SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 4, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, DeGrasse, Richter, Abdus-Salaam, JJ.

7958 72A Realty Associates, Index 570514/10
Petitioner-Appellant-Respondent,

-against-

Sandra Lucas, etc.,
Respondent-Respondent-Appellant,

John Doe, et al.,
Respondents.

- - - - -

Community Housing Improvement
Program of New York Inc.,
Amicus Curiae.

Joel M. Zinberg, New York, for appellant-respondent.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent-appellant.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for amicus curiae.

Order of the Appellate Term of the Supreme Court, First Department, entered June 13, 2011, which, to the extent appealed from, affirmed those portions of the order of the Civil Court, New York County (Peter M. Wendt, J.), entered on or about May 25,

2010, granting respondent tenant's motion to dismiss the holdover petition and denying petitioner landlord's cross motion for summary judgment on the petition, denying tenant's rent overcharge counterclaim to the extent it sought treble damages, and directing a hearing on the issue of rent overcharges based on a base date rent amount of $2,250, and modified that portion of the order conditionally granting her counterclaim for attorneys' fees to deny that counterclaim, unanimously modified, on the law, to vacate the base date rental rate determination and reinstate tenant's counterclaims for treble damages and attorneys' fees to the extent indicated below, and remand for further inquiry on those issues, and otherwise affirmed, without costs.

In light of the Court of Appeals' decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) and subsequent case law giving retroactive effect to *Roberts* (*Roberts v Tishman Speyer Properties, L.P.*, 89 AD3d 444, 445 [1st Dept 2011]; *Gersten v 56 7th Ave., LLC*, 88 AD3d 189, 196-197 [1st Dept 2011]), tenant is entitled to rent-stabilized status for the duration of her tenancy and to collect any rent overcharges, as her apartment was improperly deregulated by landlord while it was receiving J-51 tax benefits. That the J-51 benefits subsequently expired does not support landlord's claim that the apartment must

be denied ongoing regulated status. Our determination that the tenancy is rent stabilized is not, as found by the lower courts, based on the failure of the owner to have provided notice as set forth in Rent Stabilization Law § 26-504, but is premised on the apartment having been improperly deregulated as of the time that the tenant took occupancy.[1] Additionally, as we explained in *Gersten*, tenant's challenge to the deregulated status of her apartment, which presents a "continuous circumstance" (88 AD3d at 198-99), is not barred by the six-year statute of limitations period set forth in CPLR 213(2).

The courts below, however, erred in setting the base date rent for the overcharge counterclaim at the $2,250 per month rate based on the market rate in the lease effective for October 2004.

---

[1]Rent Stabilization Law § 26-504(c) provides in its last clause that if the dwelling unit would have been subject to rent stabilization in the absence of J-51 benefits, the unit, upon the expiration of the benefits, shall continue to be subject to regulation as if that subdivision had never applied. Thus, the notice requirement plainly does not apply to dwellings, such as the one here, that were subject to rent regulation for a reason other than the receipt of J-51 benefits (*see Gersten*, 88 AD3d at 195). As for tenant's citation to the notice provisions of RPTL 489(7)(b)(2), that statute is inapplicable on its face, as it applies to "[a]ny dwelling unit subject to rent regulation on or before the effective date of this subparagraph [June 18, 1985] as a result of receiving a tax exemption or abatement . . .," which is not the case here where this building received J-51 benefits in 1991 (*see Walsh v Wusinich*, 32 AD3d 743, 744 [1st Dept 2006]).

While that date is correct under CPLR 213-a, in light of the improper deregulation of the apartment and given that the record does not clearly establish the validity of the rent increase that brought the rent-stabilized amount above $2,000, the free market lease amount should not be adopted, and the matter must be remanded for further review of any available record of rental history necessary to set the proper base date rate.

The courts also erred to the extent they dismissed, as a matter of law, tenant's counterclaim seeking treble damages. Landlord, in its affidavit, states that in 2001, $30,000 worth of renovations to the apartment were completed, bringing the monthly rent above the $2,000 threshold. However, the record does not contain anything to support landlord's renovation claim, including for example, bills from a contractor, an agreement or contract for work in the apartment, or records of payments for the renovations. A $1,491 monthly increase in rent is a substantial amount, and landlord did not provide sufficient information to validate the increase. Further inquiry upon remand is required to determine whether the overcharge was not willful, but rather the result of reasonable reliance on a DHCR regulation.

Finally, regarding attorneys' fees, the issue is remanded to

the Civil Court for a trial to determine whether there is a clause in the lease that would entitle tenant to an award of attorneys' fees under Real Property Law § 234 as a prevailing party. If there is such a clause, the determination of whether to award her attorneys' fees is best left to the discretion of the trial court, taking into account all the facts and circumstances of the case, including whether any overcharge was willful, and the state of the law with respect to deregulation and J-51 benefits as it existed at the time the proceeding was commenced.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8239 Frances C. Peters, Index 600456/04
Plaintiff-Appellant,

-against-

George Christy Peters, et al.,
Defendants,

UBS AG, etc., et al.,
Defendants-Respondents.

_____

Leslie Trager, New York, for appellant.

Mayer Brown, LLP, New York (Mark G. Hanchet of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 12, 2011, which granted defendant UBS AG's and defendant UBS Trustees' (UBS Bahamas) motions to dismiss the complaint as against them on forum non conveniens and personal jurisdiction grounds, respectively, without prejudice to recommencement in the appropriate jurisdictions, unanimously affirmed, without costs.

The motion court properly exercised its discretion in finding that the fact of plaintiff's residence in New York is outweighed by the remaining factors under consideration on UBS

AG's motion to dismiss on the ground of forum non conveniens (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). The transaction out of which the cause of action arose occurred in Switzerland, all the meetings described by plaintiff that involved UBS AG personnel took place in that country, nearly all the nonparty witnesses are there, Swiss law would apply to the claims, and plaintiff may bring suit in Switzerland.

The court properly granted UBS Bahamas' motion to dismiss on the ground of lack of personal jurisdiction pursuant to CPLR 302(a)(2), since plaintiff does not allege that UBS Bahamas committed a tort within the State of New York (*see Longines-Wittnauer Watch Co. v Barnes & Reinecke*, 15 NY2d 443, 460 [1965], *cert denied* 382 US 905 [1965]; *National Union Fire Ins. Co. of Pittsburgh v Davis, Wright, Todd, Reise & Jones*, 157 AD2d 571, 572 [lst Dept 1990]). Plaintiff's claim that the individual defendants, as agents of UBS Bahamas, committed a tort in New York in furtherance of a conspiracy is conclusory (*see e.g. Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 97 [1st Dept 2010]).

The court also properly found that UBS Bahamas is not subject to jurisdiction pursuant to CPLR 302(a)(3)(ii), since the

allegedly wrongful disbursement of approximately $20 million was not an injury-causing event in New York, but, rather, a decision by a trustee in the Bahamas to authorize the release of funds from bank accounts in Switzerland. Plaintiff cannot establish injury in New York merely because she resides here (*see e.g. Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529, 532 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]; *Mid-Atlantic Residential Invs. Ltd. Partnership v McGuire*, 166 AD2d 205, 206-207 [1st Dept 1990]).

Plaintiff failed to establish that essential jurisdictional facts may exist that are not presently known so as to warrant further jurisdictional discovery (*see Copp v Ramirez*, 62 AD3d 23, 31 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Richter, Román, JJ.

8394 Robert Pitt Realty, LLC, et al., Index 24648/05
Plaintiffs-Respondents,

-against-

19-27 Orchard Street, LLC, et al.,
Defendants,

Essex Insurance Company, et al.,
Defendants-Appellants.

- - - - -

19-27 Orchard Street, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Essex Insurance Company,
Third-Party Defendant-Appellant.

_____

Clausen Miller P.C., New York (Daniel S. Valinoti, and Mark J. Sobczak of the bar of the State of Illinois, admitted pro hac vice, of counsel), for appellants.

Lewis Johs Avallone Aviles, Islandia (Elizabeth A. Fitzpatrick of counsel), for Robert Pitt Realty, LLC and The Hartford Insurance Company, respondents.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about December 13, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiffs Robert Pitt Realty, LLC and the Hartford Insurance Company's motion for summary judgment declaring that defendant Essex Insurance Company (Essex) owed a duty to defend and indemnify Robert Pitt Realty,

LLC in the underlying action, and denied the cross motion by defendants Essex and Markel Group for summary judgment declaring that Essex has no duty to defend or indemnify Robert Pitt Realty, LLC (Robert Pitt), The Hartford Insurance Company, 19-27 Orchard Street, LLC (19-27) and 24&27 Ochard Street Corp. (24&27) with respect to the underlying personal injury action, unanimously modified, on the law, plaintiffs' motion for summary judgment denied, defendants' cross motion granted to the extent of declaring that Essex has no duty to defend or indemnify 19-27 or 24&27, and otherwise affirmed, without costs.

This declaratory judgment action arises from an underlying bodily injury action brought by Victor Velez in which it is alleged that he was injured during the course and scope of his employment with defendant Avante Building & Consulting Corp. (Avante) on June 23, 2004. Avante was purportedly hired by 24&27 to perform work within premises owned by Robert Pitt and leased by 24&27.

The "Separation of Insureds Condition" contained within the Essex policy does not negate the portion of the policy which precludes coverage to Robert Pitt, the additional insured, when no coverage is extended to 24&27, the named insured, on grounds of ambiguity. Rather, it "primarily highlights the named

insured's separate rights and duties, as well as makes clear that the limits of the policy are to be shared by all of the insureds . . . [who] must share [the limit of coverage] equally; [and] it does not negate bargained-for exclusions, or otherwise expand, or limit coverage" (*DRK, LLC v Burlington Ins. Co.*, 74 AD3d 693, 694 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]). Thus, it does not render the policy's coverage or exclusion provisions ambiguous, and therefore, Robert Pitt's entitlement to coverage must be analyzed within the reasons cited by Essex's disclaimer to 24&27. Stated differently, as indicated in the insurance policy, whether Robert Pitt is entitled to coverage will generally turn on whether 24&27 is entitled to coverage.

Preliminarily, Essex establishes that the notice of the accident provided by 24&27, approximately three months after the accident in question, was untimely as a matter of law. Accordingly, since Essex timely disclaimed coverage to 24&27 on this basis, it properly denied coverage to 24&27. This, however, does not preclude coverage to Robert Pitt since although additional insured Robert Pitt, the out-of-possession landlord/owner of the premises where Velez was injured, was advised of the late notice provided by its tenant, the named insured, there was no specific disclaimer from Essex to Robert

Pitt on this basis. Notwithstanding the policy's preclusion of coverage to Robert Pitt when no coverage was extended to 24&27, as a separate insured, Robert Pitt was entitled to its own disclaimer on grounds that it failed to timely notify Essex of the accident for which it seeks coverage (*Sport Rock Intl., Inc. v American Cas. Co. of Reading, Pa.*, 65 AD3d 12, 17 [1st Dept 2009]). Since Essex failed to provide Robert Pitt with a timely disclaimer this defense was abandoned, and it cannot deny coverage to Robert Pitt on this ground (*see General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]; *Greaves v Public Serv. Mut. Ins. Co.*, 5 NY2d 120, 124 [1959]).

Essex's denial of coverage to 24&27 on the ground that the incident did not occur at a covered location is unavailing and unsupported by the record. The deposition testimony and the lease clearly established that the premises at which the work in question was being performed was "the Building at 25 Robert Pitt Drive, Monsey, NY 10952." Accordingly, Essex would not have been able to deny coverage to 24&27 on this ground and thus cannot deny coverage to Robert Pitt on this ground either.

Based on the deposition testimony, factual issues remain as to whether, Essex has a duty to defend and indemnify 24-27 and thus Robert Pitt or whether the exclusion for "bodily injury" or

"property damage" arising out of the acts or omissions of the named insured or its employees, other than general supervision of "work" performed for the named insured by the "contractor," applies. Since whether Essex is entitled to deny coverage to 24&27 is dispositive on the issue of coverage to Robert Pitt, based on the foregoing, the motion court erred in granting summary judgment to plaintiffs.

Insofar as 19-27 owned the adjacent lot, a premise separate and apart from the premises covered under the policy, Essex had no duty to defend or indemnify it. Thus, Essex properly denied coverage to 19-27.

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

ENTERED: DECEMBER 4, 2012

CLERK

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

8427 The People of the State of New York, Respondent, Ind. 815/08

-against-

Terry Chapman, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 23, 2009, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 22 years to life, unanimously affirmed.

Regardless of whether the introduction of the uncharged crime evidence was error, it was harmless in the face of the overwhelming proof of defendant's guilt. The victim clearly identified defendant as the robber both at a lineup and in court. She had an excellent opportunity to view defendant during the encounter because she was face to face with him in a well-lit store. Furthermore, the victim's identification was corroborated by the evidence uncovered at the time of defendant's arrest, as

well as the surveillance video of the robbery, which the jury viewed. Thus, there is no significant probability that the verdict would have been different if the trial court had excluded the uncharged crime evidence (*see People v Arafet*, 13 NY3d 460, 468 [2009]).

Defendant did not preserve his challenges to the court's limiting instructions concerning the uncharged robbery, and we decline to review them in the interest of justice. As an alternative holding, we find that these instructions adequately conveyed the appropriate standards.

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

ENTERED: DECEMBER 4, 2012

CLERK

Mazzarelli, J.P., Moskowitz, Richter, Abdus-Salaam, Feinman, JJ.

8570 The People of the State of New York, Ind. 4750/08
Respondent,

-against-

Ronald Messam, etc.,
Defendant-Appellant.

_____

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

Ronald Messam, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered July 28, 2010, convicting defendant, after a jury trial, of assault in the second and third degrees, attempted assault in the third degree, and criminal mischief in the second and fourth degrees, and sentencing him, as a second violent felony offender, to a term of three to six years on the second-degree criminal mischief conviction, to be served consecutively to an aggregate term of seven years on the remaining convictions, unanimously affirmed.

Contrary to defendant's argument, his conviction was based on legally sufficient evidence and was not against the weight of the evidence. The conviction of assault in the second degree

required the People to prove beyond a reasonable doubt that the victim suffered a "serious physical injury" (Penal Law § 120.05[1]), a term that the Penal Law defines as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ" (Penal Law § 10.00[10]). Although the question of whether there was serious physical injury is generally a factual issue for the jury, "there is an objective level . . . below which the question is one of law" (*see People v Oquendo*, 134 AD2d 203 [1987], *lv denied*, 70 NY2d 959 [1988] [citation omitted] [addressing "impairment of physical condition or substantial pain" under the analogous Penal Law 10.00(9)]).

Here, the evidence established that defendant violently assaulted the victim during his rampage in a hospital by punching her in the face several times, breaking her nose, damaging her teeth and causing pain in her jaw that persisted until the trial. She described the pain as a "10 out of 10" shortly after the assault and she was fearful of opening her jaw as wide as possible when she yawned, lest it lock. Thus, she sustained a serious physical injury because she still experienced pain in her jaw while eating, two years after the assault. This constituted

"protracted . . . impairment of the function of [a] bodily organ" and "protracted impairment of health" (Penal Law § 10.00[10]; *see also People v Corbin*, 90 AD3d 478, 479 [2011], *lv denied* 19 NY3d 972 [2012]).

We also reject defendant's challenge to the sufficiency and weight of the evidence supporting his second-degree criminal mischief conviction. The evidence supports a reasonable inference that the damage caused by defendant required the replacement of six glass panes at a total cost in excess of the statutory threshold.

Defendant's pro se claims are without merit.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8681 The People of the State of New York, Respondent,

-against-

Oliverio Galindo, Defendant-Appellant. Ind. 4717/09

Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered October 25, 2010, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 4 years, unanimously affirmed.

With regard to the conviction under Penal Law § 265.03(1)(b), the circumstances of defendant's possession of a loaded firearm, viewed in light of the statutory presumption of unlawful intent (Penal Law § 265.15[4]), provided legally sufficient evidence of defendant's intent to use a weapon unlawfully against another. Evidence that defendant's shooting of his cousin was accidental did not warrant a different conclusion, since the People were not required to prove that

defendant specifically intended to use the weapon against any particular person. With regard to the conviction under Penal Law § 265.03(3), defendant failed to preserve his claim that the evidence was insufficient to establish possession outside defendant's home or place of business, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, because the only reasonable interpretation of a portion of defendant's admission to a friend was that the shooting took place outdoors. With regard to both convictions, we also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]).

Defendant did not preserve his challenges to the prosecutor's summation and the court's response to a jury note, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal as to either issue (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]; *People v Malloy*, 55 NY2d 296 [1982], *cert denied* 459 US 847 [1982]).

Defendant asserts that his counsel rendered ineffective assistance by failing to raise the unpreserved issues. To the extent the record permits review, we conclude that defendant

received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his counsel's failure to raise these issues fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8682-
8683 Index 650140/10

Colliers ABR, Inc.,
Plaintiff-Respondent,

-against-

Famurb Company, et al.,
Defendants-Appellants.

Oberdier Ressmeyer LLP, New York (Carl W. Oberdier and Kellen G. Ressmeyer of counsel), for appellants.

Venable LLP, New York (David N. Cinotti of counsel), for respondent.

Judgment, Supreme Court, New York County (Jeffery K. Oing, J.), entered April 17, 2012, in plaintiff's favor, unanimously reversed, on the law, without costs, and the judgment vacated. Appeal from order, same court and justice, entered on or about October 31, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Issues of fact preclude summary judgment in favor of either side in this dispute over plaintiff's entitlement to a commission for the procurement of a sublease of defendants' commercial premises. In support of their contention that they do not owe plaintiff a commission, defendants rely on the fact that plaintiff had an exclusive agency agreement with the sublessee

(*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629-630 [1987]). However, the sublease entered into by defendants acknowledged plaintiff's services as broker. Thus, an issue of fact exists whether defendants "impliedly" employed plaintiff as broker for this transaction (*see Gronich & Co. v 649 Broadway Equities Co.*, 169 AD2d 600 [1991]). Plaintiff failed to demonstrate conclusively its implied employment by defendants since the evidence it submitted on this issue is controverted by defendant's evidence (*see Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 153-154 [1st Dept 2003]).

CPLR 4547 does not bar evidence of a proposed agreement by which defendants would pay plaintiff's commission in exchange for indemnification against the claims of a prior broker since the proposal was not an offer to compromise a claim, but an attempt to reach a business agreement.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8684-
8685 Index 107675/05

Kate Gaffney,
Plaintiff-Appellant,

-against-

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

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Michael Shender of counsel), for respondents.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 29, 2011, dismissing the complaint as against all defendants, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 26, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendants met their burden of demonstrating plaintiff's failure to establish her claims of age discrimination, hostile work environment, constructive discharge, and retaliation (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305-306 [2004]).

In opposition, plaintiff failed to raise a triable issue of material fact. As to her age discrimination claim, there is no

evidence that plaintiff suffered from an adverse employment action (*see Forrest*, 3 NY3d at 306-307). The assignment of plaintiff to certain nonsupervisory tasks ordinarily performed by teachers constituted "merely an alteration of her responsibilities and did not result in a 'materially adverse change,' since [she] retained the terms and conditions of her employment, and her salary remained the same" (*Matter of Block v Gatling*, 84 AD3d 445, 445 [1st Dept 2011], *lv denied* 17 NY3d 709 [2011], *quoting Forrest*, 3 NY3d at 306). Nor did the alleged disciplinary memos in her file, threats of unsatisfactory ratings, disciplinary meetings and allegations of corporal punishment constitute adverse employment actions. Plaintiff received "satisfactory end-of-year performance rating[s], and none of the [alleged] reprimands resulted in any reduction in pay or privileges" (*Silvis v City of New York*, 95 AD3d 665, 665 [1st Dept 2012]).

Plaintiff failed to raise a triable issue of fact as to her hostile work environment claim, as the alleged conduct and insults by her employer and coworkers were not "sufficiently severe or pervasive to alter the conditions of [her] employment"

(*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431, 431 [1st Dept 2011], quoting *Harris v Forklift Systems, Inc.*, 510 US 17, 21 [1993]).

The standard for establishing a claim of constructive discharge is "higher than the standard for establishing a hostile work environment" where, as here, the alleged constructive discharge stems from the alleged hostile work environment (*Fincher v Depository Trust & Clearing Corp.*, 604 F3d 712, 725 [2d Cir 2010]). Accordingly, because plaintiff failed to raise a triable issue of fact as to her hostile work environment claim, "her claim of constructive discharge also fails" (*id.*).

With respect to plaintiff's retaliation claim, there is no evidence of an adverse employment action resulting from her filing of a notice of claim against defendants (*see Mejia v Roosevelt Is. Med. Assoc.*, 95 AD3d 570, 573 [1st Dept 2012]). Nor is there any evidence of a causal connection between

plaintiff's commencement of litigation and the allegedly adverse actions against her. Indeed, the conduct at issue began months before plaintiff filed the notice of claim (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 129 [1st Dept 2012]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8686 In re Dayanara V., and Others,

Dependent Children Under Eighteen Years of Age, etc.,

Carlos V., et al.,
Respondents-Appellants,

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

Steven N. Feinman, White Plains, for Carlos V., appellant.

Daniel R. Katz, New York, for Luz V., appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), attorney for the child Dayanara V.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the children Stephanie V., Crystal V., Angelina V., Alexa V., Ka-el V., and Christopher V.

Order of disposition, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about October 6, 2011, which, upon a fact-finding determination that respondents abused and neglected the eldest child and derivatively abused and neglected the younger children, placed the eldest child in the care of the Administration for Children's Services until the next scheduled permanency hearing, issued a final order of protection in favor

of the eldest child against respondent father for a period of 12 months, paroled the younger children to respondents under six months of supervision, and imposed other conditions, unanimously modified, on the law and the facts, to vacate the findings of abuse and derivative abuse as against respondent mother, and otherwise affirmed, without costs.

The findings of abuse and neglect against the father were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]). At the fact-finding hearing, the eldest child testified that while the father was drunk, he sexually abused her on three occasions when she was 13 years old, and this was corroborated by the testimony of a caseworker and a pediatric specialist, who indicated that she told them similar accounts. The eldest child was subjected to extensive cross-examination, and the court credited her testimony. There exists no basis to disturb the court's credibility determinations (*see Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

The eldest child also testified that as punishment for continuing to see a boyfriend that her parents did not approve of, the father punched her in the stomach and had her sibling punch her in the eye, causing bruises. Such conduct constituted

excessive corporal punishment and thus, neglect (*see* Family Ct Act § 1012[f][i][B]; *Matter of Joseph C. [Anthony C.]*, 88 AD3d 478 [1st Dept 2011]). Moreover, the findings of derivative abuse and neglect against the father as to the younger children were appropriate. The father's actions evinced such a fundamental defect in parenting as to place the other children in substantial risk of harm (*see Matter of Joshua R.*, 47 AD3d 465 [1st Dept 2008], *lv denied* 11 NY3d 703 [2008]).

The court erred in finding that the mother abused the eldest child and derivatively abused the younger children by allowing the eldest child to be sexually abused. The child testified that she only informed the mother of the abuse when the mother interrupted the last abusive incident, after which the mother engaged in a argument with the father, who never again abused the child.

However, the mother never reported the father's conduct, nor did she have the father removed from the home, which placed all of the children in imminent risk of harm from the father's sexual compulsion, which was fueled by alcohol abuse. Accordingly, the findings of neglect and derivative neglect were supported since

she did not act as a reasonably prudent parent to protect the children from this risk (*see e.g. Matter of Rayshawn R.*, 309 AD2d 681 [1st Dept 2003]; *Matter of Eric J.*, 223 AD2d 412, 413 [1st Dept 1996]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8687 In re Manuel Aranda, Index 104898/11
Petitioner-Appellant,

-against-

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

Law Offices of Gregory T. Chillino, New York (Christopher M. Slowik of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 14, 2011, which denied the petition brought pursuant to CPLR Article 78 seeking to reverse and annul respondent New York City Department of Building's (DOB) determination denying petitioner's application for a Master Fire Suppression Piping Contractor's license and dismissed the proceeding brought, unanimously affirmed, without costs.

DOB's determination denying petitioner's application for reinstatement of his fire suppression license without retaking the examination had a rational basis and was not arbitrary and capricious (*see Arbuiso v New York City Dept. of Bldgs.*, 64 AD3d 520, 522 [1st Dept 2009]). Although petitioner submitted six

notarized letters from clients in support of the fire suppression work he performed from 2007 to 2010, his proof of supervision on enumerated projects was markedly deficient (*see* Administrative Code of the City of New York § 28-401.13). Only one of the six letters indicated that it was from a licensed Master Fire Suppression Piping Contractor, and did not indicate the description of the work petitioner performed, petitioner's daily responsibilities or the dates of his employment (*see e.g. Matter of Reingold v Koch*, 111 AD2d 688 [1st Dept 1985], *affd* 66 NY2d 994 [1985]).

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8688 G Builders IV LLC, Index 650172/10
Plaintiff-Appellant,

-against-

Madison Park Owner, LLC, et al.,
Defendants-Respondents,

Architectural Hardware, Inc., et al.,
Defendants.

- - - - -

CPN Mechanical, Inc.,
Intervenor.

_____

Dunnington Bartholow & Miller LLP, New York (Carol A. Sigmond of counsel), for appellant.

Zetlin & De Chiara, LLC, New York (Lori Samet Schwarz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered November 30, 2011, which, inter alia, granted the motion of defendants Madison Park Owner, LLC and Platte River Insurance Company to dismiss the complaint of plaintiff G Builders IV LLC and vacated plaintiff's mechanic's lien, unanimously affirmed, with costs.

After a dispute arose between plaintiff and defendants regarding a construction management contract for work to be performed by plaintiff in connection with the conversion of a 20-story office building into luxury condominiums, plaintiff

commenced this lien foreclosure action against defendants. While this action was pending, non-party GJF d/b/a Builders Group and non-party George Figliolia, plaintiff's president and chief executive officer of GJF as well as sole shareholder of Builders Group, and plaintiff's two other employees who were also employees of GJF/Builders Group, pleaded guilty to grand larceny in connection with a scheme to bilk defendants out of millions of dollars by way of a complex kick-back scheme involving the over-billing of project subcontractors. Notably, the construction management contract was signed by Figliolia on behalf of both plaintiff, as construction manager, and GJF, as guarantor.

The gravamen of plaintiff's argument is that the guilty pleas of GJF/Builders Group, as well as plaintiff's president, secretary and employee –- the only people employed by plaintiff –- cannot be imputed to plaintiff merely because plaintiff did not confess to any wrongdoing, and because the three employees did not confess to wrongdoing specifically related to defendants' project. As the motion court found, where, as here, the evidence in the record overwhelmingly supports the conclusion that the actions taken by plaintiff's employees and by GJF/Builders Group, were taken on behalf of plaintiff, plaintiff is not entitled to

collect on the lien (*see McConnell v Commonwealth Pictures Corp.*, 7 NY2d 465, 469 [1960] ["Proper and consistent application and long-settled public policy closes the doors of our courts to those who sue to collect the rewards of corruption"]). Try though it might, plaintiff simply cannot distance itself from these crimes, committed by its own employees utilizing a contract that it signed and for which it was responsible.

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Acosta, Renwick, Freedman, JJ.

8689 Joyce E. Francis, Index 102777/11
Plaintiff-Respondent,

-against-

Christian Eisenbeiss, et al.,
Defendants-Appellants.

Withers Bergman LLP, New York (Azmina N. Jasani of counsel), for appellants.

Alana Barran, New York, for respondent.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered January 30, 2012, which, to the extent appealed from, denied defendants' motion to dismiss the causes of action alleging retaliation and discrimination under the New York State Human Rights Law, unanimously affirmed, without costs.

The documentary evidence does not demonstrate conclusively that during the relevant time period defendant CRE Capital LLC employed fewer than four persons and therefore was not an employer as defined by the State Human Rights Law (Executive Law § 292[5]). In particular, while CRE's quarterly tax form for the fourth quarter of 2008 indicates that three people were employed in each month of the quarter, it lists four employees' names. Thus, contrary to defendants' contention, the form does not on

its face indicate that CRE employed only three people. It does not reflect that, as defendants explain for the first time on appeal, one employee left during the quarter and was replaced by another person, and there was no overlap in their employment.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Freedman, JJ.

8690 The People of the State of New York, Ind. 519/09
Respondent,

-against-

Natasha McCullough,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Simpson Thacher & Bartlett LLP, New York (Hiral D. Mehta of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Caesar Cirigliano, J.), rendered May 24, 2011, convicting defendant, after a jury trial, of assault in the second degree, and sentencing her to a term of six months, concurrent with five years' probation, unanimously affirmed. The matter is remitted to Supreme Court, Bronx County, for further proceedings pursuant to CPL 460.50(5).

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The

jury could have reasonably inferred that when defendant kicked the victim she did so with intent to cause serious physical injury. That inference was supported by the totality of defendant's violent and threatening conduct toward the victim, not limited to the moment of the kick. The testimony of the victim and her surgeon established that the kick caused the victim's disabling injury (*see generally Matter of Anthony M.*, 63 NY2d 270, 280-281 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8693 Eladio Garcia, Index 17167/07
Plaintiff-Appellant,

-against-

DPA Wallace Avenue I, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Respondents.

-against-

Start Elevator, Inc.,
Third-Party Defendant-Respondent.

Sobo & Sobo, LLP, Middletown (Brett Peter Linn of counsel), for appellant.

Newman Myers Kreines Gross Harris, New York (Adrienne Yaron and Olivia M. Gross of counsel), for DPA Wallace Avenue I, LLC and DPA Wallace Avenue II, LLC, respondents.

Faust Goetz Schenker & Blee LLP, New York (Nicholas J. Marino of counsel), for Start Elevator, Inc., respondent.

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 9, 2011, which granted defendants/third-party plaintiffs DPA Wallace Avenue I, LLC and DPA Wallace Avenue II, LLC's (collectively, DPA Wallace) motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on the issue of liability on his Labor Law §§ 240(1) and 241-a claims, unanimously affirmed, without costs.

Plaintiff, an elevator mechanic, was in an elevator pit

preparing to dismantle components of the elevator when the "selector tape," a thin strip of metal, broke and "snapped" upwards, cutting his hand. He testified that the breakage of the tape was caused by the loosening of the shift to which the tape was connected, allowing the tape to bend, and the tension put on the tape created by gravitational force on a weight in the overhead room, which essentially acts as a counterweight to keep the tape taut.

Labor Law § 240(1) is inapplicable to this case. The object upon which the force of gravity was applied, the weight in the overhead room, was not material being hoisted or a load that required securing for the purpose of carrying out plaintiff's undertaking. Rather, it was part of the preexisting structure as it appeared before plaintiff's work began (*see Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268-269 [2001]). The cases cited by plaintiff are distinguishable in that the objects upon which the gravitational force applied were being hoisted as part of the injured plaintiffs' work (*see Runner v New York Stock Exch., Inc.*, 13 NY3d 599 [2009]; *Harris v City of New York*, 83 AD3d 104 [1st Dept 2011]; *Apel v City of New York*, 73 AD3d 406 [1st Dept 2010]; *McLauglin v Plaza Constr. Corp.*, 2008 NY Slip Op 033042[U] [Sup Ct, New York County 2008]).

Labor Law § 241(6), as predicated on Industrial Code § 23-1.7(a)(1), and Labor Law § 241-a, are also inapplicable, as plaintiff was not subject to the overhead hazard of falling objects (*see Favia v Weatherby Constr. Corp.*, 26 AD3d 165, 166 [1st Dept 2006]; *Sharp v Scandic Wall Ltd. Partnership*, 306 AD2d 39 [1st Dept 2003]; *Nevins v Essex Owners Corp*. 259 AD2d 384 [1st Dept 1999], *lv denied* 96 NY2d 705 [2001]). The court properly rejected plaintiff's expert's affidavit, as the affidavit was based only on his review of the deposition testimony, and he did not examine the premises (*Kagan v BFP One Liberty Plaza*, 62 AD3d 531 [1st Dept 2009], *lv denied* 13 NY3d 713 [2009]).

The court also properly dismissed plaintiff's Labor Law § 200 claim. To be held liable under the statute, which is the codification of the common-law negligence standard, an owner must have had the authority to control the activity bringing about the injury (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]), or actual or constructive notice of the hazardous condition (*see Buckley v Columbia Grammar & Prepatory*, 44 AD3d 263, 272-273 [1st Dept 2007], *lv denied* 10 NY3d 710 [2008]; *Griffin v New York City Tr. Auth.*, 16 AD3d 202 [1st Dept 2005]). The evidence shows that DPA Wallace did not have the authority to control plaintiff's work. The record contains no evidence that

DPA Wallace had actual notice of the condition that caused plaintiff's injuries. That DPA Wallace was aware of the elevator’s general unsafe condition is insufficient to establish constructive notice of the particular hazardous condition that caused plaintiff's injuries (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967 [1994]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8695 Sumner Builders Corporation, et al., Index 602730/08
Plaintiffs-Respondents-Appellants,

-against-

Rutgers Casualty Insurance Company,
Defendant-Appellant-Respondent.

Miranda Sambursky Slone Sklarin Verveniotis, LLC, Mineola (Steven Verveniotis of counsel), for appellant-respondent.

Charbuck Calabria Jones & Materazo, P.C., Hicksville (Nicholas P. Calabria of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Paul G. Feinman, J.), entered August 11, 2011, which, to the extent appealed from, denied plaintiffs' motion for summary judgment declaring that defendant is obligated to defend and indemnify plaintiffs Sumner Builders corporation and P&C Building, Inc. in the underlying personal injury action, and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant defendant's motion to the extent of declaring that it has no obligation to defend or indemnify Sumner Builders Corporation and P&C Building, Inc., and otherwise affirmed, without costs.

Sumner and P&C are not entitled to coverage under the policy that defendant issued to plaintiff Premier Drywall, Inc. because

they are not named as additional insureds on the policy (*see National Abatement Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 33 AD3d 570, 571 [1st Dept 2006]; *see also, e.g., Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986]). There is no information about any additional insureds either on the Schedule on which organizations included as insureds were to be shown or on the Declarations on which information required to complete the endorsement was to be shown if the Schedule was blank. Nor, contrary to Sumner and P&C's claim, did defendant's disclaimer admit that they were additional insureds. However, in any event, it is "[t]he four corners of an insurance agreement [that] govern who is covered" (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 388 [1st Dept 2006]). Because Sumner and P&C are not additional insureds, defendant was not required to disclaim as to them (*see e.g. National Abatement*, 33 AD3d at 571).

Defendant contends that plaintiff Premier Drywall, Inc. failed to comply with the policy because it did not provide notification as soon as practicable of the underlying occurrence. However, before the timeliness of Premier's notice to defendant is considered, the timeliness of defendant's disclaimer must be

considered (*see First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 67 [2003]). Contrary to defendant's contention, the May 22, 2007 letter triggered its obligation to disclaim. Although the letter gave the wrong surname for the accident victim, it indicated the date, location, and circumstances of the accident (*see Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, PA*, 304 AD2d 334, 335-336 [1st Dept 2003]). Defendant issued its disclaimer on October 31, 2007. It was not entitled to disclaim on the ground of late notice simply because the accident occurred on April 9, 2007, and plaintiffs did not notify it until May 22, 2007; defendant needed to know when plaintiffs first learned of the accident (*see Ace Packing Co., Inc. v Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 15 [1st Dept 2007]). In addition, defendant needed more information about the accident victim's status to determine whether the policy's employee exclusion applied. However, plaintiffs did not respond to defendant's June 6, 2007 requests for additional information. Therefore, triable issues of fact exist regarding the timeliness of defendant's disclaimer (*see Admiral Ins. Co. v State Farm Fire & Cas. Co.*, 86 AD3d 486, 489-490 [1st Dept 2011]).

Defendant contends that the employee exclusion applies

because the accident victim was the cabinet contractor. However, there is conflicting evidence on this point. Defendant also relies on the fact that the complaint in the underlying personal injury action alleged that the accident victim was injured during the course of his employment. However, defendant cannot ignore the facts that created a reasonable possibility of coverage that were made known to it in the accident victim's November 2008 amended bill of particulars and rely solely on the allegations in the complaint to assess its duty to defend Premier (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 70 [1991]).

Having wrongfully refused to defend Premier in the underlying action, defendant is bound by the finding in that action that the accident victim was neither an employee nor a contractor at the time of the accident (*see Ramos v National Cas. Co.*, 227 AD2d 250, 250-251 [1st Dept 1996]). The case it cites, *First State Ins. Co. v J & S United Amusement Corp.* (67 NY2d 1044 [1984]), is distinguishable because there the insurer did not refuse to defend (*id.* at 1045-1046). Moreover, we make no declaration as to defendant's obligation to indemnify Premier (*id.* at 1046). A determination as to defendant's duty to indemnify is precluded by issues of fact as to the timeliness of defendant's disclaimer and, if the disclaimer is found to be

timely, the timeliness of plaintiffs' notices of the underlying occurrence. Defendant contends that the 43-day delay between the date Sumner and P&C's president knew of the accident and the date of the May 22 letter is unreasonable as a matter of law. However, unlike the policy in the case it cites, *Steadfast Ins. Co. v Sentinel Real Estate Corp.* (283 AD2d 44 [1st Dept 2001]), the policy in the case at bar does not contain a 15-day deadline for giving notice. Premier contends that its notice could not have been late because it was not aware of the occurrence until defendant's disclaimer. However, there is conflicting evidence as to when Premier was aware of the occurrence.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8696 Renee Levine, et al., Index 101491/06
Plaintiffs-Appellants, 59048/07
590915/09

-against-

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

Consolidated Edison Company of
New York, Inc., sued herein as
Consolidated Edison,
Defendant-Respondent.

- - - - -

[And A Third-Party Action]

- - - - -

Consolidated Edison Company
of New York, Inc.,
Second Third-Party Plaintiff,

-against-

Danella Construction Company
of NY, Inc.,
Second Third-Party Defendant-Respondent.

_____

The Berkman Law Office, LLC, Brooklyn (Robert J. Tolchin of counsel), for appellants.

Office of Richard W. Babinecz, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

McElroy Deutsch Mulvaney & Carpenter, LLP, New York (John P. Cookson of counsel), for Danella Construction Company of NY, Inc., respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered October 24, 2011, which granted the cross motion of

defendant/first and second third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Ed) for summary judgment dismissing the complaint and all cross claims as against it, and granted the motion of second third-party defendant Danella Construction Company of NY, Inc. (Danella) for summary judgment dismissing the second third-party complaint and all cross claims as against it, unanimously affirmed as to the granting of Con Ed's cross motion, and the appeal otherwise dismissed, without costs.

No appeal lies from that part of the order dismissing the second third-party complaint against Danella. Plaintiffs never asserted a direct claim against Danella, and thus, are not aggrieved by the dismissal of the second third-party action (*see* CPLR 5511; *11 Essex St. Corp. v Tower Ins. Co. of N.Y.*, 96 AD3d 699, 699-700 [1st Dept 2012]).

Con Ed established its entitlement to judgment as a matter of law by showing that they did not cause or create the pothole that caused plaintiff Renee Levine's fall and resultant injuries. Con Ed's employee testified that excavation of the area was completed more than two years before the accident, and that he inspected the area at that time and did not find any unsafe conditions or receive any complaints about the work. Moreover,

Danella's employee stated that the pothole, identified by plaintiff in photographs, was outside the area that was excavated in 2003 (*see Jones v Consolidated Edison Co. of N.Y., Inc.*, 95 AD3d 659 [1st Dept 2012]; *Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005]).

In opposition, plaintiffs failed to raise a triable issue of fact. The opinions proffered by their expert were conclusory and speculative (*see e.g. Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002]).

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8697 In re Sheena Rowe, Petitioner, Index 400369/11

-against-

John B. Rhea, etc., et al., Respondents.

_____

Urban Justice Center, New York (William Bryan of counsel), for appellant.

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated May 19, 2010, which terminated petitioner's public housing tenancy on grounds of nondesirability, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Barbara Jaffe, J.], entered November 18, 2011), dismissed, without costs.

Substantial evidence supports the conclusion that petitioner continued to be a member of a drug conspiracy until her arrest in mid-May 2009, which was during her first two weeks as a public housing tenant (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Although the federal indictment to which she pled guilty defined the drug

conspiracy as ending some time in April 2009, the record supported a reasonable inference that petitioner did not withdraw from the conspiracy prior to her arrest.

Petitioner's claim that NYCHA failed to adhere to its pre-termination procedures is unpreserved because it was not raised before the agency (*see Matter of Hughes v Suffolk County Dept. of Civ. Serv.*, 74 NY2d 833, 834 [1989]), and, in any event, is not supported by the record.

The termination of petitioner's tenancy does not shock our sense of fairness (*see e.g. Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8698 Henderson J. Prescod, Index 16327/05
Plaintiff-Respondent,

-against-

Betty Leggiero O'Brien, etc.,
Defendant-Appellant.

Eisenberg & Kirsch, Liberty (Robert M. Lefland of counsel), for appellant.

Robert I. Gruber, New York, for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 8, 2011, which, insofar as appealed from, denied defendant's motion for summary judgment dismissing plaintiff's claims of serious injury to his cervical spine and left knee within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to grant the motion insofar as it sought to dismiss plaintiff's claim regarding his cervical spine, and otherwise affirmed, without costs.

Defendant met her prima facie burden as to plaintiff's alleged serious injuries. With regard to the alleged cervical spine injury, defendant submitted the affirmed report of a radiologist opining that the MRI revealed no disc bulges, herniations, or changes causally related to the accident, and the

affirmation of an orthopedist stating that plaintiff could not have sustained the alleged injuries as a result of the accident because if he had, he would have suffered from immediate pain, yet plaintiff did not seek treatment until five days after the accident (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]; *Paulino v Rodriguez*, 91 AD3d 559 [1st Dept 2012]; *Farrington v Go On Time Car Serv.*, 76 AD3d 818, 819 [1st Dept 2010]). Plaintiff failed to raise an issue of fact in opposition because he offered no admissible objective medical evidence of an injury to his cervical spine and the EMG/NVC study revealing radiculopathy is unsworn (*see* CPLR 2106; *Barry v Arias*, 94 AD3d at 499-500).

As to plaintiff's left knee injury, defendant met her prima facie burden by offering a radiologist's report stating that the MRI was unremarkable and showed no evidence of acute traumatic injury, and the affirmations of two orthopedists stating that any injuries were not caused by the accident. In opposition, plaintiff submitted no objective evidence in support of his claim of meniscal tears. However, plaintiff raised an issue of fact in opposition by proffering the affirmation of his orthopedist who opined that plaintiff exhibited patella crepitation and chondromalacia causing diminished range of motion in extension and flexion, and that these conditions, especially as to the left

knee, were caused by the accident (*see Pommells v Perez*, 4 NY3d 566, 576-577 [2005]).

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8699 In re Shireen Rahjou, et al., Petitioners, Index 105178/11

-against-

John B. Rhea, etc., Respondent.

_____

William E. Leavitt, New York, for petitioners.

Kelly D. MacNeal, New York (Seth E. Kramer of counsel), for respondent.

_____

Determination, dated December 29, 2010, which denied petitioners a tenancy by succession as remaining family members, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Eileen A. Rakower, J.], entered October 13, 2011), dismissed, without costs.

Regardless of whether this proceeding was properly transferred to this Court (*see* CPLR 7804[g]), we retain jurisdiction of it in the interest of judicial economy (*see Matter of Sexton v Kelly*, 95 AD3d 544 [1st Dept 2012]).

Petitioners failed to demonstrate that the tenant of record received written consent for them to reside in the subject apartment and that they were authorized occupants of the

apartment for a one-year period before the tenant of record's death. Thus, respondent's decision to deny petitioners remaining family member status was not arbitrary and capricious (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012]). Even if respondent apparently acquiesced in petitioners' residency in the apartment, he is not estopped from denying them remaining family member status (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 [2008]).

The hearing officer correctly concluded that petitioners lack standing to argue that they are exempt from respondent's remaining family member policy because respondent failed to comply with the notice provisions of the deceased tenant's lease. Petitioners were not parties to the lease and had no other contractual relationship with respondent (*see Matter of Lakins v New York City Hous. Auth.*, 67 AD3d 604 [1st Dept 2009]). Moreover, the evidence supports the conclusion that petitioners had actual notice of the policy requiring management's written

permission before they could become authorized occupants of the apartment.

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

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8700 The People of the State of New York, Ind. 179/05
Respondent,

-against-

Adolf Gutt,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered June 2, 2009, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 16 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). A chain of circumstantial evidence amply supported the jury's conclusion that it was defendant, and not another person involved in the

fight, who stabbed the victim. We note that one of the links in this chain was a knife recovered from defendant's immediate vicinity at the time of his arrest that appeared to be covered with blood (*see People v Steele*, 287 AD2d 321, 322 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001] [lay witnesses competent to identify blood from its appearance]).

The court properly declined to submit reckless third-degree assault as a lesser included offense of intentional second-degree assault, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, that he acted with mere recklessness. Defendant's act of deliberately stabbing his victim could only be viewed as evincing at least an intent to cause physical injury, and there was no evidence to support a theory of recklessness (*see e.g. People v Barnes*, 265 AD2d 169 [1st Dept 1999], *lv denied* 94 NY2d 877 [2000]).

Defendant was properly adjudicated a persistent violent felony offender. Defendant waived his constitutional double jeopardy challenge to his 1995 violent felony conviction claim by failing to raise it at the time of his persistent violent felony adjudication (*see People v Alvarado*, 67 AD3d 430 [1st Dept 2009], *lv denied* 13 NY3d 936 [2010]). As an alternative holding, we reject it on the merits. In the 1995 case, defendant pleaded

guilty but withdrew that plea. This restored the original indictment (*see* CPL 220.60[3]) and rendered the original plea a nullity for double jeopardy purposes, so that there was no bar to further prosecution (*see People v Bartley*, 47 NY2d 965 [1979]). We find defendant's contrary interpretation of the record of the 1995 proceedings to be unpersuasive.

Defendant's pro se claims are unpreserved, or are unreviewable on the present record, and are in any event without merit.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8701 Jesus Paredes, an Infant Under the Age of Fourteen Years by His Mother and Natural Guardian Raquel Nunez, et al., Plaintiffs-Respondents, Index 350098/09

-against-

The City of New York, Defendant,

The Department of Education of the City of New York, Defendant-Appellant.

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

Sonkin & Fifer, New York (Howard Fifer of counsel), for respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered June 7, 2011, which, insofar as appealed from, denied defendant Department of Education's (DOE) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

"It is well-settled that schools have a duty to adequately supervise their students, and will be held liable for foreseeable injuries proximately related to the absence of adequate

supervision" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] [internal quotation marks omitted]). "[A] teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994] [internal quotation marks omitted]).

Summary judgment should have been granted in this action where the infant plaintiff was injured in a spontaneous playground accident. Moreover, the DOE employee supervising the playground at the time of the accident testified that she instructed the students on how to properly ride the apparatus from which the infant plaintiff fell, and there is no indication that any type of focused, repetitive instruction would have prevented the accident (*cf. Hunter v New York City Dept. of Educ.*, __ NY3d __, 2012 NY Slip Op 06994 [2012], *affg* 95 AD3d 719, 719 [1st Dept 2012]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8702 The People of the State of New York, Ind. 1136/09
Respondent,

-against-

Alex Rivera,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt 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 (Gregory Carro, J.), rendered on or about April 14, 2010,

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

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

ENTERED: DECEMBER 4, 2012

CLERK

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

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8703 In re Marisela N.,
Petitioner-Respondent,

-against-

Lacy M.S.,
Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Karen P. Simmons, The Children's law Center, Brooklyn (Susan M. Cordaro of counsel), attorney for the children.

Order, Family Court, Bronx County (David B. Cohen, J.), entered on or about January 19, 2012, which, after a fact-finding hearing, granted petitioner an order of protection for two years, unanimously affirmed, without costs.

A fair preponderance of the evidence (*see* Family Ct Act § 832), including petitioner's testimony, supports the court's finding that respondent had committed acts that constitute the family offense of harassment in the second degree (*see* Family Ct Act § 812[1]; Penal Law § 240.26[3]), warranting the issuance of an order of protection (*see* Family Ct Act § 841). There is no basis to disturb the court's credibility determinations (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1st Dept 1998]).

The order of protection is valid despite the lack of a

dispositional hearing. "There is no explicit statutory mandate that a dispositional hearing be conducted in proceedings under Family Court Act article 8" (*Matter of Hazel P.R. v Paul J.P.*, 34 AD3d 307, 308 [1st Dept 2006]). In addition, respondent never demanded, or objected to the lack of, such a hearing (*see Matter of Tonya B. v Matthew B.*, 90 AD3d 463, 463 [1st Dept 2011]). Moreover, since there is no other legal remedy available for the harassment proved against respondent and she "does not suggest any remedy other than issuance of an order of protection, a separate dispositional hearing would have served no purpose" (*Matter of Annie C. v Marcellus W.*, 278 AD2d 177, 177-178 [1st Dept 2000]).

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Freedman, JJ.

8704 The People of the State of New York, Ind. 6381/09
Respondent,

-against-

Anonymous,
Defendant-Appellant.

Richard M. Greenberg, Office of Appellate Defender, New York (Molly Booth of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman 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 (Laura A. Ward, J.), rendered on or about May 4, 2010,

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

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

ENTERED: DECEMBER 4, 2012

CLERK

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

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8705 Lillian Cohen, Index 118228/06
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

William M. Ezersky, Kew Gardens, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Lisa A. Giunta of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered June 3, 2010, which, in an action for personal injuries sustained when plaintiff tripped and fell over a raised sidewalk, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In support of its motion for summary judgment, the City submitted evidence demonstrating that it does not own the property abutting the sidewalk where plaintiff alleges she fell, and that the abutting property was an educational structure owned by the Dormitory Authority of the State of New York, and not an owner-occupied residential property with three or fewer units. The City thus established its absence of liability pursuant to

Administrative Code § 7-210 (b) and (c) (*see generally Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]). In opposition, plaintiff submitted no evidence or argument sufficient to raise a triable issue of fact.

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

ENTERED: DECEMBER 4, 2012

CLERK

Saxe, J.P., Friedman, Acosta, Renwick, Freedman, JJ.

8707-
8708 Frederick J. Mittermeier, Jr., et al.,
Claimants-Appellants,

-against-

The State of New York,
Defendant-Respondent.

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondent.

Order of the Court of Claims of the State of New York (Faviola A. Soto, J.), entered July 27, 2011, which, in an action for personal injuries sustained when claimant Frederick Mittermeier tripped and fell on the campus of the State University of New York Maritime College, denied claimants' motion for leave to file a late notice of claim pursuant to Court of Claims Act § 10(6), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered February 21, 2012, denying claimants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable order.

The Court of Claims providently exercised its discretion in

denying claimants' motion (*see generally Matter of Soble v State of New York*, 189 AD2d 970 [3d Dept 1993]). Petitioners failed to demonstrate a reasonable excuse for their failure to file a timely notice of claim since they did not provide a physician's affidavit or hospital records to document claimant Frederick Mittermeier's alleged period of convalescence or explain why he could not otherwise contact an attorney (*see Matter of Magee v State of New York*, 54 AD3d 1117 [3d Dept 2008]; *Cabral v State of New York*, 149 AD2d 453 [2d Dept 1989]). Moreover, claimants failed to dispute the allegation that Frederick called the campus police to request a copy of the incident report three days after his accident and that he physically appeared at the campus police's office and retrieved the incident report four days after the accident (*see e.g. Matter of Thomas v State of New York*, 272 AD2d 650, 651 [3rd Dept 2000]).

Contrary to claimants' contention, the fact that Frederick called the campus police and notified them of his injuries does not demonstrate that defendant acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual. Claimants may not rely on the incident report to impute notice to defendant of the accident, because it made no mention of the allegedly defective condition in the sidewalk that caused

Frederick to trip and fall as set forth in the proposed notice of claim (*see Quilliam v State of New York*, 282 AD2d 590 [2d Dept 2001]).

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

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

ENTERED: DECEMBER 4, 2012

CLERK