (c) the acquisition by [Red Zone] of control of [Six Flags], through a proxy contest or otherwise.

By August 16, 2005, Red Zone had purchased additional shares, increasing its equity stake in Six Flags to 11.7%. At that time, however, Six Flags' bondholders would have had the right to demand the immediate repayment of approximately $2.6 billion in debt and preferred stock if Red Zone had merged with Six Flags or otherwise acquired more than 34.9% of its shares. Due to this "poison debt" and other factors, Red Zone concluded that absent a negotiated transaction with Six Flags, raising capital to finance an acquisition of the company would have been prohibitively expensive. Red Zone further ruled out a friendly negotiated transaction with Six Flags in light of its board's past intransigence.

On August 17, 2005, Red Zone launched what turned out to be a successful proxy contest by which the shareholders approved the replacement of three of Six Flags' seven directors with Snyder, Dwight Schar (another Red Zone member) and Mark Shapiro (Red

Zone's recently hired CEO).[1] In November 2005, Six Flags' newly constituted board unanimously elected Snyder as its chair. On December 13, 2005, the board was expanded to 10 members with the addition of the late Jack Kemp, Harvey Weinstein and Michael Kassan. Snyder knew Kemp socially and had done business with Weinstein and Kassan. That same month, Six Flags' CEO was replaced by Mark Shapiro, who also continued to serve as Red Zone's CEO. At Shapiro's instance, Six Flags' board approved the hiring of 11 people for executive positions within the company. Three of the new executives had been on Red Zone's payroll when hired. On January 11, 2006, Six Flags' board unanimously voted to replace three of its pre-Red Zone directors with Pauken, C. E. Andrews and Mark Jennings. Pauken, as noted above, was a member of Red Zone and Andrews was nominated for membership on the board by Schar. Jennings held a membership interest in Red Zone through a limited partnership he controlled. Six Flags' board also approved the reimbursement of Red Zone's proxy contest expenses, which included Shapiro's compensation.

By this action, UBS seeks to recover a transaction fee on the ground that an acquisition transaction, consisting of Red

[1]As set forth in a side agreement of the same date, it was understood that this proxy contest was not to be considered an "acquisition transaction" within the meaning of the advisory agreement.

Zone's acquisition of control of Six Flags, had occurred by January 11, 2006, a date within the term of the agreement. Plaintiff's contention that control was acquired is based upon the facts that

- Red Zone's nominees held 9 of 10 seats on Six Flags' board,[2]
- over 50% of Six Flags' directors were Red Zone insiders,
- Snyder, Red Zone's managing member, was Six Flags' chair, and
- Shapiro, Red Zone's CEO, was also Six Flags' CEO.

Finding the advisory agreement ambiguous, the motion court denied plaintiff's motion for summary judgment on its contract cause of action. We now reverse.

The agreement manifestly provided for the payment of UBS's transaction fee upon Red Zone's acquisition of control of Six Flags. The parties disagree as to whether Red Zone acquired the requisite control of the company. This disagreement calls for interpretation of the term "control" as used in the agreement.

A contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]). A "written agreement

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[2]As of January 18, 2006, Kassan resigned from the board without being replaced, leaving Red Zone's nominees with six of nine seats.

that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). "Control," according to Black's Law Dictionary, is the "direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise" (*see also* Business Corporation Law § 912[a][8]; 8 Del Code § 203[c][4]). Red Zone clearly controlled Six Flags once its insiders and nominees constituted the majority of the board and took over the company's management. It cannot be disputed that Red Zone had seized the power to direct Six Flags' management and policies. We reject Red Zone's argument that it did not control Six Flags simply because it did not obtain ownership of the majority of its voting shares. The argument is at odds with the inclusive definition of "control" as well as the provisions of the advisory agreement. Moreover, the agreement provided that an acquisition transaction could have been brought about by way of a transaction in the nature of a merger, a stock acquisition or the acquisition of control "through a proxy contest or otherwise." Had the parties intended to limit the definition of "control" to the acquisition of stock, the phrase "through a proxy contest or otherwise" would have no meaning. Red Zone's argument is thus flawed because a contract should not

be interpreted so as to render any of its clauses meaningless (*see Two Guys from Harrison-N.Y. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]). In addition, Red Zone's argument that the side agreement capped UBS's fee at $2 million is belied by a reading of the document itself. Because the advisory agreement and the side agreement are unambiguous, we decline to consider Red Zone's purported extrinsic evidence of the parties' intent (*see Greenfield,* 98 NY2d at 569-570).

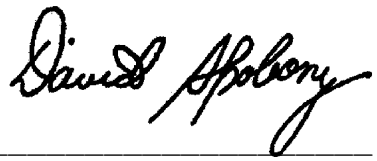
We are similarly unpersuaded by Red Zone's argument that UBS was somehow required to rebut the presumption of good faith and loyalty on part of Six Flags' directors in order to establish control of the company on Red Zone's part. Here, Red Zone misplaces its reliance on *Beam v Stewart* (845 A2d 1040 [Del 2004]), a case that addresses the entirely distinct subject of demand futility in a derivative action. Taken to its logical conclusion, Red Zone's unlikely position would be that the parties here bargained for UBS's transaction fee to be payable upon, among other things, a breach of loyalty by at least some of Six Flags' directors.

We do not reach Red Zone's cross appeal because the record does not include the papers submitted with respect to its motion for summary judgment (*see* CPLR 5526). Meaningful appellate review of the denial of that motion has thus been rendered

impossible. Having failed in its obligation to assemble a proper appellate record, Red Zone's cross appeal must be dismissed (*see Matter of Allstate Ins. Co. v Vargas*, 288 AD2d 309 [2001]).

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

ENTERED: OCTOBER 28, 2010



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Friedman, J.P., Nardelli, DeGrasse, Freedman, Manzanet-Daniels, JJ.

3350 The People of the State of New York Ind. 4824/05
Respondent,

-against-

Eugene Lewis,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Amy I. Donner of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered December 11, 2006, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously reversed, on the law, and the matter remanded for a new trial.

The record establishes that the court received a note from the jury requesting substantive legal instructions on the elements of the charged crimes. Without reading the note into the record, either verbatim or otherwise, the court responded with substantive instructions. There is no indication in the record that the attorneys ever saw the note, knew of its contents, knew of the court's proposed instructions, or had an

opportunity for input into the court's response.

In the absence of record proof that the trial court complied with its core responsibilities under CPL 310.30 to give meaningful notice to counsel following a substantive juror inquiry, a mode of proceedings error occurred requiring reversal (*People v Tabb*, 13 NY3d 852 [2009]; *People v Kisoon*, 8 NY3d 129, 135 [2007]; *People v O'Rama*, 78 NY2d 270, 277 [1991]; *cf. People v Ramirez*, __ NY3d __, 2010 NY Slip Op 06599 [2010]). While "some departures from the procedures outlined in *O'Rama* may be subject to rules of preservation" (*Kisoon*, 8 NY3d at 135; *see also People v Donoso*, __ AD3d __, 2010 NY Slip Op 07245 [2010]), a failure to fulfill the court's core responsibility on the record is not, and thus defense counsel's failure to object is of no consequence (*cf. e.g. People v Kadarko*, 14 NY3d 426 [2010]; *People v Starling*, 85 NY2d 509 [1995]).

It is possible that the court showed the note to counsel and that colloquy thereon occurred off the record. The record, however, lacks any indication that such events took place. Accordingly, we have no alternative but to reverse (*cf. People v Fishon*, 47 AD3d 591 [2008], *lv denied* 10 NY3d 958 [2008] [record demonstrated existence of unrecorded colloquy concerning note]).

Contrary to the People's argument, neither the note nor the court's response was limited to a charge of which defendant was

acquitted.

In view of this determination, we find it unnecessary to reach any other issues.

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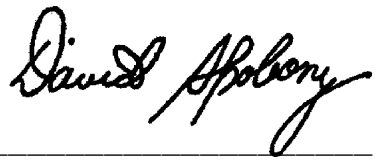

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3480 The People of the State of New York, Ind. 299/08
Respondent,

-against-

Caine Rosario,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

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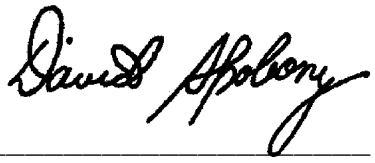
Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered May 11, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the fourth degree, and sentencing him to a term of 3 years' probation with 5 days' community service, unanimously affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to meet his burden of establishing that the prosecutor's facially race-neutral reasons for peremptorily challenging a prospective juror were pretextual (*see People v Payne*, 88 NY2d 172, 181 [1996]), and the record supports the court's finding of nonpretextuality, which is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

We reject defendant's arguments that the prosecutor's uneasiness about his perception that the prospective juror was excessively pro-prosecution was such an "absurd" reason as to not even be considered race-neutral, and that it was at least pretextual. The prosecutor had an ethical duty "to see that justice is done" and "must deal fairly with the accused" (*People v Steadman*, 82 NY2d 1, 7 [1993]). The record fails to support defendant's claim that the prosecutor disparately treated a similarly situated panelist on the basis of race, since "[t]here were significant differences in the responses of the panelists and their demeanor" (*People v Turner*, 294 AD2d 192, 192 [2002], *lv denied* 98 NY2d 732 [2002]). We also reject defendant's contention that the prosecutor gave "highly suspect" reasons for certain other peremptory challenges to which defendant does not directly object on appeal.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3481 Colonial Surety Company, Index 603656/08
Plaintiff-Respondent,

-against-

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

_____

Ruskin Moscou Faltischek, P.C., Uniondale (Joseph R. Harbeson of counsel), for appellants.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Adam R. Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 3, 2009, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a preliminary injunction directing defendants to deposit with plaintiff the sum of $1,065,273.25 as collateral security, unanimously modified, on the law, to direct plaintiff to post an undertaking, and the matter remanded for the purpose of fixing the amount of the undertaking, and otherwise affirmed, without costs.

Defendants contend that the court improperly granted the injunction directing defendants to deposit collateral with plaintiff, pursuant to the parties' Indemnity Agreement, because plaintiff breached its duty of good faith performance of the

agreement and thus came before the court with "unclean hands." They maintain that plaintiff promised to provide lien discharge bonds in connection with one of three construction projects on which it acted as performance and payment bond surety for defendant Eastland (the Clarkstown Central School District project) and broke its promise, leaving Eastland unable to pay its contractors.

Initially, we note that the Indemnity Agreement specifically provides that it may not be modified orally. While representatives of Eastland may have told representatives of Clarkstown, in plaintiff's presence, that plaintiff would bond certain liens, those statements do not constitute a specific promise on plaintiff's part.

Defendants' contention that the court erred in ordering collateral security in the full amount requested by plaintiff is raised for the first time on appeal, and is not properly before us. Were we to consider this argument, we would find that it was reasonable for the amount of security to be based on asserted claims (*see BIB Constr. Co. v Fireman's Ins. Co. of Newark, N.J.*, 214 AD2d 521, 523 [1995]).

Defendants' contention that the court erred in failing to require plaintiff to post an undertaking is also raised for the first time on appeal but may be considered, because it is a

proposition of law that appears on the face of the record and could not have been avoided if brought to plaintiff's attention at the proper time (*Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). CPLR 6312(b) provides, in pertinent part, that "prior to the granting of a preliminary injunction, the plaintiff *shall* give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction." Thus, we modify to remand for the purpose of fixing the amount of the undertaking.

THIS CONSTITUTES THE DECISION AND ORDER
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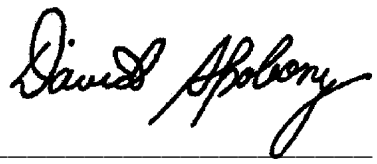

CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3482-
3482A In re Prince McM. and Another,

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

Kimberley McM.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Law Office of Kenneth M. Tuccillo, Hastings-On-Hudson (Kenneth M. Tuccillo of counsel), for appellant.

Magovern & Sclafani, New York (Marion C. Perry of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

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Orders of disposition, Family Court, Bronx County (Douglas E. Hoffman, J.), entered on or about May 7, 2009 and October 6, 2009 which, to the extent appealed from as limited by the briefs, upon fact-findings of permanent neglect, terminated respondent mother's parental rights to the seven subject children, and committed the children's guardianship and custody to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence that the mother permanently neglected the children (*see Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). Although she attended the programs recommended by the agency, she failed to correct the conditions that led to the placement of the children in foster care. She continued to reside with the father, who was twice adjudicated a child abuser, and continued to deny his sexual abuse of her children, despite complaints from three of her children over an extended time period (*see Matter of Imani Elizabeth W.*, 56 AD3d 318 [2008]). Although respondent mother testified at the hearing that she was willing to separate from the father, she had taken no action to obtain separate housing.

The agency also established by a fair preponderance of the evidence that the best interests of each of the children would be served by terminating respondent mother's parental rights so as to facilitate their adoption. The agency demonstrated that all of the children are in stable and supportive foster homes, and that two of the three children respondent mother seeks to have returned to her are in pre-adoptive homes. Termination of respondent mother's parental rights provides these children with

a realistic opportunity to free themselves from a troubled past (*see Matter of Jasmine Pauline M.*, 62 AD3d 483 [2009]).

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

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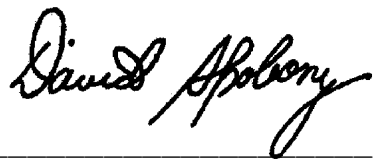


CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3483 John Malloy, Index 105290/07
Plaintiff-Appellant,

-against-

Melvin Friedland, et al.,
Defendants-Respondents,

Hamilton Heights Deli Corp.,
Defendant.

_____

Kelner and Kelner, New York (Joshua D. Kelner of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Edward J. O'Gorman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan Madden, J.), entered July 24, 2009, which granted the landlord defendants' motion for summary judgment, unanimously affirmed, without costs.

Plaintiff asserts he was injured in 2007 when he fell into a trapdoor opening while shopping at Hamilton Heights Deli on Manhattan's upper west side. According to the record, the trapdoor had been left open by one of the tenant's employees.

It is well settled that "[a] landlord is not generally liable for negligence with respect to the condition of property after

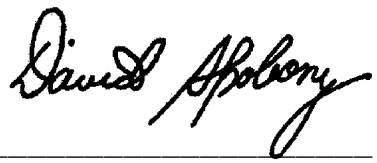
its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Babich v R.G.T. Rest. Corp.*, 75 AD3d 439, 440 [2010]). Although the lease agreement does state that the landlord has the right to reenter to make repairs, plaintiff has failed to show that the Friedland defendants violated any specific statutory safety provision. Moreover, "[a] properly functioning trapdoor that is left open by someone under the tenant's control is not a structural defect, either pursuant to the lease or under case law" (*Baez v Barnard Coll.*, 71 AD3d 585, 586 [2010]).

Pursuant to the lease, the tenant had sole responsibility for maintaining the area where plaintiff alleges he sustained his injuries. Therefore, as out-of-possession owners, the Friedland defendants cannot be held liable under these circumstances (*see*

Dexter v Horowitz Mgt., 267 AD2d 21, 22 [1999]; *see generally* *Lewis v Sears, Roebuck & Co.*, 35 AD3d 273 [2006]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3484-
3485-
3486 Index 603811/04

Jefftex International Ltd.,
Plaintiff-Appellant,

-against-

JPI Trading Corp., et al.,
Defendants-Respondents.

_____

Gottesman, Wolgel, Malamy, Flynn & Weinberg, P.C., New York (Robert A. Dashow of counsel), for appellant.

Kaplan, Massamillo & Andrews, LLC, New York (Thomas G. Carulli of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered September 8, 2009, to the extent dismissing the complaint with prejudice, and order, same court and J.H.O., entered February 25, 2010, which denied plaintiff's motion to vacate the judgment and direct dismissal of the action without prejudice, as stipulated, unanimously reversed, on the facts, without costs, and the action dismissed without prejudice. Appeal from order, same court and J.H.O., entered September 2, 2009, which dismissed the complaint with prejudice sua sponte for failure to prosecute, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The Judicial Hearing Officer's "authority to exercise all

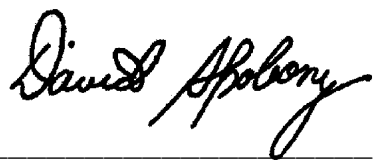
the powers of a Justice of th[e Supreme C]ourt" was recognized by stipulation between the parties on May 26, 2005. Subsequently, in September 2006, the parties stipulated to discontinue the action without prejudice.

The J.H.O. did have the authority to dismiss with prejudice, in light of the parties' unreadiness to proceed to trial and their failure to enter their 2006 stipulation or have it read into the record prior to court action (*see* CPLR 3217[a][2]; *Bove v Cherney*, 252 AD2d 512 [1998]; *Matter of Michael T.*, 188 AD2d 1090 [1992]). However, plaintiff met its burden of demonstrating a reasonable excuse for its oversight in entering the stipulation of discontinuance and a meritorious cause of action based on the submitted invoices and guaranties, thus warranting vacatur of the dismissal with prejudice under CPLR 5015(a), and dismissal instead without prejudice, as stipulated.

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

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3487 The People of the State of New York, Ind. 5347/08
Respondent,

-against-

Darnell Smith,
Defendant-Appellant.

_____

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

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

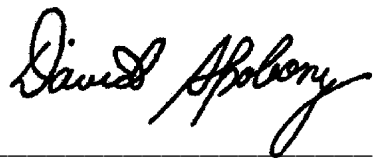
_____

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

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

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

ENTERED: OCTOBER 28, 2010



CLERK

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

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3488 Donald Sprague, Index 18270/06
Plaintiff-Respondent,

-against-

Profoods Restaurant Supply, LLC, et al.,
Defendants-Appellants,

J.P.N. Associates,
Defendant.

_____

Torino & Bernstein, P.C., Mineola (Bruce A. Torino of counsel), for appellants.

Wingate Russotti & Shapiro LLP, New York (David M. Schwarz of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered May 7, 2010, which, insofar as appealed from as limited by the briefs, denied defendants Profood Restaurant Supply, LLC and BJ's Wholesale Club, Inc.'s motion for summary judgment dismissing the complaint as to them, unanimously affirmed, without costs.

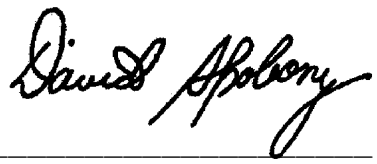
While the evidence submitted by defendants in this slip-and-fall case was sufficient to establish that they neither created the alleged icy hazard nor had actual knowledge of it, the evidence was insufficient to establish as a matter of law that they lacked constructive notice of it (*see Lebron v Napa Realty*

Corp., 65 AD3d 436 [2009]; *Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323[2008]; *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [2007]). The motion court properly found that defendants' submissions, including plaintiff's deposition and defendants' employee's deposition, as well as certified copies of meteorological data, created triable issues of fact as to the size of the ice patch, its visibility, and whether defendants had sufficient time to discover the hazard and remedy it (*cf. Disla v City of New York*, 65 AD2d 949 [2009]; *Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288 [2008]).

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: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3489 The People of the State of New York, Respondent, Ind. 20282/07 20004/08

-against-

Louis Saunders, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Tandra L. Dawson, J.), rendered on or about March 27, 2009, unanimously affirmed.

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

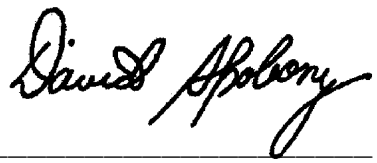
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 28, 2010



CLERK

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

3490-
3490A Index 603855/07

Harvey S. Shipley Miller, as
Trustee of the Trust known as
Judith Rothschild Foundation,
Plaintiff-Respondent,

-against-

The Icon Group LLC,
Defendant-Appellant.

_____

Goldberg & Rimberg PLLC, New York (Yehuda C. Greenfield of counsel), for appellant.

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 4, 2009, awarding plaintiff the principal sum of $1,700,000, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered April 20, 2009, which granted plaintiff's motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant, a real property management company, alleges it was fraudulently induced to enter into a $17 million contract to purchase a brownstone owned by a foundation by its trustee's false representations that the adjacent property was also

available for sale to defendant by its owner for about $10 million. Defendant further avers that the trustee represented he would make arrangements with the neighboring owner and that defendant should not contact him until the transaction with the foundation had closed. Plaintiff submitted no evidence disputing those allegations. After defendant signed the contract, its principals met with the owner of the adjacent property, who said he had no intention of selling at any price. Defendant then notified plaintiff that it would not consummate the transaction.

The contract between the parties was not conditioned on defendant's ability to acquire the adjacent property; however, defendant agreed to make reasonable commercial efforts to acquire the adjacent property, and to pay plaintiff additional compensation of $500,000 if this could be accomplished within a year after closing.

In entering into the contract, defendant represented that it had undertaken all necessary examination of the property in question, as well as "all other matters affecting or relating to this transaction," and that it was not relying on any oral or written representations by the seller, its broker, or any representatives other than those set forth in the contract. Even though the general merger and disclaimer clauses do not preclude

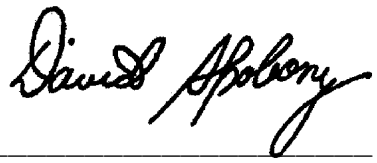
parol evidence of fraud in the inducement (*see Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group*, 19 AD3d 273, 275 [2005]; *DiFilippo v Hidden Ponds Assoc.*, 146 AD2d 737 [1989]), the fraudulent inducement defense was properly rejected. Defendant, a sophisticated real estate entity represented by counsel, could not establish justifiable reliance since it did not undertake due diligence concerning a matter it regarded as essential to the transaction and was not peculiarly within its knowledge (*see Goldman v Strough Real Estate, Inc.*, 2 AD3d 677, 678 [2003]; *Valassis Communications v Weimer*, 304 AD2d 448 [2003], *appeal dismissed* 2 NY3d 794 [2004]; *Parker E. 67th Assoc. v Minister, Elders & Deacons of Refm. Prot. Dutch Church of City of N.Y.*, 301 AD2d 453 [2003], *lv denied* 100 NY2d 502 [2003]). "Where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence, and fails to make use of those means, he cannot claim justifiable reliance on [the other party's] misrepresentations" (*Stuart Silver Assoc. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1997]).

The motion court properly denied defendant's request for further discovery prior to determination of the motion (CPLR 3212[f]), since defendant did not identify facts essential to

justify opposition to the motion that would have been exclusively within plaintiff's knowledge and control (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 102-103 [2006], *lv denied* 8 NY3d 804 [2007]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3492 The People of the State of New York, Ind. 3385/04
Respondent,

-against-

Duran Wilkins,
Defendant-Appellant.

_____

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

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

_____

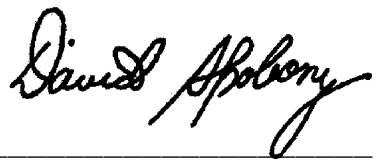
Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about January 5, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed 30 points for defendant's commission of a prior sex offense, notwithstanding that it resulted in a misdemeanor youthful offender adjudication (*see People v Arnold*, 35 AD3d 827, 827 [2006], *lv denied*, 9 NY3d 813 [2007]), as well as 10 points for the recency of that offense. Although we agree with defendant that there was an insufficient basis for assessing points for failure to accept responsibility, deducting the 10 points assessed under that risk factor lowers

defendant's point score to 120, which is still above the threshold for a level three adjudication. Even with that reduction, we find that a discretionary downward departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]) is unwarranted, especially in light of the seriousness of the underlying sex crime, which outweighs the mitigating factors cited by defendant.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3493 In re Loretta C. W.,
Petitioner-Appellant,

-against-

Mark A. W.,
Respondent-Respondent.

_____

Crystal L. Screen, Jamaica, for appellant.

Mark A. W., respondent pro se.

_____

Order, Family Court, Bronx County (Alma Cordova J.), entered on or about April 21, 2009, which denied petitioner wife's objections to the Support Magistrate's order of support, unanimously affirmed, without costs.

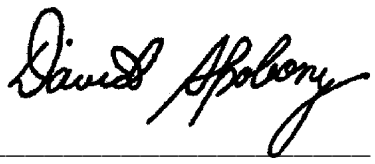
Petitioner's argument, that the 35-day period for filing objections under Family Court Act § 439(e) never began running because the Family Court mailed the order of support directly to her rather than to her counsel (*see* CPLR 2103[b]), is unpreserved since it was never raised before the Family Court. Were we to review this argument, we would find that in the objections to the order of support, petitioner's counsel conceded that the 35-day period set forth in section 439(e) indeed applied. Furthermore, the record shows that the court properly denied the objections since they were received by the clerk's office approximately one

week after the expiration of the applicable 35-day period (*see e.g. Matter of Mazzilli v Mazzilli*, 17 AD3d 680 [2005], *lv denied* 5 NY3d 705 [2005]).

In view of the foregoing, we do not reach the arguments concerning the merits of petitioner's objections to the order of support.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3495- Index 602044/09
3495A Coast to Coast Energy, Inc., et al.,
Plaintiffs-Respondents,

-against-

Mark Gasarch, et al.,
Defendants/Counterclaim
Plaintiffs-Appellants,

-against-

Coast to Coast Energy, Inc., et al.,
Counterclaim Defendants-Respondents.

_____

Eaton & Van Winkle LLP, New York (Robert S. Churchill of counsel), for appellants.

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

_____

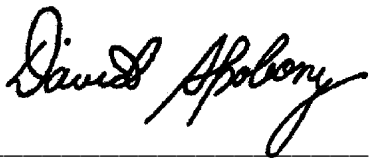
Orders, Supreme Court, New York County (James A. Yates, J.), entered May 5, 2010, which, inter alia, denied defendants' motions to suppress certain documents and information allegedly wrongfully obtained by plaintiffs, to disqualify plaintiffs' counsel, and for a protective order, unanimously affirmed, with costs.

We find that the record does not support findings that plaintiffs obtained the subject materials through theft, eavesdropping, or other unlawful means. We also find that the

record does not support findings that the subject materials were improperly or irregularly obtained within the meaning of CPLR 3103(c), but, even if the record did support such findings, we would affirm. No basis exists to disturb the Special Referee's findings that all of the subject materials in any event would have to be produced in the ordinary course of discovery, and, accordingly, that no substantial right of defendants' could have been prejudiced by the manner in which they were obtained (CPLR 3103[c]; *see Robinson v Robinson*, 308 AD2d 332, 333 [2003]; *Levy v Grandone*, 8 AD3d 630 [2004]). In view of the foregoing, the court also properly denied defendants' motion for a protective order and to disqualify plaintiffs' counsel. We have considered defendants' other arguments and find them unavailing.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3497-
3498 Index 23211/04

Carol Susan Landgraf,
Plaintiff-Respondent,

-against-

Manuel J. Neuhaus,
Defendant-Appellant.

_____

Kayser & Redfern, LLP, New York (Declan P. Redfern of counsel), for appellant.

Carol Susan Landgraf, respondent pro se.

_____

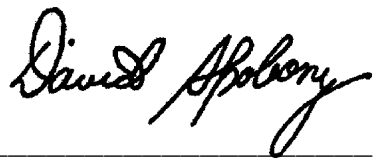
Amended judgment, Supreme Court, Bronx County (Ira R. Globerman, J.), entered March 13, 2008, dissolving the parties' marriage and, insofar as appealed from, awarding plaintiff lifetime maintenance in an amount that will increase, upon the emancipation of the parties' minor child, by 50% of defendant's then basic child support obligation, unanimously modified, on the law, to vacate the part of the judgment that directs an automatic increase in maintenance upon the emancipation of the child, and otherwise affirmed, without costs.

The award of lifetime maintenance to plaintiff was appropriate, considering her advanced age, the fact that she subordinated her career to caring for the parties' child and supporting defendant's efforts to start his own business, and her

likely inability to become self-supporting (*see* Domestic Relations Law § 236[B][a]). However, the award of an automatic increase in maintenance "on the occurrence of [one] given fact" – i.e., upon the emancipation of the child – was error, because it "ignores the possibility of change in other factors affecting the computation" (*Majauskas v Majauskas*, 61 NY2d 481, 494 [1984]).

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

ENTERED: OCTOBER 28, 2010



CLERK

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

3499 The People of the State of New York, Ind. 181/07
Respondent,

-against-

Darrell Corian,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

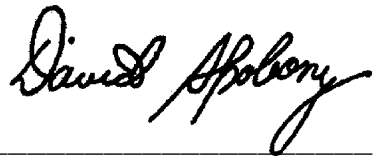
Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about April 16, 2009, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for a prior felony sex crime conviction, and properly exercised its discretion in declining to grant a downward departure (*see People v Judd*, 29 AD3d 431 [2006], *lv denied*, 7 NY3d 709 [2006]). Defendant, who, among other things, has twice been convicted of persistent sexual abuse (Penal Law § 130.53), has demonstrated an extremely high risk of recidivism, and his argument that the type

of misconduct in which he habitually engages is not serious enough to warrant a level three designation is unpersuasive.

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

ENTERED: OCTOBER 28, 2010



CLERK

Tom, J.P., Friedman, Catterson, Renwick, Manzanet-Daniels, JJ.

3500N Anthony Alcala, an infant by his mother, Yasmin Torres, et al., Plaintiffs-Appellants, Index 8196/96

-against-

Soundview Health Center, Defendant-Respondent.

_____

Grace & Grace, Yorktown Heights (William J. Grace of counsel), for appellants.

Schiavetti, Corgan, DiEdwards Weinberg & Nicholson, LLP, New York (Thomas K. Wittig of counsel), for respondent.

_____

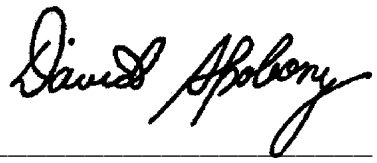
Order, Supreme Court, Bronx County (Howard R. Silver, J.), entered on or about July 14, 2009, which, to the extent appealed from, denied plaintiffs' motion for leave to amend their bill of particulars, unanimously affirmed, without costs.

Denial of the motion to amend, made 15 years after the alleged malpractice, 12 years after the initial bill of particulars, and more than 4 years after its first amendment, was a proper exercise of the court's discretion. Not only did plaintiffs fail to offer a reasonable excuse for this inordinate delay, but the proposed amendment had no merit (*see Katechis v Our Lady of Mercy Med. Ctr.*, 36 AD3d 514, 516 [2007]), propounding material changes that prejudicially introduced a new

theory of liability (*Vega v Lenox Hill Hosp.*, 235 AD2d 302 [1997]) that defendant had failed to diagnose an incompetent cervix, inconsistent with the previously alleged theory of failure to diagnose a bacterial infection.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3501 The People of the State of New York, Ind. 4236/07
Respondent,

-against-

Ariana Coleman,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at hearing; John Cataldo, J. at jury trial and sentence), rendered August 21, 2008, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing her to a term of 1 year, unanimously affirmed.

The court properly denied defendant's suppression motion. There was probable cause for defendant's arrest, based on a specific description. In this observation sale case, an officer saw defendant make a drug sale to a buyer who was promptly apprehended with drugs in his possession. Although the observing officer lost sight of defendant, he saw her two and one-half hours later within a half block of the site of the sale and recognized her as the seller. He then radioed a description of

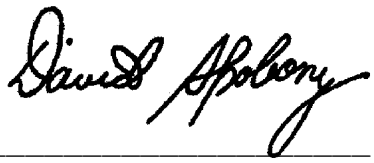
defendant that included the types and colors of several clothing items she was wearing. The description was sufficiently specific, given the close spatial and temporal proximity between the officer's recognition of defendant and the arrest, to provide probable cause (*see e.g. People v Rampersant*, 272 AD2d 202 [2000], *lv denied* 95 NY2d 870 [2000]). There was sufficient proximity to make it "highly unlikely that the suspect had departed and that, almost at the same moment, an innocent person of identical appearance coincidentally arrived on the scene" (*People v Johnson*, 63 AD3d 518 [2009], *lv denied* 13 NY3d 797 [2009]). Although the sale itself took place hours before the arrest, the observing officer recognized defendant as the particular person who made the sale, and the field team arrested her immediately. Defendant's remaining suppression arguments, including her claim that the police unlawfully searched a closed container, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The court properly exercised its discretion in admitting photographs that generally depicted the scene of the crime and the surrounding area. Since the police testimony made it clear to the jury that the photos were not intended to represent the officer's viewpoint or his ability to observe the sale, there was

no need for the People to lay a foundation along those lines (*cf.* *People v Ferrero*, 14 AD3d 447 [2005], *lv denied* 4 NY3d 886 [2005]). In any event, these photos could not have deprived defendant of a fair trial.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3502 Charlie Ascencio, etc., Index 15344/06
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

[And A Third-Party Action]

_____

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

Schachter & Levine, LLP, Brooklyn (Nicole N. Sinclair of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about November 10, 2008, which, to the extent appealed from as limited by the briefs, denied defendant-appellant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint as asserted against it, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against NYCHA. The Clerk is directed to enter judgment accordingly.

Plaintiff allegedly sustained injuries when he slipped on a sidewalk that was abutting property owned by NYCHA. He alleged negligence in failing to maintain the "sidewalk/curb area."

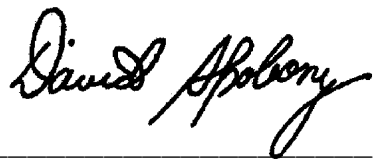
NYCHA met its burden on summary judgment with a prima facie

showing establishing as a matter of law that plaintiff did not slip on the sidewalk, but rather, on "the curb in between the street and the sidewalk" or "the edge of the sidewalk," and that it neither created the defect or made special use of the curb (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). Because Administrative Code of the City of New York § 7-210 only requires that NYCHA maintain sidewalks abutting its property, and Administrative Code § 19-101(d) defines "sidewalk" as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, *but not including the curb*, intended for the use of pedestrians" (emphasis added), NYCHA was not obligated to maintain the curb (*see Garris v City of New York*, 65 AD3d 953 [2009]; *Fernandez v Highbridge Realty Assoc.*, 49 AD3d 318, 319 [2008]). The affidavits of the Superintendent and Supervisor of Grounds for the premises, stating that neither employee knew of any repairs made by NYCHA to the curb, or any special use of the curb by NYCHA, sufficiently showed entitlement to summary judgment (*see Rubin v City of New York*, 258 AD2d 371, 372 [1999]). Nothing in the

record suggests that NYCHA created the defect or made a special use of the curb.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3503 In re Aniya Evelyn R., and Another,

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

Yolanda R.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

_____

Orders of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about September 14, 2009, which, to the extent appealable, found that respondent mother had permanently neglected the subject children, unanimously affirmed, without costs.

The finding of permanent neglect was supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record establishes that petitioner agency made diligent efforts to encourage and strengthen the parental relationship including the development of a service plan; the scheduling of multiple

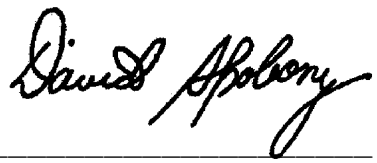
service plan reviews; the scheduling of visitation; repeated attempts to encourage respondent's compliance with the service plan requirements; and the provision of referrals for services (*see Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Despite these diligent efforts, respondent, inter alia, failed to complete the requisite drug treatment program, tested positive and refused to submit to drug screens on multiple occasions, missed the majority of the scheduled visits with the children and failed to complete a parenting skills program. There exists no basis to disturb the court's credibility determinations (*see generally Matter of Irene O.*, 38 NY2d 776 [1975]).

No appeal lies from the dispositional portion of the order since it was entered on default (*see Matter of Rueben Doulphus R.*, 11 AD3d 398 [2004], *lv dismissed in part, denied in part* 4 NY3d 759 [2005]). Were we to review it, we would find that a preponderance of the evidence supported the finding that it was in the children's best interests to terminate respondent's parental rights and enable the foster mother to adopt the children given that they have thrived in the foster home and bonded with the foster mother and her children (*see Matter of Myles N.*, 49 AD3d 381 [2008], *lv denied* 11 NY3d 709 [2008]).

Contrary to respondent's contention, the circumstances presented do not warrant a suspended judgment.

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

ENTERED: OCTOBER 28, 2010



CLERK

Acosta, J.P., Freedman, Richter, Abdus-Salaam, JJ.

3505 Amy Fabrikant, Index 350394/04
Plaintiff-Respondent-Appellant,

-against-

Jay A. Fabrikant,
Defendant-Appellant-Respondent.

_____

Maloof, Lebowitz, Connahan & Oleske, New York (Charles J. Gayner of counsel), for appellant-respondent.

Bernard G. Post LLP, New York (William S. Hochenberg of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Saralee Evans, J.), entered February 22, 2010, which, inter alia, denied defendant's motion for a downward modification of his child and spousal support obligations, granted plaintiff's cross motion to the extent of ordering defendant to provide evidence of life insurance and pay plaintiff support arrears, and granting plaintiff a money judgment for such arrears, and denied plaintiff's motion to hold defendant in contempt and to require him to post security to insure future support payments, unanimously affirmed, without costs.

The Supreme Court properly denied, without a hearing, defendant's motion for a downward modification of his support

obligations because he did not establish, prima facie, that there had been a substantial, unanticipated, and unreasonable change in circumstances or that continued enforcement of his obligations would create an extreme hardship (see Domestic Relations Law § 236[B][9][b]; *Farkas v Farkas*, 192 AD2d 384 [1993]). We note that while defendant presented evidence and argument regarding his health, much of that had previously been rejected by the Supreme Court in earlier proceedings and thus did not constitute a change of circumstances. More significantly, defendant failed to address the imputation of income to him, which was affirmed by this Court (62 AD3d 585 [2009]).

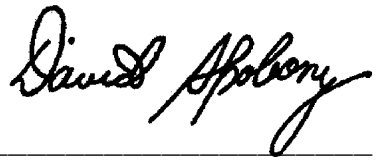
The Supreme Court providently exercised its discretion in declining to adjudicate defendant in contempt for his failure to provide proof of current life insurance and instead directing him to provide such proof (*see Matter of Storm*, 28 AD2d 290 [1967]).

Similarly, the Supreme Court providently exercised its discretion in declining to order the posting of security to insure future payment of his support obligations and instead directing defendant to pay the accrued arrears and granting

plaintiff a money judgment for those arrears (DRL § 243; *Adler v Adler*, 203 AD2d 81 [1994]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3506 Dhanraj Rajkumar, Index 25619/03
Plaintiff-Respondent,

-against-

Budd Contracting Corporation,
Defendant,

Sheraton Hotel, et al.,
Defendants-Appellants.

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellants.

Kravet Hoefer & Maher, P.C., Bronx (John A. Maher of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered June 19, 2009, which, to the extent appealed from as limited by the briefs, denied the hotel defendants' motion for summary judgment insofar as it sought dismissal of plaintiff's Labor Law §§ 200 and 241(6) and common law negligence claims, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against the hotel defendants. The Clerk is directed to enter judgment accordingly.

Dismissal of the Labor Law § 241(6) claim was warranted as the evidence demonstrated that plaintiff's interior decorating work, which involved, inter alia, the manufacture and hanging of

a 300-pound mirror in the hotel defendants' main lobby, was not done in the context of construction, demolition or excavation work (*see Nagel v D & R Realty Corp.*, 99 NY2d 98 [2002]; *Esposito v New York City Indus. Dev. Agency*, 305 AD2d 108 [2003], *affd* 1 NY3d 526 [2003]). To the extent the hotel defendants raise the issue of the applicability of Labor Law § 241(6) for the first time on appeal, we exercise our discretion to reach the unpreserved issue as it could have been decided, as a matter of law, below (*see e.g. Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]).

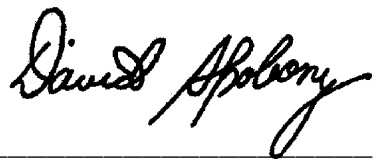
Even assuming, arguendo, plaintiff's work was performed in the context of construction, demolition or excavation, we further find that Industrial Code § 23-1.7(e), upon which plaintiff relies in support of his Labor Law § 241(6) claim, lacks evidentiary support in the record for its application. Plaintiff described the main lobby in which his accident occurred as a big open space, and we conclude that such an area would not fit within the term of "passageway," as set forth in subdivision (e)(1) (*see e.g. Smith v Hines GS Props., Inc.*, 29 AD3d 433 [2006]). Further, subdivision (e)(2) of Industrial Code § 23-1.7(e) pertains to such tripping hazards as dirt, debris and scattered tools and materials in a work area. Here, the plaintiff did not trip over loose or scattered material, but

rather, over brown construction paper that was purposefully laid over newly installed floors to protect them. Such paper covering constituted an integral part of the floor work on the renovation project, and could not be construed to be a misplaced material over which one might trip (*see e.g. Vieira v Tishman Constr. Corp.*, 255 AD2d 235 [1998]).

Plaintiff's Labor Law § 200 and common law negligence claims should have been dismissed as there was no evidence that the hotel defendants had actual or constructive notice of a defect in the paper floor covering (*see Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350-351 [2006]; *Canning v Barneys N.Y.*, 289 AD2d 32, 33 [2001]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3507 In re Yahya Sabree W.,

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

_____

Andrew J. Baer, New York, for appellant.

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

_____

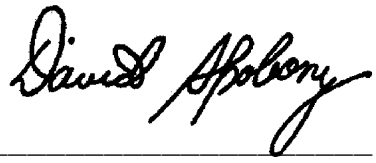
Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about June 24, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he had committed acts that, if committed by an adult, would constitute the crimes of robbery in the second degree, grand larceny in the fourth degree, criminal possession of stolen property in the fifth degree, and attempted assault in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence warranted the inferences that appellant shared his companions'

intent in all respects (*see e.g. Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]), including the intent to injure the victim and the intent to deprive him of property by "dispos[ing] of the property in such manner or under such circumstances as to render it unlikely that [the] owner [would] recover such property" (Penal Law § 155.00[3][b]). The evidence does not support an inference that appellant merely intended to temporarily separate the victim from his property (*compare Matter of Nehial W.*, 232 AD2d 152 [1996], *with People v Parker*, 96 AD2d 1063, 1065 [1983]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3508 The People of the State of New York, Ind. 6408/08
Respondent,

-against-

Jose Portrazo,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (James A. Yates, J.), rendered on or about March 12, 2009, unanimously affirmed.

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

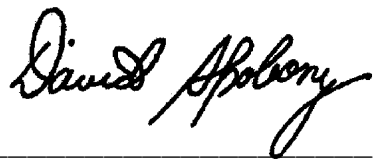
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Abdus-Salaam, JJ.

3510 Mary Colon, Ind 8832/06
Plaintiff-Respondent,

-against-

New York Eye Surgery Associates, P.C.,
Defendant-Appellant.

_____

Law Office of Andrea G. Sawyers, Melville (David R. Holland of counsel), for appellant.

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

_____

Amended order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about January 20, 2010, which directed a new trial on damages unless the parties agreed to reduce the jury verdict for past pain and suffering from $750,000 to $300,000 and for future pain and suffering from $1.5 million to $650,000, and bringing up for review a prior order, entered December 18, 2009, which denied that portion of defendant's post-trial motion to set aside the verdict as to liability and direct entry of judgment in its favor, unanimously affirmed, without costs.

Giving plaintiff every favorable inference that can

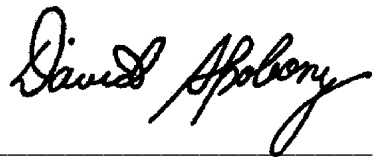
reasonably be drawn from the facts (*Sagorsky v Malyon*, 307 NY 584 [1954]), we conclude that the jury's finding was supported by sufficient evidence and was not against the weight of that evidence. The testimonial and photographic evidence demonstrated that the height differential between the concrete sidewalk and the adjacent grassy verge constituted a dangerous condition that was not obvious to a pedestrian, and that the differential at its greatest point was not trivial (*see Trincere v County of Suffolk*, 90 NY2d 976 [1997]). The jury could have reasonably found, based on the photographs taken days after the accident and the testimony of defendant's facility manager, that the entire property was inspected daily, giving defendant constructive notice of the defect.

The court properly permitted plaintiff's expert to testify, based on medical records in evidence and his examination of plaintiff, that she had "some components" of Reflex Sympathetic Dystrophy that were "more likely than not" causally related to the incident.

The reduced awards for past and future pain and suffering did not grossly deviate from what would be considered reasonable compensation (CPLR 5501[c]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3512 Catrina Nesper, Index 102501/08
Plaintiff-Respondent,

-against-

Goldmag Hacking Corp., et al.,
Defendants-Appellants.

_____

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

Marie R. Hodukavich, Peekskill, for respondent.

_____

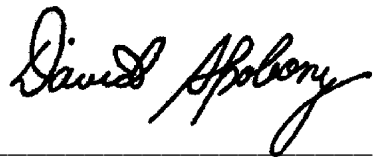
Order, Supreme Court, New York County (Paul Wooten, J.), entered December 9, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, without costs, and the motion denied.

Although plaintiff made a prima facie showing of entitlement to summary judgment on the issue of liability by supplying an affidavit stating that she was struck by defendant's vehicle while crossing a street in a crosswalk with the green light, defendant met his burden of establishing the existence of material issues of fact requiring a trial by stating in his affidavit that his vehicle never struck plaintiff (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Defendant's affidavit did not contradict his statement to the police so as to warrant

rejecting it as a belated attempt to avoid the consequences of an earlier admission. Accordingly, there was no basis for the grant of partial summary judgment to plaintiff.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3515 Nicholas Stephan, et al., Index 110867/08
Plaintiffs-Appellants,

-against-

James Cawley,
Defendant-Respondent.

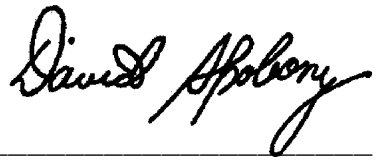
_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered on or about June 8, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 20, 2010,

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3516 Emmy Castore, Index 105668/07
Plaintiff-Appellant,

-against-

Tutto Bene Restaurant Inc., doing
business as Chelsea Restaurant,
Defendant-Respondent.

_____

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

Fixler & LaGattuta, LLP, New York (Paul F. LaGattuta, III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered August 14, 2009, which, in this action seeking damages for personal injuries suffered in a slip and fall, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met its initial burden of showing, prima facie, that it neither created nor had notice, whether actual or constructive, of the purportedly dangerous condition that caused plaintiff to slip and fall (see *Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837-838 [1986]) by presenting an affidavit from the owner and manager of the subject restaurant and one of

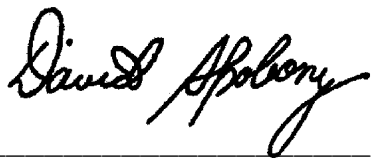
its waiters as to its lack of knowledge of the existence of a dangerous condition. Indeed, the waiter averred that he had, just moments before the accident, descended the same stairs as had plaintiff without observing the presence of any liquid on the landing to those stairs. Consequently, the burden shifted to plaintiff to raise a triable question of fact by offering competent evidence that, if credited by a jury, would be sufficient to rebut defendant's proof. In that regard, plaintiff conjectured that restaurant employees might have spilled some water or other liquid on the stairs when food was transported from the basement upstairs to the first floor, where the dining room was located. However, it is well-settled that rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact (*see Kane v Estia Greek Rest.*, 4 AD3d 189, 190 [2004]).

Insofar as plaintiff argues that a triable question of fact has been raised by her expert's affidavit that her accident was likely caused by the existence of a single step at the bottom of the landing and the absence of a handrail thereon, she testified at her deposition merely that she fell as the result of slipping on some liquid. There is, thus, no evidence whatsoever that the configuration of the stairs to include a landing at the bottom,

plus a single step to the ground, contributed at all to the event (see *Raghu v The New York City Hous. Auth.*, 72 AD3d 480, 482 [2010]; *Bethea v The Weston House Hous. Dev. Fund Co., Inc.*, 70 AD3d 470, 471 [2010]). Accordingly, it is purely speculative to suppose that plaintiff's accident might have been avoided had there been a handrail in place on the landing.

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

ENTERED: OCTOBER 28, 2010



CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3517 Matar Diouf, Index 108095/04
Plaintiff-Respondent,

-against-

New York City Transit Authority,
Defendant-Appellant.

_____

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

Kahn Gordon Timko & Rodriques, P.C., New York (Nicholas I. Timko of counsel), for respondent.

_____

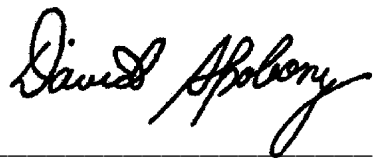
Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered May 6, 2009, insofar as appealed from as limited by the briefs, upon a jury verdict, awarding plaintiff $800,000 for future pain and suffering, unanimously affirmed, without costs.

Plaintiff, a 55-year-old tailor, sustained painful fractures to both wrists after falling on uneven stairs leading into a subway station. The fracture to the left wrist was a comminuted intra-articular fracture of the distal radius and ulnar styloid, which required reduction surgery and a second surgical procedure to remove the metal hardware inserted into his wrist. Following a course of occupational therapy, plaintiff's fractures healed but he had reduced ranges of motion, tenderness and reduced grip strength, and traumatic arthritis causing pain in both wrists.

Under the circumstances presented, the award for future pain and suffering did not deviate materially from what is reasonable compensation (*see Karwacki v Astoria Med. Anesthesia Assoc., P.C.*, 23 AD3d 438 [2005]; *Hayes v Normandie LLC*, 306 AD2d 133 [2003], *lv dismissed* 100 NY2d 640 [2003]; *Cabezas v City of New York*, 303 AD2d 307 [2003]; CPLR 5501[c]).

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

ENTERED: OCTOBER 28, 2010



CLERK

Andrias, J.P., Catterson, Renwick, Richter, Román, JJ.

2785 Gill Kent, Index 107528/08
Plaintiff-Respondent,

-against-

534 East 11th Street, et al.,
Defendants-Appellants.

[And A Third-Party Action]

_____

O'Connor Redd, LLP, White Plains (John P. Grill of counsel), for appellants.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (Serge Joseph of counsel), for respondent.

_____

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 16, 2009, reversed, on the law, without costs and summary judgment granted to defendants dismissing the complaint. The Clerk is directed to enter judgment accordingly.

Opinion by Catterson, J. All concur except Román, J. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
James M. Catterson
Dianne T. Renwick
Rosalyn H. Richter
Nelson S. Román, JJ.

2785
Index 107528/08

_____x

Gill Kent,
Plaintiff-Respondent,

-against-

534 East 11th Street, et al.,
Defendants-Appellants.

[And A Third-Party Action]

_____x

Defendants appeal from the order of the Supreme Court, New York County (Walter B. Tolub, J.), entered November 16, 2009, which, to the extent appealed from, granted plaintiff's motion for reargument of a prior order summarily dismissing the complaint, vacated that order and reinstated the complaint.

O'Connor Redd, LLP, White Plains (John P. Grill of counsel), for appellants.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (Serge Joseph of counsel), for respondent.

CATTERSON, J.

This action reaches us as a result of the plaintiff's attorneys reframing their arguments in a way obviously designed to evade the statute of limitations. This does not salvage plaintiff's complaint but serves only to illustrate why the motion court should have adhered to its original ruling granting summary judgment to the defendants, and not permitted revisitation by granting plaintiff's motion for reargument.

The plaintiff initially asserted causes of action in negligence, constructive eviction, damages and nuisance, but, on appeal she reframes these as causes of action arising out of a breach of contract. In her brief, the plaintiff states unequivocally: "the gravaman (sic) of this action is in breach of contract." More specifically, she details each of her four causes of action as a breach of the proprietary lease. For example, she states that her third cause of action is for "money damages based on defendants' negligent performance of *work required under the proprietary lease* " (emphasis added).

However, the plaintiff did not include a copy of the proprietary lease in any of her submissions to the court, and the lease therefore is not before this Court. This omission should in itself be sufficient reason to dismiss the complaint since it

is well established that a court must know what an agreement contains before it can determine whether there has been a breach of that agreement. See e.g. Cobble Hill Nursing Home v. Henry & Warren Corp., 74 N.Y.2d 475, 482, 548 N.Y.S.2d 920, 923, 548 N.E.2d 203, 206 (1989). Further, the plaintiff has added, for the first time on appeal, a cause of action for breach of the warranty of habitability alleging that the defendants through negligent construction work caused her apartment to become contaminated with toxins and thus rendered it uninhabitable.

Even if this Court were to examine the claims in light of a breach of that warranty, it would not help the plaintiff. For the reasons set forth below, this Court agrees with the defendants that there is no evidence in the record, and discovery cannot yield any evidence, as a matter of law, to raise a triable issue of fact as to whether between 2002 and 2006 contaminants existed in the plaintiff's apartment at sufficient levels to constitute a breach of the warranty of habitability by the defendants.

This action arises from an incident in 2002, after defendants retained a contracting company to work on the roof of the plaintiff's building on East 11th Street, Manhattan. The plaintiff alleges that when work commenced, the contractors set

up a scaffold outside plaintiff's living-room window. The plaintiff claims that, at the end of each day, the workers threw rubble off the roof into the alley leading to the backyard, causing clouds of dust to enter plaintiff's apartment on a regular basis. According to the plaintiff's summons and complaint, this resulted in health problems for her.

Four years later, in 2006, the plaintiff hired JLC Environmental Consultants (hereinafter referred to as "JLC") to study and report on the physical conditions of the apartment. Evan Browne, a JLC employee, investigated from July 2006 through August 2006, and issued a report on September 5, 2006. The report stated that the apartment contained heavy metals, but that the source of the metals was unclear.

Subsequently, JLC tested the apartment again. A report, dated October 19, 2006, stated that levels of heavy metal concentration were generally "below the detection limit."[1] Nevertheless, the plaintiff moved out of the apartment in November 2006 and sublet the premises to a third party.

Eighteen months after that report, in May 2008, the

[1]This statement by the plaintiff's expert is a key component of her claim of contamination. The expert claims that the heavy metals exist but that they cannot be detected. No further analysis of this claim should even be necessary.

plaintiff commenced this action stating causes of action for: (1) nuisance; (2) money damages; (3) negligence; and (4) constructive eviction. The complaint further alleged that, "*within a matter of days*" (emphasis added) after the start of the work, plaintiff began experiencing, inter alia, extreme fatigue and bronchial symptoms followed by bone and joint pain and swelling, skin eruptions, hair loss, loosening teeth, ridged and splitting nails, thyroid collapse, pulmonary disorder, weight gain and cognitive impairment affecting her memory, concentration and balance.

The defendants answered and set forth affirmative defenses, including statutes of limitations, failure to state a cause of action and destruction of evidence. At the time of the filing of the bill of particulars, the only material provided in support of the claim was the JLC report which indicated "a largely successful" cleanup in removing contaminated dust. The report alluded to the existence of the prior tests, and the defendants requested that those results be provided, if such tests existed. The plaintiff did not provide copies of such tests.

In December 2008, the defendants moved for summary judgment dismissing the complaint, or an order compelling the plaintiff to provide initial environmental testing results and to submit to a

physical examination. The defendants also sought, inter alia, an order striking plaintiff's health ailments on the grounds that her complaint was not a personal injury action. The defendants argued that the action was barred by the statute of limitations, that there was a lack of causation between alleged toxic chemicals and plaintiff's complaints, that there was no proof that the plaintiff was exposed to any particular amount of toxic elements, and no proof of what the toxic elements were or whether there were sufficient quantities to cause harm.

The plaintiff opposed and submitted, for the first time, the previous unsworn reports of environmental testing. In reply, the defendants provided a sworn report of an expert who reviewed the new material consisting of the prior environmental reports provided by plaintiff. He opined that the results of the tests could not be used to support plaintiff's assertion of contaminants in the apartment from the renovation work outside.

The plaintiff moved, by order to show cause, to strike the reply or for leave to serve a surreply in response to the defendants' "new arguments." She also requested time to conduct further discovery since the summary judgment motion was made prior to the defendants' compliance with the requirement to supply photographs and documents relating to the renovation.

The defendants opposed, arguing that their expert evidence was not new material but was a response to the new evidence submitted by plaintiff. The plaintiff did not serve a reply.

By order dated March 19, 2009, the court granted the defendants' motion for summary judgment dismissing the complaint. The court concluded that the unsworn reports of Browne, the JLC inspector who took "environmental tests two years [sic] [it was in fact four years] after work was commenced" on the building, had no probative weight and failed to raise a triable issue of fact. The court further held that plaintiff had not submitted any admissible evidence that plaintiff was subjected to toxins in the apartment, or any evidence that, if the toxins existed, they were caused by work performed on the building.

The plaintiff moved to renew and reargue the motion, submitting new materials including affidavits from Browne and an affirmation of the plaintiff's physician, Susan Richman, M.D. The defendants opposed and cross-moved for sanctions.

The plaintiff contended that the court failed to appreciate that the motion to dismiss was made prior to discovery. She also argued that the defendants raised new issues in their reply papers, and thus the plaintiff was unable to raise issues with the court to defeat the motion.

On November 16, 2009, the court granted the motion to reargue, and upon reargument, vacated its order of March 19, 2009. The court held that, although it still believed that plaintiff's proof was insufficient to sustain the action, the plaintiff had not had an adequate opportunity to undertake discovery, particularly as it was alleged that the defendants had exclusive knowledge of evidentiary material sufficient to buttress plaintiff's allegations.

For the reasons set forth below, we reverse, and grant summary judgment in favor of the defendants, dismissing the complaint. As a threshold matter, the plaintiff's causes of action in constructive eviction, negligence and damage to property must be dismissed as statutorily time-barred. It is well settled that a cause of action for constructive eviction is governed by a one year statute of limitations. CPLR 215; Jones v. City of New York, 161 A.D.2d 518, 518-519, 555 N.Y.S.2d 788, 789 (1st Dept. 1990); Yokley v. Henry-Clark Assoc., 170 Misc.2d 779, 781, 655 N.Y.S.2d 714, 716 (App. Term, 2d Dept. 1996) (finding a claim based on constructive eviction is actually one for wrongful eviction and is subject to the one year statute of limitations).

The plaintiff alleges that the contamination of her apartment occurred in 2002, and further alleges that contaminants

were detected in 2006. She moved out in November 2006. Her summons and complaint were filed in May 2008, approximately 18 months later. Hence, the cause of action for constructive eviction is time-barred.

Further, causes of action for negligence and for injury to property are governed by CPLR 214, which provides for a three-year statute of limitations. Likewise, a cause of action for injury to property caused by exposure to toxins must be commenced within three years either from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered. CPLR 214-c(2).

The plaintiff's complaint is unequivocal that, due to the defendants' negligence, clouds of dust entered her apartment in June 2002 and contaminated her living and work space. Thus, the alleged damage to property and negligence occurred in 2002 – six years prior to the filing of the complaint. Therefore, these causes of action as specified in the complaint are also time-barred.

It is evident that the plaintiff's subsequent attempts to persuade this Court that all her claims sound in breach of contract are simply a maneuver to evade the statute of

limitations. The plaintiff now argues that the damages to property and pecuniary interest, the monetary damages arising out of remediating the hazardous conditions, as well as the dimunition in value of her investment, are a breach of article 2 of the lease. However, the plaintiff's breach of contract claims, while within the six year statute of limitations of CPLR 213, must fail because, as the defendants correctly assert, the contract to which the plaintiff refers, that is the proprietary lease, is not before the Court.

The existence of a proprietary lease is not disputed, but the Court must be able to determine what the provisions of the agreement are before it can conclude that there has been a breach. Cobble Hill Nursing Home, 74 N.Y.2d at 482, 548 N.Y.S.2d at 923. The plaintiff's failure to submit the proprietary lease, therefore, precludes recovery on a breach of contract claim.

The plaintiff's complaint does not include a cause of action for breach of implied contract provisions. Nevertheless, since an implied warranty of habitability exists in every residential lease (see Granirer v. Bakery Inc., 54 A.D.3d 269, 863 N.Y.S.2d 396 (1st. Dept. 2008)), the plaintiff rests on this cause of action at the last minute. This does not help the plaintiff. The implied warranty of habitability sets forth a minimum

standard to protect tenants against conditions that render residential premises uninhabitable or unuseable. Real Property Law § 235-b; see also Solow v. Wellner, 86 N.Y.2d 582, 635 N.Y.S.2d 132, 658 N.E.2d 1005 (1995). Tenants alleging breach of warranty of habitability must provide evidence sufficient to support their claims. See Park W. Mgt. Corp. v. Mitchell, 47 N.Y.2d 316, 328, 418 N.Y.S.2d 310, 316, 391 N.E.2d 1288, 1294 (1979), cert denied, 444 U.S. 992, 100 S.Ct. 523, 62 L.Ed.2d 421 (1979); Minjak Co. v. Randolph, 140 A.D.2d 245, 528 N.Y.S.2d 554 (1st Dept. 1988).

In this case, as the motion court correctly found in its initial order, the plaintiff did not submit any admissible evidence that she was subjected to toxins in the apartment or any evidence that, if the toxins existed, they were caused by work performed on the building in 2002.

The court allows expert testimony only where the principles and methodology relied upon by the expert have gained general acceptance within the scientific community. People v. Wesley, 83 N.Y.2d 417, 422-23, 611 N.Y.S.2d 97, 100, 633 N.E.2d 451, 454 (1994). The record reflects that the plaintiff's expert, Evan Browne of JLC, possessed only an asbestos inspector's certification, and the plaintiff does not allege asbestos

contamination. Also, the unsworn reports of alleged environmental testing submitted in opposition to the motion for summary judgment were insufficient to rebut defendants' entitlement to summary judgment. See Briggs v. 2244 Morris L.P., 30 A.D.3d 216, 817 N.Y.S.2d 239 (1st Dept. 2006) (hearsay is insufficient to warrant denial of summary judgment where, as here, it is the only evidence submitted in opposition).

Even if we were to accept, arguendo, that the unsworn reports had any probative value, the most they could demonstrate is that there was some contamination in the unit in July 2006. There is no evidence that such contaminants were in the apartment in 2002, or at any time prior to July 2006, or that they were a result of construction work in 2002. Further, according to the plaintiff's expert, there was no detectable contamination in the apartment in September 2006. The plaintiff's allegation that hazardous conditions still exist is based on Browne's statement that "[o]bviously, this assessment [of decontamination] did not apply to the study or office, which was not cleaned or decontaminated, *and which I did not test*" (emphasis added). This is insufficient evidence to raise a triable issue of fact as to existing contamination in the plaintiff's study especially in view of an e-mail dated October 19, 2006, written by Browne,

which stated: "I think that you can sublet with peace of mind."

There is also no evidence of any causal connection between the alleged contamination and the plaintiff's alleged ailments sufficient to raise a triable issue of fact as to the breach of warranty of habitability. The plaintiff offers the affirmation of physician Susan Richman M.D. But, the plaintiff did not consult the physician until 2006.

However, in any cause of action that asserts constructive eviction or breach of warranty of habitability due to contamination affecting health, the plaintiff is obliged to produce some evidence of a causal connection. See 360 W. 51st St. Realty, LLC. v. Cornell, 14 Misc.3d 90, 91, 831 N.Y.S.2d 634, 635 (App. Term, 1st Dept. 2007). Here, the physician's affirmation rests only on the plaintiff's representations that her shortness of breath and thyroid problems started with the defendants' roof repair work in 2002. Further, the physician's recommendation that the plaintiff should move for health reasons was based solely on the plaintiff's report as to contamination in her apartment. Indeed, no reliable air samples were ever taken in the apartment,[2] and thus Dr. Richman's conclusion that

[2] In his affidavit, Browne claimed to be "licensed as an Air Sampling Technician." However, plaintiff has failed to submit

plaintiff's symptoms were "exacerbated" by inhalation of toxic particles was totally unfounded. Hence, the physician's affirmation does not reach the level of sufficient evidence in order for the plaintiff to prevail in her opposition to summary judgment.

Finally, the absence of discovery should not bar summary judgment in favor of the defendants. A reversal of summary judgment would be appropriate only if the plaintiff can show that additional discovery will lead to relevant evidence. Auerbach v. Bennett, 47 N.Y.2d 619, 636, 419 N.Y.S.2d 920, 930, 393 N.E.2d 994, 1004 (N.Y. 1979); Arpi v. New York City Tr. Auth., 42 A.D.3d 478, 479, 840 N.Y.S.2d 107, 108 (2d Dept. 2007). Plaintiff's mere hope of locating additional evidence does not establish a basis for reversal of summary judgment; rather there must be an actual likelihood. See Neryaev v. Solon, 6 A.D.3d 510, 775 N.Y.S.2d 348 (2d Dept. 2004).

Here, the plaintiff has failed to establish how discovery will uncover further evidence or material in the exclusive possession of the defendants, as is required under CPLR 3212(f). See Berkeley Fed. Bank & Trust v. 229 E. 53rd St. Assoc., 242

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any license or certification of his qualifications to sample air.

A.D.2d 489, 662 N.Y.S.2d 481 (1st Dept. 1997). The plaintiff asserted only that photographs, documents and "other facts" relating to the renovation work are within the exclusive knowledge and control of the defendants and that she had no opportunity to conduct such discovery.

Such discovery however, as the plaintiff acknowledges, relates only to the roof renovation work, and thus cannot constitute relevant evidence as a matter of law. Even if the documentation or photographs showed that the brick or roofing, both of which were demolished in 2002, were contaminated, it would not render the plaintiff's claims as to negligence or damage to property or constructive eviction any less time-barred. Nor could such evidence establish that the plaintiff's apartment, inside the building, was contaminated to a level sufficient to breach the warranty of habitability.

Accordingly, the order of the Supreme Court, New York County (Walter B. Tolub, J.), entered November 16, 2009, which, to the extent appealed from, granted plaintiff's motion for reargument of a prior order summarily dismissing the complaint and vacated that order and reinstated the complaint, should be reversed, on

the law, without costs, and summary judgment granted to defendants dismissing the complaint. The Clerk is directed to enter judgment accordingly.

All concur except Román, J. who concurs in a separate Opinion:

ROMÁN, J. (concurring)

I write separately because while I agree with the majority's decision reversing the motion court's order, beyond determining whether reargument was warranted, I do not believe that it was necessary to reach the other issues reached, discussed and resolved by the majority. In granting defendants' initial motion for summary judgment, the motion court neither misapplied the law nor misapprehended the facts thereby precluding the grant of reargument. Given the motion court's decision and the salient arguments made in favor of reargument, reversal is warranted insofar as CPLR 3212(f) did not warrant denial of defendants' motion for summary judgment and it was thus error to grant reargument on this basis.

The instant action is for nuisance, money damages, negligence and constructive eviction. Plaintiff, a resident shareholder within a residential multiple dwelling owned and managed by defendants, alleges that beginning on June 3, 2002, and continuing through the early fall of that same year, as a result of construction work performed at defendants' behest, she and her apartment were exposed to toxic contaminants.

On March 19, 2009, upon consolidating defendants' motion for, inter alia, summary judgment and plaintiff's motion seeking

to, inter alia, strike defendants' reply papers, the motion court granted defendants' motion for summary judgment finding that plaintiff failed to submit admissible evidence demonstrating that she had been exposed to toxins within her apartment. Essentially the motion court found that defendants' proof evinced an absence of any elevated toxicity levels within plaintiff's apartment on the date tests were performed. Thereafter, on November 10, 2009, the motion court granted plaintiff's motion seeking reargument of its decision granting defendants summary judgment, premising such relief on plaintiff's allegations that "[d]efendants have exclusive knowledge of evidentiary material sufficient to buttress [p]laintiff's allegations." The motion court thus vacated its decision dated March 19, 2009, granting defendants summary judgment and defendants now appeal.

A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law (*300 W. Realty Co. v City of New* York, 99 AD2d 708, 709 [1984]), *appeal dismissed* 63 NY2d 952 [1984]; *Foley v Roche*, 68 AD2d 558, 567 [1979]). Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions

previously decided or to assert new, never previously offered arguments (*Foley* at 557; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1992], *lv dismissed in part* 80 NY2d 1005 [1992]). Here, plaintiff's motion for reargument was granted based upon her previously asserted and disregarded argument that defendants had failed to provide necessary discovery, exclusively in their possession, thereby precluding summary judgment.

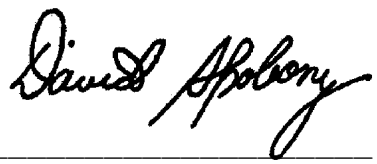
Pursuant to CPLR 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist, but are unavailable to the opposing party. This is particularly true when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Esposito v Metropolitan Transp. Authority*, 264 AD2d 370, 371 [1999]; *Franklin Nat. Bank of Long Is. v De Giacomo*, 20 AD2d 797, 792 [1964]). Insofar as defendants' motion for summary judgment was granted on grounds that the record was bereft of admissible proof demonstrating elevated toxicity levels within plaintiff's apartment, it is inconceivable how the discovery sought by plaintiff from defendants – photographs and other documents regarding the construction work being performed *outside* her apartment – would have allowed her to successfully controvert defendants' prima facie showing that plaintiff's apartment, when

tested, evinced no toxins. None of the discovery sought would have demonstrated the level of toxins, if any, within plaintiff's apartment and thus, plaintiff's mere hope that somehow further discovery will yield evidence to prove her case is insufficient for denial of summary judgment (*Jones v Surrey Coop. Apts.*, 263 AD2d 33, 38 [1999]). Thus, CPLR 3212(f) did not mandate denial of defendants' initial motion for summary judgment, and in granting the same the motion court neither misapplied the law nor misapprehended the facts. Accordingly, granting plaintiff's motion for reargument was improper.

Having determined that reargument was improper, the motion court's order granting defendants summary judgment stands for the reasons therein stated and I think that it is unnecessary to delve into the legion of other issues discussed by the majority in its decision.

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

ENTERED: OCTOBER 28, 2010



CLERK