SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 13, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8819 The People of the State of New York, Respondent, Ind. 151/00

-against-

Clinton Newsome,
Defendant-Appellant.

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

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

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered September 8, 2010, resentencing defendant to an aggregate term of 17 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease

supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8817 The People of the State of New York, Ind. 1120/09
Respondent,

-against-

Darrin Q. Coaxum,
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 (Sara M. Zausmer 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 (Rena K. Uviller, J.), rendered on or about January 20, 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 13, 2012

CLERK

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

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8820-
8821 Kaimchand Doodnath,
Plaintiff-Appellant,

-against-

The Morgan Contracting Corp., et al.,
Defendants-Respondents-Appellants.

- - - - -

The Morgan Contracting Corp., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Regional Scaffolding & Hoisting Co., Inc.,
Third-Party Defendant-Respondent.

- - - - -

The Morgan Contracting Corp., et al.,
Second Third-Party
Plaintiffs-Appellants,

-against-

AWR Group, Inc.,
Second Third-Party
Defendant-Respondent.

- - - - -

AWR Group, Inc.,
Third Third-Party
Plaintiff-Respondent,

-against-

Dio Restoration, Inc.,
Third Third-Party
Defendant-Respondent.

Index 303662/07
83995/08
84057/08

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Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of counsel), for Kaimchand Doodnath, appellant.

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for The Morgan Contracting Corp. and Cornell

University, respondents-appellants/appellants.

Cartafalsa, Slattery, Turpin & Lenoff, Tarrytown (Christopher J. Turpin of counsel), for Regional Scaffolding & Hoisting Co., Inc., respondent.

Mound Cotton Wollan & Greengrass, New York (Paul S. Danner of counsel), for AWR Group, Inc., respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 1, 2011, which, to the extent appealed and as limited by the briefs, granted the summary judgment motion of defendants/third-party plaintiffs/second third-party plaintiffs The Morgan Contracting Corp. (Morgan) and Cornell University (Cornell) (collectively Morgan/Cornell) dismissing plaintiff's complaint and all cross-claims against them, denied Morgan/Cornell's motion for summary judgment on their alleged contractual indemnification claims against third-party defendant Regional Scaffolding & Hoisting Co., Inc. (Regional), and granted third-party defendant/third third-party plaintiff AWR Group, Inc.'s (AWR Group) motion for summary judgment dismissing Morgan/Cornell's second third-party complaint and all cross-claims against it, unanimously affirmed, without costs.

Plaintiff, a truck driver employed by defendant subcontractor Regional, was injured while he was stacking planks

and panels from a dismantled sidewalk bridge and placing them in Regional's flatbed truck. He was holding a 100-pound, 4' by 8' panel, standing in the back of the truck when his right foot slipped on a wet, dirty plank that had previously been placed on a pile in the truck. Cornell, as property owner, and Morgan, as general contractor, were entitled to summary judgment dismissing plaintiff's complaint and the cross-claims against them alleging violations of Labor Law §§ 200 and 241(6). The evidence demonstrates that Regional controlled the activity of its workers during the disassembly of the sidewalk bridge and the stacking of the bridge materials and that plaintiff was injured as a result of the manner in which he performed his work. There is no evidence that Morgan or Cornell controlled the manner in which the work was performed. In addition, Morgan and/or Cornell lacked timely notice of the specific condition which allegedly caused plaintiff to fall (i.e., his stacking and stepping on a purported slippery plank in the back of Regional's truck) (*see generally Rizzuto v LA Wegner Contracting Co., Inc.*, 91 NY2d 343, 352 [1998]; *Cahill v Triborough Bridge & Tunnel Authority*, 31 AD3d 347, 350-351 [1st Dept 2006]).

Plaintiff's Labor Law 241(6) claim, predicated upon an alleged violation of Industrial Code § 23-1.7(d), is similarly unavailing. Plaintiff was not caused to slip due to a slippery

work surface, but rather because he placed his right foot onto an allegedly wet and dirty plank that was stacked on top of other planks, 16 inches off the surface of the truck bed (*see generally Bond v York Hunter Constr.*, Inc., 270 AD2d 112 [1st Dept 2000], *affd* 95 NY2d 883 [2000]; *Francis v Aluminum Co. of Am.*, 240 AD2d 985 [3d Dept 1997]; *Basile v ICF Kaiser Engrs. Corp.*, 227 AD2d 959 [4th Dept 1996]).

Morgan/Cornell's arguments for summary judgment on their claims for contractual indemnification from Regional and AWR Group in the third-party action and second third-party action, respectively, are moot (*see generally Mayes v UVI Holding LLC*, 301 AD2d 409 [1st Dept 2003]; *DiGiulio v City of Buffalo*, 237 AD2d 938, 940 [4th Dept 1997]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8822 The People of the State of New York, Respondent, Ind. 1686/06

-against-

Malik Bryson, Defendant-Appellant.

Deron Castro, Forest Hills (Patrick Michael Megaro and John S. Campo of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Christopher J. Blira-Koessler of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 16, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him to a term of seven years, unanimously affirmed.

At a *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]), the People established, by clear and convincing evidence, that defendant caused a witness's unavailability by making threats. Accordingly, defendant forfeited his right to confront this witness, whose grand jury testimony was properly received in evidence (*see People v Cotto*, 92 NY2d 68 [1998]; *People v Geraci*, 85 NY2d 359 [1995]). There was ample proof of the identities of the participants in recorded phone conversations. To the extent that defendant's threats to the

witness were implied threats, the implication was unmistakable. Furthermore, it can be readily inferred that the witness's failure to testify was caused by the threats.

The court properly exercised its discretion in admitting expert testimony regarding gangs (*see generally People v Lee*, 96 NY2d 157, 162 [2001]). Regardless of whether the underlying charges were gang-related, expert testimony was necessary to explain words and phrases that defendant used in phone conversations (*see e.g. People v Boyd*, 164 AD2d 800, 803 [1st Dept 1990], *lv denied* 77 NY2d 904 [1991]). This testimony was highly probative, and was beyond the knowledge of the typical juror. The expert was sufficiently qualified to give this testimony, based on his practical experience, and he did not convey any hearsay to the jury.

The court properly declined to give missing witness charges as to three uncalled witnesses. Defendant did not establish that these persons were under the People's control for purposes of a missing witness charge, or that they could offer material, noncumulative testimony (*see People v Gonzalez*, 68 NY2d 424 [1986]).

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for

reducing the sentence.

We have considered and rejected defendant's remaining claims.

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8823 441 Convent LLC, Index 570939/10
Petitioner-Landlord-Respondent,

-against-

Betty Stafford,
Respondent-Tenant-Appellant.

Betty Stafford, appellant pro se.

Horing Welikson & Rosen, P.C., Williston Park (Christopher J. Duval of counsel), for respondent.

Order of the Appellate Term of the Supreme Court, First Department, entered on or about November 29, 2011, which, in this licensee holdover proceeding, affirmed a judgment of Civil Court, New York County (Joseph E. Capella, J.), entered on or about April 13, 2010, awarding petitioner landlord possession of the premises, unanimously affirmed, without costs.

There is no basis for departing from the hearing court's finding, based on an assessment of the witnesses' credibility, that service was properly effected by the process servers (*see Pressley v Shneyer*, 56 AD3d 263 [1st Dept 2008]).

Respondent tenant failed to establish that she had resided with her aunt for at least two years immediately before her aunt vacated the apartment (*see* Rent Stabilization Code [9 NYCRR] § 2523.5 [b] [1]). Indeed, the record shows that respondent

resided with her aunt for less than two years, before her aunt went into a nursing home, where she died several months later (*see Matter of Glass v Glass*, 29 AD3d 347, 349 [1st Dept 2006]). Respondent also failed to demonstrate the requisite "emotional and financial commitment, and interdependence" between her and her aunt (Rent Stabilization Code [9 NYCRR] §§ 2523.5[b][1], 2520.6[o][2]).

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

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8824 Peter Mirdita, Index 309860/08
Plaintiff-Appellant,

-against-

Ash Leasing Inc., et al.,
Defendants-Respondents,

M.L. Marcasciano, Jr.,
Defendant.

Paul G. Vesnaver, PLLC, Baldwin (Victor A. Carr of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 29, 2011, which, in an action for personal injuries sustained in an automobile accident, granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that the injuries plaintiff sustained to his cervical and thoracic spine and his shoulders were not serious within the meaning of Insurance Law § 5102(d). Defendants submitted, inter alia, an affirmed report of a radiologist who opined that the MRI films of the claimed injured body parts reflected a chronic preexisting condition, and found

no radiographic evidence of trauma or any causally related injury (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589, 590-591 [1st Dept 2011]).

Plaintiff's opposition failed to raise a triable issue of fact. His physician's affirmed reports of the physical examinations of plaintiff measured range of motion limitations without comparing them to a normal standard, so that any claimed deficits could not be properly assessed to see whether they are significant (*see Winters v Cruz*, 90 AD3d 412 [1st Dept 2011]). Moreover, plaintiff failed to tender a recent physical examination by his physician, rendering the findings deficient (*see Vega v MTA Bus Co.*, 96 AD3d 506 [1st Dept 2012]; *Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011]). Plaintiff's expert also failed to address the defense doctors' findings of degeneration or provide any competent evidence supporting his conclusion (*see Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012]).

Furthermore, in light of the lack of evidence of causation, plaintiff cannot establish his 90/180-day claim (*see Barry v Arias*, 94 AD3d 499 [1st Dept 2012]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8825 Jay Osha, Index 301110/12
Plaintiff-Respondent,

-against-

Olurotimi Osha,
Defendant-Appellant.

Brian D. Perskin, Brooklyn, for appellant.

Anne Peyton Bryant, New York, for respondent.

Order, Supreme Court, New York County (Ellen Gesmer, J.), entered July 9, 2012, which, to the extent appealed from as limited by the briefs, granted defendant husband's motion for pendente lite relief to the extent of awarding him $500 per month in temporary maintenance for a period of six months, with retroactive temporary maintenance of $50 per month, and directing plaintiff wife to pay interim counsel fees of $10,000 directly to defendant's attorney, unanimously affirmed, without costs.

There is no basis for disturbing the court's award of temporary maintenance. In calculating the award, the court correctly applied the formula set forth in Domestic Relations Law § 236(B)(5-a)(c)(1) (*see Khaira v Khaira*, 93 AD3d 194, 197 [1st Dept 2012]). The court considered numerous statutory factors and found that the statutory presumptive or guideline amount of temporary maintenance of $1,959.86 per month was "unjust or

inappropriate" (Domestic Relations Law § 236[B][5-a][e][1]). The court set forth the amount of the unadjusted presumptive award, the factors it considered, and the reasons that it adjusted the presumptive award (§ 236[B][5-a][e][2]).

The court providently exercised its discretion in imputing gross annual income to defendant in the amount of $90,000, given defendant's past work experience and educational background (*see Hickland v Hickland*, 39 NY2d 1, 5 [1976], *cert denied* 429 US 941 [1976]).

The court's award of $10,000 to defendant's attorney for interim counsel fees, rather than the $25,000 defendant requested, was a provident exercise of discretion (*see* Domestic Relations Law § 237[a]). Although defendant is the less monied spouse, this divorce action is unlikely to be prolonged, as the parties have little marital assets and no children.

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

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8826 The People of the State of New York, Respondent, Ind. 3422/99

-against-

Charles Randolph, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lindsey J. Ramistella of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Margaret Clancy, J.), rendered June 22, 2011, resentencing defendant to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive. We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8827-
8828 Martine Marcellus,
Plaintiff-Appellant,

-against-

James M. Forvarp, et al.,
Defendants-Respondents,

Julio V. Delgado, et al.,
Defendants.

Index 301296/08

David M. Peterson, P.C., New York (Susan R. Nudelman of counsel), for appellant.

Hodges Walsh & Slater LLP, White Plains (Paul E. Svensson of counsel), for James M. Forvarp, respondent.

Burke, Gordon & Conway, White Plains (Ashley E. Sproat of counsel), for Dan M. Voic, respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered February 4, 2011, which, in an action for personal injuries sustained in an automobile accident, granted defendants' motions for summary judgment dismissing the complaint, and order, same court and Justice, entered February 1, 2012, which, to the extent appealable, denied plaintiff's motion to renew, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by showing that the injuries plaintiff sustained to her right shoulder were not serious within the meaning of

Insurance Law § 5102(d). Defendants submitted evidence showing that plaintiff had previously injured her right shoulder in a 2004 accident, including her surgeon's operative report and an MRI report finding degenerative changes in the shoulder, and the affirmed report of their orthopedic expert who found full range of motion and opined that any right shoulder injury had fully resolved post-operatively (*see McArthur v Act Limo, Inc.*, 93 AD3d 567 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Although plaintiff submitted medical evidence of recent limitations and MRI findings of right shoulder injuries, she failed to show such injuries were caused by the 2008 accident. In concluding that the shoulder injuries were causally related to the accident, her experts did not address a December 2005 medical report, prepared in association with the 2004 accident, noting plaintiff's complaints of worsening right shoulder pain and finding of shoulder impingement (*see Zhijian Yang v Alston*, 73 AD3d 562, 563 [1st Dept 2010]). Nor has plaintiff submitted any evidence explaining the effect of such prior injuries on the injuries attributable to the subject 2008 accident (*see Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]). While plaintiff's experts concluded that the accident was the competent cause of the superior labrum anterior position tear observed by plaintiff's

surgeon during her shoulder surgery, they did not address the surgeon's opinion that such tear was degenerative in nature (*Williams v Horman*, 95 AD3d 650 [1st Dept 2012]; *compare Perl v Meher*, 18 NY3d 208, 218-219 [2011]). Plaintiff also did not address a September 2009 MRI report concluding that abnormalities observed in the shoulder were degenerative in nature.

Dismissal of the 90/180-day claim was warranted in light of plaintiff's bill of particulars and deposition testimony wherein she alleged that she was confined to home for several days, and missed just four days of work after the accident (*see Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]).

The court properly denied leave to renew since plaintiff's new evidence of contemporaneous limitations did not address the causation issue, and thus would be insufficient to defeat summary judgment.

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8830 The People of the State of New York, Ind. 5749/09
Respondent,

-against-

Vincent Franklin,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (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 (A. Kirke Bartley, Jr., J.), rendered on or about March 31, 2011,

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

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

ENTERED: DECEMBER 13, 2012

CLERK

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

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8831 Carlene Hernandez, Index 307436/09
Plaintiff,

-against-

Advance Transit Co., Inc., et al.,
Defendants-Appellants,

General Glass & Metal, L.L.C., et al.,
Defendants-Respondents.

Landman Corsi Ballaine & Ford P.C., New York (Andrew P. Keaveney of counsel), for appellants.

Burke, Gordon & Conway, White Plains (Ashley E. Sproat of counsel), for respondents.

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about November 30, 2011, which denied defendants' Advance Transit Co. Inc. (Advance) and Franklin S. Lopez's motion to renew a prior order of the same court and Justice, entered on or about July 29, 2010, and for summary judgment, unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by plaintiff while she was a passenger in a vehicle owned by defendant Advance and operated by defendant Lopez when it was rear-ended by a vehicle driven by defendant Joseph DiGerardo, Jr., the motion court properly denied summary judgment to defendants Advance and Lopez. Although a rear-end collision with

a stopped vehicle creates a presumption of negligence on the part of the operator of the moving vehicle (*see Berger v New York City Hous. Auth.*, 82 AD3d 531 [1st Dept 2011]), summary judgment is not warranted where, as here, there are questions of fact as to whether the stopped vehicle was the proximate cause of the accident. There is evidence indicating that defendant Lopez's vehicle "suddenly swerved from the extreme right lane to the far left lane (across two lanes of traffic) and suddenly stopped short" just prior to the collision.

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8832 The People of the State of New York, Ind. 1046/10
Respondent,

-against-

James Porter,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello 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 (Bonnie G. Wittner, J.), rendered on or about January 25, 2011,

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

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

ENTERED: DECEMBER 13, 2012

CLERK

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

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8833 In re Roxroy R.,

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

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

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

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about March 13, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 18 months, with 100 hours of community service, unanimously affirmed, without costs.

The disposition was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection, and was a proper exercise of discretion (*see*

Matter of Katherine W., 62 NY2d 947 [1984]). The underlying incident was serious and violent, and the length and conditions of probation were not unduly punitive.

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8834 Henry Coaxum, Index 309385/09
Plaintiff-Appellant,

-against-

Nor-Topia Service Station, Inc., et al.,
Defendants-Respondents.

Burns & Harris, New York (Christopher J. Donadio of counsel), for appellant.

Law Office of James J. Toomey, New York (Evy Kazansky of counsel), for Nor-Topia Service Station, Inc. and Michael Vasquez, respondents.

O'Connor, McGuinness, Conte, Doyle, Oleson, Watson & Loftus, LLP, White Plains (Montgomery L. Effinger of counsel), for Darryl A. Robinson, respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 12, 2011, which, upon reargument, inter alia, granted defendants' motions to dismiss the complaint as barred by CPLR § 205(a), unanimously affirmed, without costs.

The motion court correctly determined that the order dismissing plaintiff's complaint under Bronx County Index No., 28626/2001 was for failure to prosecute, as evidenced by plaintiff's willful and contumacious disregard for the court's discovery orders (*Perez v New York City Hous. Auth.*, 302 AD2d 210 [1st Dept 2003]). Accordingly, plaintiff's second complaint, filed under Bronx County Index No. 309385/09, was barred by CPLR

§ 205(a) and properly dismissed by the motion court.

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 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8835N CDR Créances S.A.S., Index 650084/09E
Plaintiff-Appellant,

-against-

First Hotels & Resorts Investments, Inc.
(also known as LES Premiers Investissements
Hoteliers & Villegiature, Inc.), et al.,
Defendants-Respondents,

Board of Managers of the Trump World
Tower Condominium, et al.,
Defendants.

_____

Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for First Hotels & Resorts Investments, Inc., respondent.

Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC (Carl J. Nichols of the bars of the State of Virginia and the District of Columbia, admitted pro hac vice, of counsel), for HSBC Bank USA, N.A., respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 8, 2012, which denied plaintiff's motion for leave to amend its complaint, unanimously affirmed, with costs.

Plaintiff brought this action to force the sale of property owned by defendant First Hotels & Resorts Investments, Inc., the mortgage on which was held by defendant HSBC Bank USA, N.A. First Hotels was one of many entities owned by nonparties Leon Cohen, Maurice Cohen and Sonia Cohen. It is undisputed that the

Cohens engaged in a web of fraudulent activity that resulted in the loss to plaintiff of hundreds of millions of dollars and that they used their accounts at HSBC to move money that plaintiff alleges was at least in part fraudulently obtained. Plaintiff sued the Cohens, among others, and obtained judgments against them from courts in New York and Florida. In seeking to collect on the judgments, plaintiff issued subpoenas to HSBC, inter alia. HSBC responded to the subpoenas, albeit not always to plaintiff's satisfaction.

After HSBC responded to the subpoenas, two members of the Cohen family were indicted for various tax violations. In connection with the indictments, the United States Department of Justice issued a grand jury subpoena to HSBC. HSBC produced many documents (the DOJ Documents), some of which had not been produced to plaintiff in response to its civil subpoena. Plaintiff requested and received copies of the DOJ Documents. Plaintiff asserts that HSBC's failure to produce the documents to it was intentional; HSBC asserts that the documents were not produced because they were not responsive, or for other reasons.

Plaintiff now seeks to amend the complaint in this action, to, inter alia, assert a claim of "aiding and abetting a conspiracy to defraud" against HSBC, add a number of new defendants who have no connection with the property or its sale,

and add new allegations against First Hotels, including a claim of fraud and conspiracy to defraud. Plaintiff maintains that amendment is warranted by new information revealed by the DOJ Documents.

Nothing in the DOJ Documents, however, warrants amendment of the complaint. Plaintiff's argument amounts to little more than that, because HSBC failed to produce the DOJ Documents in response to its subpoena, it must have been concealing those documents in an effort to further the Cohens' fraud against plaintiff. Even though HSBC should have produced the DOJ Documents in response to plaintiff's subpoena, the proper action for plaintiff in the face of what is essentially discovery misconduct is not to make HSBC a defendant in its action for fraud. As we observed in a prior appeal in this case, the "ultimate sanction" for discovery misconduct is a default judgment (*see* 62 AD3d 576, 577 [1st Dept 2009]).

In any event, the proposed amended complaint fails to state a cause of action for aiding and abetting fraud (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *see also National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]). Like the dismissed complaint in *Weksel*, it is "devoid of any but the most conclusory allegations" (124 AD2d at 149). Plaintiff states, citing *Oster* (77 AD3d at

56), that HSBC had actual knowledge of the fraud as discerned from the surrounding circumstances, but to identify those circumstances it sets forth its very detailed allegations of the Cohens' fraud against HSBC. As we observed in *Weksel*, aiding and abetting "is not made out simply by allegations which would be sufficient to state a claim against the principal participants in the fraud" (124 AD2d at 149).

The proposed allegations of fraud and conspiracy to defraud against First Hotels, which the motion court did not address, are supported by the same allegedly newly discovered evidence as underlies the proposed HSBC amendment. Its use against First Hotels is more offensive, because most of this evidence is not new at all, and plaintiff asserted a claim for conspiracy to defraud against First Hotels in the first complaint, and the claim was dismissed. Moreover, while it would not be impossible for plaintiff to say that it only discovered the extent of HSBC's alleged involvement in the conspiracy after reviewing the DOJ Documents, it could not say that about First Hotels.

To the extent First Hotels can be deemed liable for amounts owed pursuant to the aforementioned judgments obtained by plaintiff, plaintiff's appropriate course is to seek amendment of those judgments, not to seek relief via this completely unrelated action. Indeed, plaintiff's counsel stated at oral argument that

if the court denied amendment, plaintiff would bring a special proceeding pursuant to CPLR 5225. Moreover, no allegation in the proposed amended complaint suffices to connect First Hotels, an entity that did not even exist until 2004, when it was created to purchase the property, with a fraud by the Cohens that occurred decades ago, regardless of any use the Cohens may ultimately have made of it.

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8836N Arianit Simoni, Index 302290/10
Plaintiff-Respondent,

-against-

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

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Ropers Majeski Kohn Bentley, New York (Andrew L. Margulis of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 18, 2012, which, insofar as appealed from, denied defendants' motion to stay the instant legal malpractice action pending the resolution of plaintiff's related personal injury action, and granted plaintiff's cross motion for leave to amend the complaint to add further allegations of malpractice against defendants, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying defendants' request for a stay of the legal malpractice action pending resolution of plaintiff's personal injury action (*see* CPLR 2201). The proceedings do not share complete identity of parties, claims and relief sought (*see 952 Assoc., LLC v Palmer*, 52 AD3d 236 [1st Dept 2008]; *Esposit v Anderson Kill Olick & Oshinsky, P.C.*, 237 AD2d 246 [2d Dept 1997]).

The motion court also properly permitted plaintiff to amend the complaint (*see* CPLR 3025[b]). The amended complaint and the documents submitted in support of the cross motion allege facts from which it could reasonably be inferred that defendants' negligence caused plaintiff's loss (*see Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435 [1st Dept 2011]). At this stage of the proceedings, plaintiff does not have to show that he actually sustained damages as a result of defendants' alleged malpractice (*id.* at 436).

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8837N- Index 651192/11
8837NA Signal Capital Holdings Corp., etc.,
Plaintiff-Respondent,

-against-

Banc of America Leasing &
Capital, LLC, etc., et al.,
Defendants-Appellants.

Nixon Peabody LLP, New York (Adam B. Gilbert of counsel), for appellants.

Jenner & Block LLP, New York (Brian J. Fischer of counsel), for respondent.

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 23, 2012, which, to the extent appealed from as limited by the briefs, denied defendants' motion to compel arbitration, unanimously affirmed, with costs.

This dispute over the meaning of the ambiguous contract term "the date of scheduled expiration of the Leases" does not fall within the parties' narrow alternative dispute resolution (ADR) clause providing for an independent financial professional to verify certain calculations based on a dollar figure for rental income as of that date (*see McDonnell Douglas Fin. Corp. v Pennsylvania Power & Light Co.*, 858 F2d 825 [2d Cir 1988]). The focus of the ADR clause is a mathematical calculation; contract interpretation would be outside the expertise of the independent

accountant acting as verifier (*see Fit Tech, Inc. v Bally Total Fitness Holding Corp.*, 374 F3d 1, 8 [1st Cir 2004]).

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

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

ENTERED: DECEMBER 13, 2012

CLERK

Gonzalez, P.J., Mazzarelli, Acosta, Román, JJ.

8839N Elaine K. Burn, Index 314953/03
Plaintiff-Appellant,

-against-

Steven A. Burn,
Defendant-Respondent.

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Tarter Krinsky & Drogin LLP, New York (Debra Bodian Bernstein of counsel), for appellant.

Hoffman Polland & Furman PLLC, New York (Jennifer R. Deniger of counsel), for respondent.

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Order, Supreme Court, New York County (Lori S. Sattler, J.), entered August 10, 2012, which, insofar as appealed from, denied plaintiff wife's motion to hold defendant husband in civil contempt and to compel him to comply with the court's June 2011 order and the parties' separation agreement, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for a determination of the appropriate punishment for defendant's contempt and plaintiff's counsel fee request.

The parties' 2003 separation agreement provided that in exchange for waiving her interest in certain distributable property, including defendant's retirement accounts and his interests in real property worth millions of dollars, plaintiff was to receive maintenance payments from defendant "until the death of the Wife or the death of the Husband." The agreement

was incorporated by reference but not merged into the 2004 judgment of divorce. Plaintiff remarried in July 2011.

In the absence of an agreement to the contrary, spousal support ordered in a judgment of divorce must terminate upon the remarriage of the payee (*see* Domestic Relations Law § 248). However, where, as here, "the parties' separation agreement expressly or impliedly provides that spousal support is to continue after the payee's remarriage, such obligation will be enforced" (*Hancher v Hancher*, 31 AD3d 1152, 1153 [4th Dept 2006]). A separation agreement that provides for spousal support to be paid for life or some other fixed period manifests the parties' intent that the support obligation is to continue despite the payee's remarriage (*see Matter of DeAngelis v DeAngelis*, 285 AD2d 593 [2d Dept 2001]; *Jung v Jung*, 171 AD2d 993 [3d Dept 1991]).

Here, although the separation agreement does not expressly address the effect of remarriage on the maintenance obligation, the language of the maintenance clause, as well as consideration of the entire agreement, including plaintiff's waiver of a share of assets worth millions of dollars, evinces the intent of the parties that the maintenance payments would continue until plaintiff's death or the death of defendant, regardless of plaintiff's marital status (*see Quaranta v Quaranta*, 212 AD2d 683

[2d Dept 1995]). Furthermore, the commencement of a plenary action was not required because the judgment of divorce incorporated the parties' agreement by reference, and thus, plaintiff can enforce the provisions of the separation agreement in this action pursuant to Domestic Relations Law § 244 (*see Werblud*, 128 AD2d 194, 199-200 [1st Dept 1987]).

Plaintiff also correctly maintains that defendant should have been found in civil contempt. In the June 2011 order, Supreme Court, having found that defendant willfully disobeyed a prior order, directed defendant to immediately pay his May 2011 maintenance obligation and to pay all future maintenance by automatic transfer. Plaintiff established that defendant was aware of this clear and unequivocal order, and there is no dispute that defendant failed to make the maintenance payments as directed, and thus prejudiced plaintiff's rights (*see Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; Judiciary Law § 753).

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

ENTERED: DECEMBER 13, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

8056 Enrique Sosa, Index 112660/09
Plaintiff,

-against-

46th Street Development LLC, et al.,
Defendants-Appellants,

Five Star Electrical Corp.,
Defendant-Respondent.

Goldberg Segalla LLP, Garden City (Brian W. McElhenny of counsel), for appellants.

Peisner Girsh Schaefer & Sfouggatakis, New York (Allen H. Gueldenzopf of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered December 23, 2011, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Plaza Construction Corporation (Plaza) for conditional summary judgment on its cross claim seeking contractual indemnification from defendant Five Star Electrical Corp. (Five Star), affirmed, without costs.

Defendant 46 Street Development LLC (owner) hired Plaza to manage the construction of a 42-story residential building owned by the former. Plaza hired Five Star as the electrical subcontractor. Pursuant to the contract between Plaza and the owner, Plaza was solely responsible for "coordinating the

construction of all portions of the work," and had broad and specific responsibilities relating to site safety. Indeed, Plaza hired an outside safety coordinator, Total Safety Consulting, to ensure that all proper safety precautions were taken on the site. The contract between Plaza and Five Star contained an indemnification and hold harmless clause, which provided that Five Star would indemnify and hold Plaza harmless for damages which "ar[i]se out of or are connected with or ... claimed to arise out of or be connected with ... performance of [w]ork by [Five Star]."

Plaintiff Enrique Sosa was an employee of non party Port Morris Tile Corporation, the tile contractor. He alleges that at about 7:15 a.m. on December 13, 2007, while engaged in tiling work in a bathroom in an apartment on the 10th floor, he sustained injuries from an electric shock after coming into contact with an exposed, hanging electric wire. When the accident occurred, Con Edison was already in the process of transforming the power supply in the building from "temporary" to "permanent." The temporary supply was made available to contractors while the superstructure of the building was being erected. Robert Marrone, who was Plaza's superintendent at the project in the year leading up to the accident, testified that power was gradually switched to permanent as the building rose

and individual apartments became ready to be finished. However, even after sections of the building went to permanent power supply, that power would remain off unless a contractor specifically requested that power be supplied to the apartments. To connect the power in those apartments, Five Star was required to activate breakers at central panels which controlled power to three floors. It also had to activate breakers in the individual apartments where the requesting contractor desired to work. Plaza generally coordinated with Five Star when individual contractors needed power in an apartment.

A few days before the accident in question, Port Morris requested that the permanent power supply in the apartments be activated in two specific areas, including at the outlets providing electricity for washing machines. Port Morris planned to plug tile-cutting saws into those outlets. Five Star accommodated the request by activating breakers at the central panels and at the necessary areas in the apartments. It also went to each individual apartment to “safe off” the relevant outlets, which involved insulating the wires at those outlets to prevent the workers from sustaining electrical shocks. Chris Cote, Five Star’s foreman, testified at his deposition that on the night before the accident he saw workers from contractors other than Port Morris working in apartments and using permanent

electricity. The only way these workers could have accessed the electricity was to activate breakers in those apartments. However, these workers were not permitted to do so without direct authorization from Five Star. Cote reported what he saw to Plaza. This was not the first time that Cote noticed other contractors circumventing Five Star to draw more power for their work. In fact, he testified, it happened more frequently in the beginning stages of the project. The subject incident occurred toward the end of the project.

Two of Five Star's workers gave testimony that was consistent with Cote's to the extent they stated that it was not unheard of for other contractors, after the permanent power supply had been activated, to energize electric power in individual apartments without Five Star's knowledge or permission. One of the workers, Ralph Lopez, testified that from the time the permanent power supply was activated at the site, he was aware of incidents where other trades would activate breakers inside apartments without Five Star's knowledge. Bridgette Kennedy, who had been working at the job for a few weeks before the accident, testified that the problem occurred on a daily basis. She further averred that the problem was not uncommon in the industry. Finally, Kennedy testified that the issue was discussed at safety meetings run by Plaza through its contractor,

Total Safety Consulting.

Plaza's superintendent on the project, William Rogers, testified that it was "possible" that there was a problem during the construction of the building with contractors activating electricity in apartments without proper authorization. He further testified that it was "possible" that the issue came up during safety meetings.

Plaza cross-claimed against Five Star for, inter alia, contractual indemnification. It then moved for conditional summary judgment on that claim. Conceding that any evidence of active negligence on its part would render the indemnification clause unenforceable, Plaza argued that "[t]he fact that a construction manager runs safety meetings, inspects the site, supervises and coordinates the work of the trades etc. is not the basis for a claim of active negligence."

In opposition, Five Star did not contest that the indemnification provision covered the subject accident. However, relying on testimony from Five Star's witnesses that there was a problem at the construction site with unauthorized activation of permanent power, it asserted that, pursuant to General Obligations Law § 5-322.1, an issue of fact existed regarding enforceability of the indemnification provision.

In a ruling from the bench, the court denied the motion. It

stated that “to the extent that Plaza was coordinating the different trades within the unit, whether or not there was knowledge of them turning the circuit breakers on is a question of fact. One of [Five] Star’s workers says they kept finding the circuit breakers switched on when they should have been switched off, and this is a question for the jury.”

As trite as such recitations have become, this is a case that deserves a brief reiteration of the by now well-settled constraints imposed on any court considering a summary judgment motion. “On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]). Courts may not resolve summary judgment motions by making credibility determinations, as those are exclusively within the province of the trier of fact (*see Sanchez v Finke*, 288 AD2d 122, 123 [1st Dept 2001]).

Applying these principles, the burden was on Plaza to

demonstrate, beyond a material issue of fact, that it bore no responsibility for plaintiff's accident. Because this was an accident on a construction site, it had to show that it did not exercise any authority over the means and methods of plaintiff's work, or that, to the extent the accident arose out of a dangerous condition on the premises, it was not liable for the condition (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 148 [1st Dept 2012]). It does not appear to be in dispute that this accident falls into the latter category. Thus, Plaza was required to establish that it did not create the condition or have actual or constructive notice of its existence prior to the accident in sufficient time to take corrective measures (*see Mitchell v New York Univ.*, 12 AD3d 200, 201 [1st Dept 2004]).

It appears from the testimony, especially that of Lopez and Kennedy, that there was some history during the project of contractors activating the electricity in individual apartments without having first received the proper authorization. Further, and significantly, Kennedy testified that the issue came up at safety meetings run by Plaza. This suggests that Plaza was concerned about the practice and considered it a possible threat to the safety of workers such as plaintiff. No one from Plaza refuted the testimony of Lopez and Kennedy. To the contrary, its superintendent Rogers stated that it was "possible" that this

occurred. Under these circumstances, and giving every benefit of the doubt to Five Star as the non-moving party, we find that an issue of fact exists as to whether Plaza had the requisite notice of a dangerous condition in sufficient time to do something about it. Accordingly, summary judgment was properly denied (*see Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 429 [1st Dept 2006]).

In opining that there are no issues of fact whether Plaza was negligent, the dissent misapprehends the record. First, it states that Cote "testified that there was no *ongoing* problem with other subcontractors turning on electrical power before the plaintiff's accident". In fact, however, Cote testified that, even in the early stages of construction, contractors were "trying to bypass Five Star Electric to get more power for their work." Including Lopez and Kennnedy, the two other Five Star workers who testified, there were three witnesses who consistently testified that in the weeks prior to the accident, there was an issue with unauthorized activations of electricity.

The dissent further reads the record incorrectly when it states that Kennedy "could not remember when she worked at the project." At first she could not, when she asked to describe in absolute terms her time energizing outlets in individual apartments. However, when asked to state the period of time in

terms of weeks or months, she answered, “Probably a couple of weeks.” Again, this Court is not permitted to make credibility determinations and as such this testimony cannot be rejected out of hand. Further, contrary to the dissent’s comment that Lopez could not say when contractors accessed electricity “with reference to the plaintiff’s accident,” Lopez’s testimony that the problem existed was in response to a question asking if it happened “[f]rom the time the power was provided to the apartment panels and was permanent.” Because Marrone testified that power was switched gradually from temporary to permanent, beginning on the lowest floors and proceeding to the higher floors, and the accident occurred on the 10th floor, an inference can be drawn that Lopez was describing a problem which began some time before the accident.

Finally, the dissent ignores Kennedy’s testimony that the issue of other contractors activating electricity in individual apartments was discussed at Plaza’s safety meetings. If we assume this to be true, as we must, it would evince specific awareness of the problem and an acknowledgment by Plaza that it considered it to be a significant safety concern. Accordingly, the cases cited by the dissent where the defendant only had a general awareness of a dangerous condition are completely inapposite.

Five Star has pointed to concrete evidence in the record to suggest that Plaza had notice of a dangerous condition on the construction site in sufficient time to remedy it. Accordingly, because a material issue of fact exists whether Plaza's negligence voids Five Star's contractual obligation to indemnify Plaza against plaintiff's claims, the motion court properly denied Plaza summary judgment on its cross claim against Five Star.

All concur except Catterson, J. who dissents in a memorandum as follows:

CATTERSON, J. (dissenting)

I must respectfully dissent. In my opinion, codefendant subcontractor Five Star Electrical Corp. (hereinafter referred to as "Five Star") fails to raise an issue of fact as to whether defendant Plaza Construction Corp. was actively negligent in bringing about the plaintiff's injury which was caused by a live, exposed wire while he was tiling a bathroom. Five Star contends, inter alia, that general contractor Plaza had constructive notice of a dangerous condition at the building site where other trades were allegedly turning on electrical power without authorization. In my view, the testimony upon which Five Star relies simply does not support its contention.

As set forth in greater detail below, at best the testimony of two Five Star electricians and its foreman establishes only that Plaza may have had a general awareness of a potentially hazardous condition, which precedent deems is an insufficient basis for constructive notice. Moreover, the testimony of the Five Star foreman as to a telephone call he made to Plaza regarding a situation where other tradesmen had turned on circuit breakers in some apartments also fails to raise an issue of fact as to notice. Given the timing of the call on the night before the plaintiff's accident, there is no evidence of record that Plaza could have taken any concrete steps to remedy the situation

before the plaintiff's accident at 7.15 a.m. the following morning. Therefore, in my view, Plaza is entitled to contractual indemnification from Five Star, and I would grant its motion for summary judgment.

Defendant 46th Street Development LLC hired Plaza to manage the construction of a 42-story residential building. Plaza's contractual responsibility included "coordinating the construction of all portions of the work" among the trade subcontractors at the site. Plaza hired Five Star for the electrical work and nonparty Port Morris Tile Corp. for the tile work. The plaintiff, an employee of Port Morris Tile, alleges that at about 7:15 a.m. on December 13, 2007, he sustained injuries from an electric shock after touching an exposed, live electric wire while tiling a bathroom in one of the apartments in the building.

The plaintiff brought this action against, inter alia, Plaza and Five Star alleging violations of Labor Law §§ 200, 240, and 241. Plaza cross-claimed against Five Star for contractual indemnification based on a very broad indemnification and "hold harmless" provision, which stated that Five Star would indemnify and hold Plaza harmless for damages that "arise out of or are connected with [...] performance of [w]ork by the subcontractor."

At the conclusion of discovery, Plaza moved for summary

judgment on its indemnity claim against Five Star on the ground that the plaintiff's accident arose out of Five Star's work. Plaza argued that the plaintiff was injured after he touched live electrical wires that the plaintiff claimed were not taped or capped to prevent shocks. Plaza contended that the broad indemnity clause applied whether Five Star was negligent or not.

Five Star did not dispute that the plaintiff's accident arose out of or was connected to Five Star's electrical work. Rather, Five Star argued that New York General Obligations Law § 5-322.1 precludes full contractual indemnification on the ground that Plaza was actively negligent. Specifically, Five Star contended that there was evidence that Plaza had notice that other subcontractors were improperly turning on circuit breakers and that Plaza failed to "coordinate the trades" at the project. The motion court agreed and denied Plaza's motion.

The majority affirms, finding that there is "concrete evidence in the record to suggest that Plaza had notice of a dangerous condition on the construction site in sufficient time to remedy it." For the reasons set forth below, I disagree. New York General Obligations Law § 5-322.1(1) states that

> "[an] ... agreement ... in connection with ... a contract or agreement relative to the construction ... of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons ... caused by or resulting from the negligence of

> the promisee ... whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

Thus, a subcontractor seeking to avoid enforcement of an indemnity agreement has the burden of proving that the indemnitee general contractor was "negligent to some degree." Brown v. Two Exch. Plaza Partners, 146 A.D.2d 129, 539 N.Y.S.2d 889 (1st Dept. 1989), aff'd 76 N.Y.2d 172, 556 N.Y.S.2d 991, 556 N.E.2d 430 (1990). Conversely, summary judgment may be granted to a contractor on its contractual indemnity claim against a subcontractor when there is no possibility that the contractor will be found actively negligent. See Warnett v A.J. Pegno Constr. Corp., 1 A.D.3d 207, 767 N.Y.S.2d 107 (1st Dept. 2003); see also Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 658 N.Y.S.2d 903, 680 N.E.2d 1200 (1997) (absent a finding of negligence on an indemnitee's behalf, an indemnity agreement would not run afoul of GOL 5–322.1).

A general contractor may be held liable for negligence when it has actual or constructive notice of a dangerous condition and fails to take corrective action. See Mitchell v New York Univ., 12 A.D.3d 200, 200-201, 784 N.Y.S.2d 104, 106 (1st Dept. 2004). A defendant has constructive notice of a hazardous condition when a defect is visible and apparent and exists for a sufficient length of time prior to the accident to permit the defendant's

employees to discover and remedy it. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837-838, 501 N.Y.S.2d 646, 647, 492 N.E.2d 774, 775 (1986).

Here, Five Star contends that Plaza was negligent because it failed to "keep the hands of the other trades out of the electricians' work." Five Star further contends that Plaza had constructive notice of this "recurring hazardous condition," and failed to address it in a timely and reasonable manner. In support of this argument, Five Star relies primarily on the testimony of two electricians who were responsible for capping or taping the wires as well as the testimony of its foreman.

Five Star's general foreman testified that two or three days before the plaintiff's accident, he was asked to "energize" or provide permanent power to apartments on the first 11 floors of the building. He directed two electricians to put wire nuts or tape on the wires and turn on the power to the apartments. He instructed them to then turn on the circuit breakers for "the washer unit so the tile guy would have power to the washer outlet and operate his saw, and the lighting circuit, so they had light to perform their work." All other circuit breakers, including those in the bathrooms, were to be left off.

The foreman further testified that there was no *ongoing* problem with other subcontractors turning on electrical power

before the plaintiff's accident. However, he acknowledged that on the night before the accident, he observed that some workers in some of the apartments had turned on electrical circuits without permission. He testified that he told those workers they could not do so, and that he reported the incident to Plaza. However, he did not identify the workers or the apartments.

The two electricians testified that they capped and taped the wires and activated the two circuits in each apartment as instructed. Both of them also testified as to seeing other tradesmen improperly turning on electrical power in certain apartments. However, neither electrician could identify the location of the apartments.

One electrician testified that she saw "other trades touching electrical breakers ... [a]lmost every day ... from the time [she] started." However, she could not remember when she worked at the project. The second electrician testified that some of the trades went into the panel to turn breakers on "*once in a while.*" However, he could not say when this occurred with reference to the plaintiff's accident. Hence the testimony of the first electrician is inconsistent with that of the second, and the testimony of both electricians is inconsistent with that of the Five Star foreman.

More significantly, the vagueness of the testimony precludes

any conclusion that a triable issue of fact exists as to Plaza's constructive notice. At best, the testimony imputes to Plaza only a general awareness of a potentially dangerous condition and it is well settled that a "general awareness" that a dangerous condition may be present is legally insufficient to constitute constructive notice of the particular condition that caused a plaintiff's accident. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969, 622 N.Y.S.2d 493, 494, 646 N.E.2d 795, 796 (1994). Thus, vague testimony, which cannot establish the length of time a hazardous condition has existed, is insufficient to raise a triable issue of fact as to constructive notice. See e.g. Kobiashvilli v. Hill, 34 A.D.3d 747, 747-748, 828 N.Y.S.2d 68, 69 (2d Dept. 2006) ("appellant established its entitlement to judgment as a matter of law by submitting proof that the length of time for which the [defect] existed was unknown")(internal quotation marks omitted); Reilly v. Newireen Assoc., 303 A.D.2d 214, 756 N.Y.S.2d 192 (1st Dept. 2003), lv. denied 100 N.Y.2d 508, 764 N.Y.S.2d 235, 795 N.E.2d 1244 (2003) (testimony that a hoist broke down "periodically" or "twice a week" was too vague and unspecific to state a viable claim for negligent maintenance).

Nor, in my view, does Five Star raise an issue of fact as to notice by relying on its foreman's testimony as to his phone call

to Plaza on the night before the accident. Actual notice "must call attention to the specific defect or hazardous condition *and its specific location, sufficient for corrective action to be taken*." Mitchell, 12 A.D.3d at 201, 784 N.Y.S.2d at 106 (emphasis added). Here, the foreman could not identify the workers who allegedly were turning on electrical power without authorization; nor could he identify the apartments, or the floors on which they were located.

Even assuming arguendo that the foreman's telephone phone call was sufficiently specific to provide Plaza with actual notice, there is no evidence that there was time for Plaza to take any concrete steps to remedy the hazardous condition. The only evidence concerning a remedy was testimony that after the accident locks were installed on each apartment's electric panel to ensure that only Five Star would have access to the circuit breakers. Not only did Five Star's foreman admit that this was not the standard practice in the industry, but Plaza, who was

allegedly notified the night before the plaintiff's accident, could not have had time to have locks installed on every apartment panel in the 42-story building when work began at 7 the following morning and the plaintiff was injured at 7:15 a.m.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Mazzarelli, Saxe, Catterson, DeGrasse, JJ.

8137 Arpi Koulajian, Index 100673/10
Plaintiff-Appellant,

-against-

Tamara Smith, et al.,
Defendants-Respondents.

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Frederic Lewis, New York, for appellant.

DeSena & Sweeney, LLP, Hauppauge (Shawn P. O'Shaughnessy of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 4, 2011, which granted defendants' motion for summary judgment dismissing the complaint, affirmed, without costs.

Contrary to plaintiff's contention, there is no evidence in the record to support her theory that either of defendants was pulling the suitcase that plaintiff tripped over. Although defendants assert that the child was in control of the suitcase, plaintiff insists that the child was not. Accordingly, she could not prove a claim for negligent supervision, as such a cause of action is dependent on an allegation that a child improvidently used or operated a dangerous instrument (*see Rios v Smith*, 95 NY2d 647, 652-653 [2001]). In light of this, the dissent's argument concerning whether the suitcase was a dangerous

instrument is wholly academic.

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

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

SAXE, J. (dissenting)

I agree with the majority that plaintiff has not presented any evidence from which it could be found that one of the defendant parents, rather than their two year old, was handling the suitcase that caused plaintiff's fall. However, I disagree with the dismissal of the claim of negligence against the parents. In particular, I disagree with the motion court's implicit conclusion that entrusting a two year old with a medium-sized wheeled suitcase on a Manhattan sidewalk does not, as a matter of law, create a dangerous instrumentality. Although plaintiff challenged the order on appeal with the contention that it was not alleging negligent supervision, and that an issue of fact was presented as to who was actually handling the suitcase, I would deny dismissal, finding an issue of fact as to whether defendant parents breached their duty to third parties by creating an unreasonable risk of harm to others when they placed a wheeled suitcase under the control of their two year old on a public sidewalk.

Plaintiff alleges that at around noon on Saturday, October 3, 2009, she was walking on the sidewalk of York Avenue between 78th Street and 79th Street in Manhattan when she was struck from behind, and caused to fall, by what turned out to be a wheeled suitcase that hit her in the back of her leg. Plaintiff did not

see the suitcase until after she fell, and she did not know who had been handling it. According to defendants' deposition testimony, their two year old child had been pulling the suitcase at the time of the incident, although neither parent saw how it occurred. The child's father, David Austin, had been walking in front of the child, holding her right hand with his left hand, while she pulled the suitcase behind her, with its handle fully extended. The child's mother was behind them, but by the time she turned the corner onto York Avenue from 78th Street, plaintiff was already falling, and the suitcase was on the ground, no longer held by anyone.

Defendants' summary judgment motion was based on the assertion that it was their child who was pulling the suitcase, and that the child herself, being two years old, could not be found negligent (*see Verni v Johnson*, 295 NY 436, 438 [1946]), while a parent cannot be held liable for lack of supervision of a child unless the accident was clearly foreseeable from the child's improvident use or operation of a dangerous instrument that was subject to the parent's control (*see Rios v Smith*, 95 NY2d 647, 652-653 [2001]). They asserted that a suitcase cannot be a dangerous instrument.

Plaintiff countered that there was a question of fact as to who was pulling (or pushing) the suitcase at the time she was

struck, but that it would have been impossible for a child the size of defendants' daughter -- who was no taller than the suitcase itself, and weighed less than 30 pounds -- to handle it.

The majority holds that there is no viable claim against defendants, as there is no evidence supporting plaintiff's theory that one of the defendants handled the suitcase. I disagree with that broad holding, and submit that the evidence showing that defendants' child was handling the suitcase at the time of the accident may warrant holding the parents liable if they entrusted their child with an object that, under those particular circumstances, created an unreasonable risk of harm to others.

In *Nolechek v Gesuale* (46 NY2d 332 [1978]) and *Rios v Smith* (95 NY2d 647 [2001]), the Court of Appeals upheld negligence claims against parents who provided their minor children with motorized vehicles when they were aware that others would be endangered by their use. The defendant father in *Nolechek* had given a motorcycle to his 16-year-old son who was blind in one eye and had impaired vision in the other (46 NY2d at 337), and in doing so may have breached his "duty to protect third parties from the foreseeable harm that results from the children's improvident use of dangerous instruments, to the extent that such use is subject to parental control" (*id.* at 340). In *Rios*, the 17-year-old plaintiff was injured when riding as a passenger on

an ATV supplied to the 16-year-old driver by his friend, the defendant's son (95 NY2d at 650). The Court held that the evidence was sufficient to support a fact issue as to whether the father had "created an unreasonable risk of harm to plaintiff by negligently entrusting the ATVs to his son" (*id.* at 653).

While those cases concerned instrumentalities that are generally agreed to be dangerous, the law does not limit the possibility of parental liability to instrumentalities which by their nature alone are dangerous.

Importantly, the PJI does not frame the issue of negligent entrustment of an instrumentality to a child in terms of "dangerous instruments." Rather, PJI 2:260 states,

> "A parent is not responsible for the acts of (his, her) child, but is responsible for the failure to use reasonable care in entrusting to or leaving in the possession of the child an instrument which, *in view of the nature of the instrument, the age, intelligence, and disposition of the child and (his, her) prior experience with such an instrument*, constitutes an unreasonable risk of harm to others" (emphasis added).

The Comment to this instruction further explains that it is not the instrument alone that establishes the danger: "The tort consists of entrusting or permitting the use of an instrument *made dangerous by the age, intelligence, infirmity, disposition or training of the user* which causes injury to a third party" (1B NY PJI3d 2:260 at 723 [2012] [emphasis added]). As the *Rios*

Court explained, "[w]hether a particular object qualifies as a dangerous instrument depends on the nature of the instrument and the facts pertaining to its use, including the particular attributes of the minor using or operating the item" (95 NY2d at 653, citing 45 NY Jur 2d, Domestic Relations § 534, *Craft v Mid Is. Dept. Stores*, 112 AD2d 969, 970 [2d Dept 1985], and *Alessi v Alessi*, 103 AD2d 1023, 1024 [4th Dept 1984]).

There is no question that "items that are commonly used by children, of suitable age in a manner consistent with their intended use, may not, as a matter of law, be classified as dangerous instruments" (*Rios*, 95 NY&2d at 653, citing *Sorto v Flores*, 241 AD2d 446, 447 [2d Dept 1997], *Barocas v F.W. Woolworth Co.*, 207 AD2d 145, 148 [1st Dept 1995], and *Santalucia v County of Broome*, 205 AD2d 969, 970-971 [3d Dept 1994], *lv dismissed* 84 NY2d 923 [1994]). However, the cases in which claims of negligent entrustment have been dismissed all concern playthings or items associated with child rearing.

Sorto (241 AD2d 446) concerned the parents' entrustment of a bicycle to a five-and-one-half-year-old boy who then collided with a three-year-old girl, injuring her. The Court observed that there was no proof that the bicycle was unsuitable for a boy of his age, height, or weight, nor any proof that he lacked the skills of a boy his age or that he was riding it improperly or in

an inappropriate area (*id.* at 447). Similarly, in *Santalucia* (205 AD2d 969), the parents of a five year old provided with a 16-inch bicycle were held not liable as a matter of law to a plaintiff injured by that child. The Court emphasized that "[r]iding a bicycle has become, practically speaking, a natural stage of every child's development" (*id.* at 970), so as long as there was no evidence that the child lacked the basic skills to ride it alone, the parents could not be said to have breached their duty to third parties. And this Court, in *Barocas* (207 AD2d 145), held that a parent who gave a plastic doll to a child, not knowing that it would have a sharp edge when broken, was not liable, as a matter of law, for negligent supervision based on a theory of entrusting a child with a dangerous instrumentality, since the item in question was not something that the parents had reason to believe unsafe (*id.* at 148).

The case of *Zarilla v Pennachio* (90 AD3d 1040 [2d Dept 2011]), presents some superficial similarities to the present matter. There, a grandmother was struck by a battery-powered tricycle scooter being ridden by her three-year-old grandson, whom she was then supervising. The grandmother sued the child's mother, contending that she had negligently entrusted her child with a dangerous instrument. The Second Department dismissed the negligent entrustment action, stating that "items that are

commonly used by children, of suitable age in a manner consistent with their intended use, may not, as a matter of law, be classified as dangerous instruments" (*id.* at 1040-1041, quoting *Rios*, 95 NY2d at 653).

But, there is an important distinction between *Zarilla* and the present case. In *Zarilla*, the negligent entrustment claim was based on the assertion that the mother had provided her child with a dangerous instrument, when what she had provided was a toy apparently used generally by children of that age. The law that was applied was, therefore, that merely providing the child with a commonly used riding toy could not be said to, in and of itself, breach any duty owed to third parties. However, if there had been a showing that other facts or circumstances, of which the defendant mother was aware, would have warranted her taking additional measures to protect third parties from her child's use of the riding toy, the ruling might have not been the same. For instance, if, hypothetically, the mother in *Zarilla* had been present and had the ability or the obligation to observe that the child was operating the battery-powered scooter wildly or without control, so as to endanger passersby, she could have been liable for negligence. But, in *Zarilla*, it was the plaintiff grandmother who was supervising the child at the time, so the grandmother could make no such claim against the mother.

Providing a child with a standard toy *may* support a negligence claim against the parent where there is more to the claim than merely giving the child a toy to play with. As the Court said in *Alessi* (103 AD2d 1023), where a six year old "launched" a toy airplane and struck his four-year-old brother in the eye, "the question of whether the toy airplane is a dangerous instrument is a question of fact to be determined at trial based upon the object's size, weight, shape and operating potential, as well as the age, intelligence, disposition and prior experience of the infant defendant" (*id.* at 1023-1024).

It is not that the parents here provided their child with an object that by its nature constitutes a dangerous instrument. Of course, a wheeled suitcase is not normally a dangerous instrument. But the critical inquiry does not focus solely on the instrumentality itself. It asks whether the parent "fail[ed] to use reasonable care in entrusting to . . . the child an instrument which, *in view of the nature of the instrument, the age, intelligence, and disposition of the child and* (his, her) *prior experience with such an instrument*," creates an unreasonable risk of harm to others (PJI 2:260 [emphasis added]). However innocuous a wheeled suitcase might seem generally when handled by adults or larger and older children, when it is the same size as the two-year-old child wielding it, the potential

hazards it could create may warrant imposing on the parent supervising the child a greater degree of care and supervision, to ensure that the object does not unwittingly turn into a hazardous object that may foreseeably cause harm to nearby pedestrians. Such an object, in the hands of a possibly heedless two year old wielding it without parental oversight on a Manhattan sidewalk, could turn into a hazard, creating "an unreasonable risk of harm to others" (*id.*).

Parents' duty to control their minor children is expressed in the Restatement (Second) of Torts § 316 as follows:

> "A parent is under a duty to exercise reasonable care so as to control his minor child as to prevent it from . . . so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control."

Particularly applicable here is one of the Comments to the section, which explains that "[t]he child may be so young as to be incapable of negligence, but this does not absolve the parent from the performance of his duty to exercise reasonable care to control the child's conduct. Indeed, the very youth of the child is likely to give the parent more effective ability to control its actions and to make it more often necessary to exercise it" (*id.*, Comment *c*).

The facts as presented in the record on appeal are

sufficient to permit the finding that defendant parents acted negligently by first entrusting a small two year old with a wheeled suitcase as big as she was, and then failing to take any steps to prevent her from wielding that suitcase in a manner that created an unreasonable risk of bodily harm to other pedestrians sharing the sidewalk with them. In my view, this is sufficient to preclude dismissal of the action.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8790 Castlepoint Insurance Company, Index 113048/09
Plaintiff-Respondent,

-against-

Mike's Pipe Yard and Building Supply Corp.,
Defendant,

Damon Haindl,
Defendant-Appellant.

Avanzino & Moreno, P.C., Brooklyn (Oliver R. Tobias of counsel), for appellant.

Law Office of Steven G. Fauth, LLC, New York (Suma Samuel Thomas of counsel), for respondent.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 16, 2011, which, upon renewal and reargument, granted plaintiff Castlepoint Insurance Company's motion for summary judgment to declare that Castlepoint did not have an obligation to indemnify or defend defendant Mike's Pipe Yard and Building Supply Corp. (Mike's) in an underlying personal injury action brought by defendant Damon Haindl, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting Castlepoint's motion to renew and reargue its prior motion (*see e.g. Meija v Nanni*, 307 AD2d 870 [1st Dept 2003]). Castlepoint correctly argued that Mike's could not demonstrate

the reasonableness of its delay in reporting the accident leading to Haindl's injury (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 240 [1st Dept 2002]). Mike's principal knew of the accident the day it occurred and of the potential for litigation almost immediately thereafter. In addition, the arguments it made in opposition to the initial motion for summary judgment had been previously rejected in a similar action (*Tower Ins. Co. of N.Y. v Mike's Pipe Yard & Bldg. Supply Corp.*, 35 AD3d 275 [1st Dept 2006]), making it unreasonable for Mike's to think they would suffice to excuse late notice to its insurer in the instant action.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8791 In re Craig S.,
Petitioner-Appellant,

-against-

Donna S.,
Respondent-Respondent.

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the child.

Order, Family Court, New York County (Douglas E. Hoffman, J.F.C.), entered on or about April 7, 2011, which, after a fact-finding hearing, denied petitioner father's application for visitation with the parties' minor child, except to the extent of allowing limited written communication via mail, unanimously affirmed, without costs.

There is a sound and substantial evidentiary basis for the Family Court's determination that it is not in the subject child's best interest to award petitioner visitation (*Corsell v Corsell*, 101 AD2d 766 [1st Dept 1984]. The evidence establishes that petitioner's lack of visitation with the subject child, over a period of many years, was the result of his own inaction and not due to the mother's interference. Moreover, the record supports the court's determination that visitation would have a

negative impact on the child's emotional well-being (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]; *Mohabir v Singh*, 78 AD3d 1056 [2d Dept 2010]). Finally, under the circumstances, the court properly provided for limited written communication with the child, which the child may read at her discretion (*see In Re Tristam K.*, 65 AD3d 894 [1st Dept 2009]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8792 Alexander Eisenberg, Index 307644/08
Plaintiff-Respondent,

-against-

Marcos Guzman,
Defendant-Appellant.

Marjorie E. Bornes, Brooklyn, for appellant.

Paris & Chaikin, PLLC, New York (Chad P. Ayoub of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 27, 2011, which, in an action for personal injuries sustained in a motor vehicle accident, denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established his entitlement to judgment as a matter of law as to plaintiff's claims of "significant limitation" and "consequential limitation" of use of his anterior cruciate ligament (ACL) of his left knee. Although defendant's orthopedist found a loss of range of motion in plaintiff's left knee in 2009, defendant's radiologist found no evidence of an ACL tear on the MRI taken of the left knee after the subject accident (*see Linton v Nawaz*, 62 AD3d 434, 439 [1st Dept 2009], *affd on*

other grounds 14 NY3d 821 [2010).

Plaintiff's opposition failed to raise a triable issue of fact. Even assuming that plaintiff came forward with proof that this particular body part had not been injured during his two prior surgeries (*see McArthur v Act Limo, Inc.*, 93 AD3d 567 [1st Dept 2012]), and assuming, further, that he raised an issue of fact as to whether this ligament was actually torn, via the affirmation of his radiologist, plaintiff failed to come forward with proof of "significant" or "important" limitations caused by the accident. Indeed, the examination performed by plaintiff's physician in 2011 measured only minor limitations in range of motion (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584, 585 [1st Dept 2011]).

Defendant met his burden as to the 90/180–day claim by relying on plaintiff's deposition testimony, where he stated that he was confined to home for only two weeks, and did not work

because there was “no work” (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]; *Williams v Baldor Specialty Foods, Inc.*, 70 AD3d 522 [1st Dept 2010]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8793 April Cater, Index 302022/09
Plaintiff-Appellant,

-against-

Double Down Realty Corp., et al.,
Defendants-Respondents.

Bader Yakaitis & Nonnenmacher, LLP, New York (Robert E. Burke of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for respondents.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 19, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to establish their entitlement to judgment as a matter of law, in this action where plaintiff slipped and fell as she descended the interior stairs of defendants' building. The evidence submitted by defendants was insufficient to show that they lacked constructive notice of the alleged wet condition of the stairs. Defendants failed to offer specific

evidence as to their activities on the day of the accident, including evidence indicating the last time the staircase was inspected, cleaned, or maintained before plaintiff's fall (*see Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323 [1st Dept 2008]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8794 W.W. Glass System, Inc., Index 400575/11
Fourth-Party Plaintiff, 590507/07
590205/11

-against-

Metal Sales Co., Inc.,
Fourth-Party Defendant.

- - - - -

[And Another Action]

- - - - -

Metal Sales Co., Inc.,
Third Fourth-Party
Plaintiff-Appellant,

-against-

H.R.A.D. Construction Corp., et al.,
Third Fourth-Party
Defendants-Respondents.

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Litchfield Cavo LLP, New York (Joseph E. Boury of counsel), for appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Debra A. Adler of counsel), for H.R.A.D. Construction Corp. and HRAD/MRP J.V., LLC, respondents.

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for Total Safety Consulting LLC, respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 6, 2011, which granted the motion of third fourth-party defendant Total Safety Consulting LLC and the cross motion of the third fourth-party HRAD defendants to dismiss the third fourth-party action, and denied third fourth-party plaintiff Metal Sales Co., Inc.'s cross motion to vacate portions of the

court's orders entered November 10, 2010 and December 7, 2010 that dismissed its claims for common-law indemnification against Total Safety, and for renewal of its argument that its claim for common-law indemnification against Total Safety was viable, unanimously modified, on the law, to deny so much of Total Safety's motion and the HRAD defendants' cross motion as sought dismissal of Metal Sales' third fourth-party contribution claims, and otherwise affirmed, without costs.

The court correctly dismissed Metal Sales' common-law indemnification claims. Metal Sales failed to offer evidence showing that liability on its part, if any, was only vicarious vis-à-vis Total Safety or the HRAD defendants (*see generally McDermott v City of New York*, 50 NY2d 211, 216-217 [1980]; *Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006], *lv dismissed* 7 NY3d 864 [2006]).

Metal Sales' contribution claims should not have been dismissed. The court's order entered November 10, 2010 did not expressly grant relief, either way, as to those claims. To the extent that language in the court's memorandum decision might be interpreted as dismissing the contribution claim against Total Safety pursuant to General Obligations Law § 15-108 (b) based on the court's mistaken belief that Total Safety had obtained a release from liability in conjunction with a settlement of the

main action, Metal Sales should be relieved of that finding (*see generally* CPLR 5015 [a] [2], [3]; CPLR 2221 [e]; *cf. Long Is. Light. Co. v Century Indem. Co.*, 52 AD3d 383, 384 [1st Dept 2008]; *Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739 [1984]). Indeed, the finding was based on Total Safety's inaccurate, unequivocal statement that it had obtained a release from the project manager and general contractor who had settled in the main action. Total Safety's inaccurate assertion came to light only after entry of the court's order. Further, after the end of lengthy discovery, Metal Sales diligently sought to conform its claims to the evidence, which, as found by the motion court, reflected a basis for finding that the acts and/or omissions of Total Safety and the HRAD defendants had potentially contributed to plaintiff's fall and injury.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8795 In re Michael Cipollaro, Index 251046/11
Petitioner,

-against-

New York State Department
of Motor Vehicles,
Respondent.

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Michael Cipollaro, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Simon Heller of counsel), for respondent.

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Determination of respondent, dated September 24, 2010, which found petitioner in violation of 34 RCNY 4-13(d)(2), and imposed a $200 fine plus the $80 state surcharge, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, Bronx County [Mitchell J. Danziger, J.], entered November 16, 2011), dismissed, without costs.

Respondent's determination was supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). There exists no basis to disturb the credibility determinations of the Administrative Law Judge (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). Moreover, petitioner's argument that he did not have fair warning that the area where he was pulled over

and ticketed was not a designated truck route, is unpreserved as it was not raised at the administrative hearing (*see Matter of Palette v City of New York*, 208 AD2d 427 [1st Dept 1994], *lv denied* 85 NY2d 803 [1995]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8796 The People of the State of New York, Respondent, Ind. 5637/09

-against-

Gilbert Bonilla, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Robert M. Stoltz, J.), rendered September 29, 2010, convicting defendant, after a jury trial, of robbery in the second degree and possession of tear gas in violation of Administrative Code § 10-131(e)(1), and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The verdict 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 jury's credibility determinations. It is undisputed that defendant stole merchandise from a store, and the evidence, viewed as a whole, supports the conclusion that the shoplifter was the same person who sprayed a pursuing cashier in the face with a noxious substance.

The court properly declined to submit robbery in the third degree as a lesser included offense. There was no reasonable view of the evidence, viewed most favorably to defendant, that defendant used force against the cashier to retain stolen property but did not cause physical injury within the meaning of Penal Law § 10.00(9) (*see People v Diggs*, 60 AD3d 459 [1st Dept 2009], *lv denied* 12 NY3d 914 [2009]; *People v Gonzalez*, 60 AD3d 447, 448 [1st Dept 2009], *lv denied* 12 NY3d 915 [2009]). The cashier's testimony, the testimony of witnesses who observed the cashier's condition and heard him screaming after he was sprayed, and the testimony of law enforcement and medical witnesses as to the effects of being sprayed with mace or pepper spray compelled a conclusion that the cashier sustained "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]). The evidence did not merely provide persuasive evidence that the cashier sustained physical injury; instead, the jury would have had no rational basis to conclude otherwise.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8797-
8798 In re Natixis North America, LLC, Index 652378/11
Petitioner-Appellant,

-against-

Brook Payner,
Respondent-Respondent.

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Proskauer Rose LLP, New York (Mark D. Harris of counsel), for appellant.

Morrison Cohen LLP, New York (Donald H. Chase of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered February 2, 2012, which denied the petition to vacate an arbitration award, granted respondent's cross motion to confirm the award, and awarded respondent judgment on the award in the total amount of $3,290,627.73, unanimously affirmed, with costs.

The arbitral award was properly confirmed in the absence of a showing that the arbitrators manifestly disregarded the law (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 480-481 [2006], *cert dismissed* 548 US 940 [2006]; *Cantor Fitzgerald Sec. v Refco Sec., LLC*, 83 AD3d 592, 593 [1st Dept 2011]). There is no basis to conclude that the arbitrators ignored law which is

"well defined, explicit, and clearly applicable to the case," as required to vacate an arbitral award under the "manifest disregard" standard (*Wien*, 6 NY3d at 481).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8800 UBS Securities LLC, Index 652606/11
Plaintiff-Respondent-Appellant,

-against-

RAE Systems Inc.,
Defendant-Appellant-Respondent.

Kaplan Rice LLP, New York (Justin M. Garbaccio of counsel), for appellant-respondent.

Miller & Wrubel P.C., New York (Joel M. Miller of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Jeffery K. Oing, J.), entered on or about February 28, 2012 which denied defendant-appellant's motion to dismiss pursuant to CPLR 3211, and granted plaintiff's cross motion for summary judgment insofar as finding that the parties' agreement included a right to indemnification of plaintiff for its attorney's fees, but denied the cross motion insofar as it sought pay of a discretionary bonus, unanimously modified, on the law, to grant the motion to dismiss the complaint, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Contrary to the finding of the IAS court, the clause at issue, which provides that defendant "may" in its "sole discretion" pay plaintiff a bonus based on an assessment of its performance, was not a conditional promise, but an entirely

discretionary clause that imposed no obligation on defendant to pay (*Hunter v Deutsche Bank AG, N.Y. Branch*, 56 AD3d 274 [1st Dept 2008]). Nor did the "approval" of the bonus by defendant's special committee create some obligation on defendant to make the wholly discretionary payment (*id.*; *see generally Matter of Cosmopolitan Mut. Cas. Co. of N.Y. v Monarch Concrete Corp.*, 6 AD2d 163, 166 [1st Dept 1958], *revd* 6 NY2d 383, 388 [1959]).

While the parties' amended agreement was properly read by the court to include a right to indemnification of plaintiff's attorney's fees in a direct party action (*see Breed, Abbott & Morgan v Hulko*, 74 NY2d 686 [1989]), because plaintiff had no right to enforce payment of the aforementioned discretionary bonus sought herein, the cause of action for attorney's fees should also have been dismissed.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8801 Eloise Carter, Index 302484/08
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

Belovin & Franzblau, LLP, Bronx (David A. Karlin of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for respondent.

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 18, 2011, which, in this personal injury action resulting from a slip and fall on a floor in defendant's building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant made a prima facie showing that it did not create or have notice of the dangerous condition that allegedly caused plaintiff's injuries (*Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471 [1st Dept 2012]; *Love v New York City Hous. Auth.*, 82 AD3d 588 [1st Dept 2011]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's neighbor's affidavit stating that the accident location "was constantly and frequently littered with garbage, debris, water and other liquids," and plaintiff's deposition

testimony that she saw water at the accident location two days before she fell, were insufficient to raise an issue of fact as to constructive notice. Indeed, these statements should not be considered, as they were tailored to avoid the consequences of plaintiff's earlier 50-h testimony that she did not see water at the accident location before her accident (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 501 [1st Dept 2008]; *Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]). Even if the statements are considered, they merely show that defendant had a "general awareness" of a dangerous condition, for which defendant is not liable (*Love*, 82 AD3d at 588). Indeed, there is no evidence that defendant had actual or constructive notice of the specific condition that allegedly caused plaintiff's injuries – namely, a leaking picnic cooler.

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 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8802-
8802A Guillermo Picaso, Index 302963/07
83887/09
Plaintiff-Respondent,

-against-

345 East 73 Owners Corp., et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Tower Building Services, Inc.,
Third-Party Defendant-Appellant.

_____

Goldberg Segalla, LLP, White Plains (William T. O'Connell of counsel), for appellant.

Levine and Grossman, Mineola (Scott D. Rubin of counsel), for Guillermo Picaso, respondent.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for 345 East 73 Owners Corp. and Goodstein Management, Inc., respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about April 14, 2011, which, to the extent appealed from, granted defendants 345 East 73 Owners Corp. and Goodstein Management, Inc.'s motion for summary judgment dismissing the Labor Law § 200 and common-law negligence causes of action, and denied third-party defendant Tower Building Services, Inc.'s motion for summary judgment dismissing the common-law indemnification claim, and order, same court and Justice, entered

January 12, 2012, which, to the extent appealed from, upon reargument, conditionally granted defendants' motion for summary judgment on their contractual indemnification claim, unanimously reversed, on the law, without costs, defendants' motion for summary judgment dismissing the Labor Law § 200 and common-law negligence claims denied, Tower's motion for summary judgment dismissing the common-law indemnification claim granted, and defendants' motion for summary judgment on the contractual indemnification claim denied.

Plaintiff's Labor Law § 200 and common-law negligence claims should not be dismissed since defendants failed to demonstrate that they lacked notice of a hazardous condition that allegedly caused plaintiff to trip and fall on a staircase in the building they owned and managed (*see Griffin v New York City Tr. Auth.*, 16 AD3d 202 [1st Dept 2005]). A manager for defendant owners corporation testified that he performed daily inspections of staircases in the building to determine whether there were any defects requiring repairs. In light of these regular inspections and plaintiff's testimony that he noticed the defective condition of the step two weeks before the accident occurred, triable issues of fact exist whether defendants had constructive notice of the condition (*see Vidor v 6 Jones St. Assoc.*, LLC, 85 AD3d 449 [1st Dept 2011]).

Tower may not be held liable for common-law indemnification of defendants since plaintiff does not allege, nor does his bill of particulars evince, a "grave injury" within the meaning of Workers' Compensation Law § 11 (*see Meis v ELO Org.*, 97 NY2d 714 [2002]).

Contrary to defendants' contention, the contractual indemnification provision on which they rely contains no language limiting indemnification to damages arising from accidents caused by Tower's negligence, or precluding indemnification for damages caused by their own negligence (*see Hernandez v Argo Corp.*, 95 AD3d 782, 783-784 [1st Dept 2012]). Thus, if it is found that plaintiff's injuries are attributable to any negligence on their part, enforcement of the indemnification provision will be barred by General Obligations Law § 5-322.1 (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786 [1997]), and the conditional grant of summary judgment to defendants on their

contractual indemnification claim against Tower is premature (*compare Colozzo v National Ctr. Found., Inc.*, 30 AD3d 251 [1st Dept 2006]; *Aarons v 401 Hotel, L.P.*, 12 AD3d 293, 294 [1st Dept 2004]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8803 The People of the State of New York, Ind. 155/09
Respondent,

-against-

Kimani Stephenson,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy Kahn, J.), rendered on or about February 8, 2011,

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

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

ENTERED: DECEMBER 13, 2012

CLERK

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

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8805 The People of the State of New York, Respondent, Ind. 4433/07

-against-

James Jimenez, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Roger S. Hayes, J. at first jury trial; Jill Konviser, J. at second jury trial and sentencing), rendered September 7, 2010, convicting defendant of burglary in the second degree and two counts of criminal trespass in the second degree, and sentencing him to an aggregate term of four years, unanimously affirmed.

At the first trial, the court correctly declined to "accept" a purported verdict of guilty on two counts of criminal trespass. The court had submitted three counts of second-degree burglary with three corresponding counts of the lesser included offense of second-degree criminal trespass. As to one of these pairs of counts, the jury reached a proper verdict, acquitting defendant of burglary and convicting him of trespass, and the court accepted that verdict. The jury announced that it had not

reached unanimous verdicts as to the two other burglary counts. However, on the verdict sheet the guilty boxes for the two corresponding trespass counts contained check marks. The court rejected defendant's request that it take the verdict according to the sheet (which would have amounted to acquittals of the greater burglary charges).

The court did not err in its handling of the situation. In the first place, "[m]arks on verdict sheets are not verdicts" (*Matter of Suarez v Byrne*, 10 NY3d 523, 528 n 3 [2008]). Therefore, with respect to the counts at issue there was nothing before the court but a statement that the jury had not reached a verdict.

In any event, trespass convictions not preceded by corresponding burglary acquittals would have been defective (*see* CPL 310.50) because they would have violated the court's instruction to consider the lesser offenses only if the jury found the defendant not guilty of the corresponding greater offenses (*see People v Boettcher*, 69 NY2d 174, 182-183 [1987]). Furthermore, guilty verdicts on the trespass counts without any verdicts on the burglary counts would have demonstrated the jury's confusion as to the order in which to proceed. Accordingly, the court did not err when it repeated its acquit-first instruction and directed the jury to resume its

deliberations on the counts upon which it had not reached a verdict.

There was nothing coercive about this course of action. We note that the jury was still unable to reach a verdict on the counts at issue, resulting in a mistrial on those counts, followed by a retrial where defendant was convicted of one count of burglary and one additional count of trespass.

During jury deliberations at the second trial, the court properly exercised its discretion in refusing to disqualify a juror who had read, and mentioned to some jurors, a portion of a news article that described the case. Following probing and tactful individual inquiries by the court, each juror unequivocally assured the court that he or she could decide the case based solely on the evidence presented in the courtroom and could render a fair and impartial verdict (*see e.g. People v Costello*, 104 AD2d 947 [2d Dept 1984]). The circumstances did not warrant a finding that the juror who read the article was

grossly unqualified to serve. Moreover, since it was no longer possible to substitute an alternate, removal of the juror would have necessitated the drastic remedy of a mistrial followed by yet another trial.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8806 Lawrence A. Omansky, Index 114241/09
Plaintiff-Appellant,

-against-

Tjebbo Penning,
Defendant,

160 Chambers Street Owners, Inc.,
Defendant-Respondent.

Lawrence A. Omansky, New York, appellant pro se.

Law Office of Nathaniel B. Smith, New York (Nathaniel B. Smith of counsel), for respondent.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered on or about April 25, 2011, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff asserts that defendants defamed him by stating, in front of a potential subtenant, that plaintiff had been evicted and had no right to sublet the property, which was owned by defendants and had been leased to plaintiff. The documentary evidence established, however, that, prior to the alleged statements being made, plaintiff had assigned his rights in the leasehold to Nicolena's B and B II, Inc., a corporate entity run by plaintiff. The documentary evidence further showed that Nicolena's had assigned its rights in the leasehold to an

unrelated third-party. Thus, it is that third-party, and not plaintiff, who owns the leasehold, and plaintiff lacked capacity to bring a suit arising out of the same (*see Old Clinton Corp. v 502 Old Country Rd.*, 5 AD3d 363, 364 [2d Dept 2004]). Plaintiff could also not be defamed by a statement when the net effect of that statement was, in fact, true (*see Konrad v Brown*, 91 AD3d 545 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012]).

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 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8807-
8808-
8809 Index 114676/09

Lynn & Cahill, LLP,
Plaintiff-Respondent,

-against-

Nadine Witkin,
Defendant-Appellant.

Law Firm of Kenneth S. Sternberg, New York (Kenneth S. Sternberg of counsel), for appellant.

Lynn & Cahill, LLP, New York (John R. Cahill of counsel), for respondent.

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 4, 2012, awarding plaintiff the principal amount of $57,121.90 on its claim for an account stated, pursuant to an order, same court and Justice, entered January 6, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for a default judgment with respect to its claim for an account stated, and denied defendant's cross motion for an extension of time to file an answer, unanimously affirmed, with costs. Appeals from aforesaid order and from order, same court and Justice, entered April 2, 2012, which, upon renewal and reargument, adhered to its original determination, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In response to plaintiff's motion for a default judgment, defendant failed to provide a reasonable excuse for failing to file an answer (*see e.g. Toure v Harrison*, 6 AD3d 270, 271 [1st Dept 2004]). Rather, the record suggests that defendant's inaction constituted a tactical decision on the part of herself and counsel. Nor did defendant demonstrate a meritorious defense to the action.

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

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8810 Alyson Silverman, Index 310336/08
Plaintiff-Appellant,

GEICO General Insurance Company, etc.,
Plaintiff,

-against-

MTA Bus Company, et al.,
Defendants-Respondents.

Charles J. Chiclacos, Glen Cove (Susan R. Nudelman of counsel), for appellant.

Sullivan & Brill, LLP, New York (Adam A. Khalil and Joseph F. Sullivan of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about October 5, 2011, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motion with respect to the claims of "permanent consequential limitation" and "significant limitation" of the cervical and lumbar spine and the 90/180-day claim, and otherwise affirmed, without costs.

Plaintiff, who was 27 years old at the time of the accident, alleges she suffered serious injuries as the result of an accident that occurred on November 26, 2007, when the car she was

driving was struck by a bus owned by defendant MTA Bus Company.

As to the alleged cervical spine and lumbar spine injuries, defendants met their initial burden by relying on plaintiff's deposition testimony, where she conceded that in 2002, she injured her back and neck when she was struck by a minivan while crossing the street (*see Chintam v Fenelus*, 65 AD3d 946, 947 [1st Dept 2009]; *Brewster v FTM Servo, Corp.*, 44 AD3d 351, 352 [1st Dept 2007]). In opposition, plaintiff raised an issue of fact as to those injuries by submitting the affidavit of her chiropractor, who conducted electrodiagnostic studies which revealed lumbar and cervical radiculopathy, and measured significant limitations in range of motion in every plane, contemporaneously with the 2007 accident, continuously through treatment, and recently (*see Pinzon v Gonzalez*, 93 AD3d 615 [1st Dept 2012]). The chiropractor adequately addressed causation by explaining that he had also treated plaintiff after her 2002 accident, and that when he released her from his care in June 2004, she had recovered and was asymptomatic. His opinion was supported by his review of MRI reports taken in 2002 and 2007, which showed that the only injury from the 2002 accident that was pre-existing was a disc bulge at L5-S1, and that the subject 2007 accident had caused new injuries, namely bulging discs at C2-3, C3-4, C4-5, C6-7, L3-4, and L4-5, and a subligamentous

herniation. Defendants did not submit the opinion of an expert radiologist disputing those findings, and since the unaffirmed MRIs were not the sole basis for the chiropractor's findings, they may properly be considered in opposition to the motion (*see Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]; *James v Perez*, 95 AD3d 788 [1st Dept 2012]).

As to the claimed left knee, shoulder and hand injuries, defendants met their prima facie burden by submitting their expert orthopedist's opinion finding a full range of motion and opining that plaintiff's knee conditions were preexisting and not related to the 2007 accident (*see Jno-Baptist v Buckley*, 82 AD3d 578 [1st Dept 2011]; *Depena v Sylla*, 63 AD3d 504, 505 [1st Dept 2009], *lv denied* 13 NY3d 706 [2009]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]). Plaintiff failed to raise an issue of fact since she provided no evidence of permanent limitations resulting from the accident.

Defendants failed to meet their prima facie burden as to plaintiff's 90/180-day claim, since the bill of particulars

alleged that plaintiff was confined to home for four months and they did not submit medical evidence contradicting her claimed disability during that period (*see Quinones v Ksieniewicz*, 80 AD3d 506 [1st Dept 2011]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8811 In re Theophilos Athanassiou, Index 115789/10
Petitioner-Appellant,

-against-

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

David Jalosky, New York, for appellant.

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

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered August 2, 2011, denying the petition to annul respondents' determination which denied petitioner's application for accident disability retirement (ADR) benefits, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible evidence supported the conclusion that petitioner's injuries did not warrant the grant of ADR benefits (*see generally Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]). Petitioner's application and evidence submitted in support were repeatedly reviewed and evaluated by the Medical Board, which ultimately found that petitioner's credibility was called into question by his failure to file a claim for several years after the event

that allegedly caused his hearing loss, and by the fluctuations in his hearing test results. Resolution of the conflicting opinions of the medical experts was for the Medical Board to resolve (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]; *Matter of Whitton v Spinnato*, 143 AD2d 274, 275 [2d Dept 1988]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8812 In re Anastasia Pazana, Index 106019/11
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation & Development,
Respondent-Respondent,

Village View Housing Corporation,
Respondent.

_____

Vernon & Ginsburg, LLP, New York (Yoram Silagy of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 31, 2011, denying the petition seeking to annul respondent New York City Department of Housing Preservation & Development's determination which denied petitioner succession rights to the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The agency's determination had a rational basis in the record (*see Matter of Hochhauser v City of N.Y. Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [1st Dept 2008]). Even assuming that petitioner established disability, she still failed to meet her burden of proving that she resided in the apartment as her

primary residence for a one-year period prior to her grandmother's death in May 2008 (*see* 28 RCNY 3-02[p][3]). Petitioner's affidavit contained the equivocal claim that she "spent much time" at the apartment, where she had lived "for extended periods," which residency she believed lasted for "well over half the year" in both 2006 and 2007. While petitioner explained the absence of some of the normal documentary indicia of residency, she failed to explain the lack of any other documentary proof of such residence (*compare Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 91 AD3d 481 [1st Dept 2012], *lv granted* 19 NY3d 812 [2012]).

The court properly refused to consider additional evidence not submitted to the agency (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]), which submissions, in any event, would not have changed the outcome.

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

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8813 The People of the State of New York, Respondent, Ind. 1331/09

-against-

Raul Espino, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Marcy L. Kahn, J. at suppression motion; Edward J. McLaughlin, J. at plea and sentencing), rendered May 18, 2010, as amended May 25, 2010 and September 13, 2010, convicting defendant of three counts of burglary in the second degree, and sentencing him, as a second violent felony offender, to concurrent terms of 15 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The People established the voluntariness of defendant's statements beyond a reasonable doubt. The record supports the court's determination to credit the police testimony and to

discredit the testimony of defendant (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

We perceive no basis for a reduction of sentence.

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8814 Gayle Levy, Index 102846/09
Plaintiff-Appellant,

-against-

Town Sports International, Inc. doing business as New York Sports Club,
Defendant-Respondent.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Jacqueline Hattar of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 11, 2011, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured when, while engaged in fitness training at defendant gym, she fell after being directed by her personal trainer (defendant's employee) to perform jump repetitions on an exercise ball. Plaintiff's opposition to defendant's showing of entitlement to judgment as a matter of law based on an assumption of the risk defense, raised triable issues of fact that warrant the denial of the motion. Such issues include whether the trainer, knowing that plaintiff had osteoporosis and had recently had surgery, unreasonably increased

the risk of harm to plaintiff by recommending that she perform an advanced exercise with multiple repetitions (*see Mathis v New York Health Club*, 261 AD2d 345 [1st Dept 1999]; *see also Corrigan v Musclemakers, Inc.*, 258 AD2d 861, 863 [3d Dept 1999]); whether the trainer was in a proper position to help guard against plaintiff falling during the exercise; and whether plaintiff voluntarily assumed the risks or was following the trainer's expert advice and encouragement while attempting to complete the exercise (*see Mathis* at 346).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8815 Ursula Moore-Mohammed, etc., Index 301341/09
Plaintiff-Appellant,

-against-

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

The Taub Law Firm, P.C., New York (Matthew A. Taub of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 20, 2011, which, in this negligence action arising from a 911 call, to the extent appealed from as limited by the briefs, granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants made a prima facie showing of the lack of a special relationship between plaintiff's decedent and defendants by submitting evidence that they did not give the decedent any assurance or direction that would justify any reliance on decedent's part (*Dinardo v City of New York*, 13 NY3d 872, 874-875 [2009]; *Diliberti v City of New York*, 49 AD3d 424 [1st Dept 2008]).

In opposition, plaintiff failed to raise a triable issue of

fact. Indeed, plaintiff failed to submit any evidence of an assumption by defendants, through promises or actions, of an affirmative duty to act on behalf of the decedent (*compare Diliberti*, 49 AD3d at 424, *with De Long v Erie County*, 60 NY2d 296, 305 [1983], *and Applewhite v Accuhealth, Inc.*, 90 AD3d 501, 504-505 [1st Dept 2011]).

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

ENTERED: DECEMBER 13, 2012

CLERK

Tom, J.P., Sweeny, Moskowitz, Renwick, Clark, JJ.

8816	In re Raymond Lewis	Ind. 3448/10
[M-4988]	Petitioner,	3792/10
		5283/10
	-against-	2990/11
	Hon. Bonnie Wittner, etc., et al., Respondents.	

Raymond Lewis, petitioner pro se.

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

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

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

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

ENTERED: DECEMBER 13, 2012

CLERK

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

7416-
7417-
7418 In re Matthew O., and Others,

Kenneth O., et al.,
Respondents-Appellants,

Commissioner of Social Services,
Petitioner-Respondent.

_____

John C. Klotz, New York, for Kenneth O. and Nancy O., appellants.

Aleza Ross, Central Islip, for Merlene R., appellant.

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

Ellen Winter Mendelson, Upper Nyack, attorney for the children Katherine O. and Victoria O.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 7, 2010, affirmed, without costs.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. Catterson
Rosalyn H. Richter
Sheila Abdus-Salaam
Nelson S. Román, JJ.

7416-7417-7418

_____x

In re Matthew O., and Others,

Kenneth O., et al.,
Respondents-Appellants,

Commissioner of Social Services,
Petitioner-Respondent.
_____x

Respondents appeal from the order of disposition of the Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 7, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that they had abused the youngest subject child and derivatively neglected the other children.

John C. Klotz, New York, for Kenneth O. and Nancy O., appellants.

Aleza Ross, Central Islip, for Merlene R., appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley and Edward F.X. Hart of counsel), for respondent.

Ellen Winter Mendelson, Upper Nyack, attorney for the children Katherine O. and Victoria O.

CATTERSON, J.

This appeal arises from a Family Court determination that the respondents, the parents and the nanny of a baby girl, Victoria O., abused the infant and derivatively neglected her siblings. The respondents contend that the court's finding was not supported by a preponderance of the evidence even though it is undisputed that Victoria O. suffered seven distinct fractures of her arms, legs and skull before reaching the age of five months. The respondents argue nevertheless that the preponderance of evidence standard requires evidence that "pinpoints" the time when the injuries occurred, and thus establishes which caregiver was in control of the child at the time. The respondents misconstrue the precedent on which they purport to rely because, of course, any such requirement would automatically immunize entire households where multiple caregivers share responsibility for child care.

The record reflects that on February 16, 2005, five-month-old Victoria O. was taken to the emergency room with a "painfully" swollen left arm. She was diagnosed with a fracture and admitted for treatment. On February 18, 2005, a pediatrician at New York Presbyterian Hospital examined Victoria and reviewed her medical record and Xrays in response to a report of suspected child abuse. The pediatrician discovered that in addition to the

fracture for which she was admitted, Victoria had suffered six additional fractures, the oldest of which may have occurred when she was just two months old. The same day, the Administration for Children's Services (hereinafter referred to as "ACS") filed a petition initiating child abuse and neglect proceedings against Victoria's parents, Kenneth O. and Nancy O., and Merlene R., who worked as a nanny for the family 12 hours a day, 5 days a week, during the relevant period. The petition alleged that Victoria sustained multiple injuries for which the parents provided no explanation. A separate petition was filed alleging abuse and neglect of Victoria's three siblings.[1]

The record further reflects that 11 witnesses testified over 42 days at a fact-finding hearing. Among the witnesses was the pediatrician who diagnosed the fractures. Her testimony adduced the following: Victoria suffered seven fractures -- two left elbow fractures, a left-wrist fracture, a fractured left tibia

[1] On February 18, 2005, Family Court remanded Victoria and the youngest of her sisters to the care of the Commissioner of Social Services and paroled the two oldest children to the care of the parents. On October 24, 2005, Victoria's youngest sister was paroled to her parents. On or about January 11, 2006, Family Court paroled Victoria to her parents with specific conditions not relevant to this appeal. ACS requested a removal hearing pursuant to Family Court Act § 1027 opposing the court's order. At the conclusion of the hearing, Family Court denied the removal application. On or about June 5, 2008, the court discontinued all supervision of the family.

and fibula, and two skull fractures -- none of which could have been self-inflicted. Although the elbow fractures could not be dated with certainty, the swelling and Victoria's distress when she arrived at the hospital indicated "recent trauma; within the past week." The pediatrician testified that the elbow "corner bucket handle" fractures could not have been accidental, and are seen predominantly in cases of child abuse. She testified that such fractures are caused by "very violent shaking or tearing," and that it was unlikely that any of Victoria's siblings could exert the force necessary to cause such fractures. Victoria's left wrist fracture was between two weeks and three months old, and would have initially caused pain and swelling. The fractures to Victoria's left tibia and fibula would also have initially caused significant pain and swelling. While the pediatrician testified that it was impossible to determine precisely when these fractures occurred due to a lack of medical or other documentation, she surmised that all were at least one week old.

Furthermore, according to her testimony, the pediatrician found that Victoria had suffered two skull injuries: a displaced fracture on the side of her skull, which she determined to be less than three months old, and a non-displaced occipital skull fracture. While the pediatrician was unable to testify to the exact date that the second fracture occurred, she testified that

cranial swelling present at the time of her examination was either unrelated to the fracture or suggested that the fracture was "very recent."

The pediatrician also testified that Victoria was underweight and suffered from moderate malnutrition. The pediatrician attributed the infant's loss of appetite to the pain of her successive injuries. The pediatrician opined that given the various stages of healing of the fractures, the lack of any explanation as to how they occurred, and Victoria's very young age, "all of the fractures were inflicted" on the infant. Victoria's parents and Merlene R. also testified at the fact-finding hearing. Merlene R. testified that she worked as the children's nanny for approximately eight years until February 16, 2005. She testified that there were instances when Victoria appeared to be injured which she reported to Nancy O. She testified that both parents were uninvolved with their children, and that Nancy was a very "disengaged" mother.

The parents testified that they were happy and satisfied with Merlene R.'s care of their children until the birth of Victoria, at which time Merlene became distracted and distant with the children. The parents speculated that personal and family problems affected her job performance. They admitted to allowing the other children to carry Victoria when she was three

months old. Kenneth O. testified that Merlene appeared to be depressed and was inattentive to Victoria. With regard to Victoria's injuries, the parents claimed that they sought medical attention for Victoria, but that no one diagnosed the fractures. Although Nancy O. testified that "[t]he only explanation that I can come up with is that Merlene did this to the baby," she conceded that she never saw Merlene behave in a manner likely to have caused Victoria's injuries.

In a 61-page decision dated January 8, 2010, Family Court concluded that "the severity and large number of Victoria's injuries themselves, coupled with her very young age [...] make out a clear case of abuse." The court further found that although "each [r]espondent denied that they ever injured Victoria and tried to suggest that the others were capable of inflicting these injuries," none of the testimony specifically "inculpate[d] or exculpate[d]" any of the respondents. The court determined that because all three respondents were responsible for caring for Victoria during the period that the injuries took place, all three respondents had abused Victoria within the meaning of section 1012(e)(ii) of the Family Court Act (hereinafter referred to as "FCA"). The court also entered findings of derivative neglect with regard to Victoria's three siblings.

On appeal, the respondents argue that the Family Court's findings of abuse and derivative neglect were not supported by a preponderance of the evidence. The respondents contend that ACS failed to present expert testimony that Victoria's injuries fit within the statutory definition of abuse. They further argue that even if Victoria was abused, ACS failed to establish precisely when the injuries occurred, and thus cannot show that any of the injuries can be attributed to a particular respondent. Finally, the respondents argue that because there was no evidence indicating that the other three children were abused or neglected, the finding of derivative neglect should be vacated.

For the reasons set forth below, we affirm the decision of Family Court. A child is abused, within the definition of FCA 1012(e)(ii), when a parent or other person legally responsible for the child's care,

> "creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ."

Contrary to the respondents' argument, expert testimony is not required in order to determine that the injury sustained constitutes abuse under the statute. See e.g. Matter of

Angelique, 215 A.D.2d 318, 319-320, 627 N.Y.S.2d 31, 32 (1st Dept. 1995) (medical evidence presented in the hospital records demonstrated that the child sustained an injury that fell within the statutory definition). Evidence of the severity of the injury may be sufficient to meet the statutory definition. See e.g. Matter of Johnny O., 240 A.D.2d 179, 658 N.Y.S.2d 871 (1st Dept. 1997) (evidence of frequent brutal beatings supported a finding of abuse); Matter of Robert W., 234 A.D.2d 23, 650 N.Y.S.2d 167 (1st Dept. 1996) (child's report of being beaten with a stick embedded with nails and corroborating emergency room records was sufficient to support a finding of abuse); see also e.g. Matter of Christopher P., 30 A.D.3d 307, 308, 818 N.Y.S.2d 50, 51 (1st Dept. 2006), lv. denied 7 N.Y.3d 713, 824 N.Y.S.2d 605, 857 N.E.2d 1136 (2006) (personal observations of a child protective specialist and medical records corroborated the child's description of excessive corporal punishment).

In this case, the testimony of the pediatrician supports a finding of abuse. As Family Court found, the pediatrician's testimony established that "before she reached the age of six months ... [someone inflicted] force sufficient to cause seven different fractures on this baby." The pediatrician specifically testified that two of the fractures Victoria sustained are the type of injuries that occur in child abuse cases as a result of

"very violent shaking or tearing." The testimony of the pediatrician, and indeed of the respondents, indicates that five-month-old Victoria expressed the pain she was suffering as a result of her injuries through symptoms of distress such as fussiness, crying and loss of appetite.

The evidence of the violence perpetrated on a five-month-old infant and the pain she suffered as a result supports Family Court's finding that respondents abused Victoria by "creat[ing] or allow[ing] to be created a substantial risk of physical injury to Victoria by other than accidental means which would be likely to cause death ... disfigurement, or ... impairment." Thus, ACS's failure to present expert testimony that Victoria's injuries were consistent with the statutory definition is not fatal to ACS's establishment of a prima facie case of child abuse.

Neither is the inability of ACS to pinpoint the time and date of each injury and link it to an individual respondent fatal to the establishment of a prima facie case against all three respondents. Proof of injuries to a child which would "ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse." FCA 1046(a)(ii). The Court of Appeals, in Matter of

Phillip M. (82 N.Y.2d 238, 604 N.Y.S.2d 40, 624 N.E.2d 168 (1993)), construed this language to require "(1) an injury to a child which would ordinarily not occur absent an act or omission of respondents, and (2) that respondents are the caregivers of the child at the time the injury occurred." 82 N.Y.2d at 243, 604 N.Y.S.2d at 44. In that case, the Court found that a prima facie case of abuse was established against both parents because "respondents conceded that they were responsible for the children's care" (82 N.Y.2d at 245, 604 N.Y.S.2d at 44) during the period when the abused child contracted a sexually transmitted disease. Such a presumption of culpability extends to all of a child's caregivers, especially when they are few and well defined, as in the instant case. See Matter of Fantaysia L., 36 A.D.3d 813, 814, 828 N.Y.S.2d 497, 499 (2d Dept. 2007) (prima facie case of abuse established against the father and paternal grandmother in one household and the mother and stepfather in another household because the child moved between the two households at the time she contracted a sexually transmitted disease); Matter of Seamus K., 33 A.D.3d 1030, 1033, 822 N.Y.S.2d 168, 171-172 (3d Dept. 2006) (prima facie case of abuse against both parents where baby suffered multiple brain bleeds in shaken baby syndrome); see also Matter of Keone J., 309 A.D.2d 684, 686-687, 766 N.Y.S.2d 192, 194 (1st Dept. 2003)

(finding of abuse entered against mother and live-in boyfriend because "[e]ven assuming the child suffered his rib injuries [...] while he was under the care of his father [...] their testimony denying any awareness of any symptoms is incredible").

The respondents, relying solely upon this Court's decision in Matter of Veronica C. v. Carrion, (55 A.D.3d 411, 866 N.Y.S.2d 49 (1st Dept. 2008)), argue that because the agency cannot identify the specific dates and times of the injuries, it cannot point to any one respondent who was the culpable caregiver. Hence, the respondents assert there is insufficient evidence to make out a prima facie case of abuse against them, much less satisfy the preponderance of evidence standard required for a finding of abuse. This reasoning totally misconstrues our analysis in that case.

In Veronica C., the abuse allegation was directed at the infant's nanny, who was but one of three caregivers in the household. It also related to just one injury of lacerations on the infant's hands. The evidence established that "both the child's parents and [the nanny] acted as the caretakers within the 24 hours" (55 A.D.3d at 412, 866 N.Y.S.2d at 50) preceding diagnosis of the injury. The record in that case also reflected that the evidence consisted of an unsworn statement by the father of the child, and the credible testimony of the nanny that the

child was unharmed when she handed him over to his father. Thus, we found that the administrative determination that the nanny was culpable was not supported by substantial evidence, because "it could not be determined on [the] record who the child's caretaker was at the time of the injury." Id. Hence, the import of our decision, given the distinguishable facts of the case, was simply, and unsurprisingly, that if allegations of child abuse are brought against just one of a child's multiple caregivers, then the preponderance of evidence must support a finding that only the accused caregiver was in control of the child at the time of injury. To be more precise, the holding could have read: "it could not be determined that the nanny was the caregiver at the time of the [one] injury." While, as set forth below, establishing the time of an injury may be used *by a respondent* to rebut evidence of abuse by such respondent, our holding in Veronica C. does not stand for the proposition that charges of abuse must be dismissed if the time of an injury cannot be precisely "pinpointed."

In any event, in this case, Victoria suffered seven distinct injuries, which, the pediatrician testified, would have caused a loss of appetite and resultant "moderate malnutrition" over a period of three months. Hence, the abuse was ongoing and apparently evident over a period of three months. Family Court

therefore correctly found that "the time period within which the injuries or condition arose" was the entire three-month period rather than the dates of each separate injury which could not be determined. Since the three respondents shared responsibility for Victoria's care during that period, the court also correctly found that ACS had established a prima facie case against all three respondents.

Family Court further correctly determined that the respondents failed to meet their burden of rebutting the evidence of abuse. It is well settled that once a prima facie case is established, respondents may "simply rest without attempting to rebut the presumption." Matter of Philip M., 82 N.Y.2d at 244, 604 N.Y.S.2d at 44. Alternatively, respondents may challenge the establishment of the prima facie case by providing evidence that, inter alia, they were not acting in the capacity of caregivers at the time of the injuries, or that the injuries came about as a result of accidents for which they were not responsible. Id.; see e.g. Matter of Vincent M., 193 A.D.2d 398, 597 N.Y.S.2d 309 (1st Dept. 1993) (testimony by both parents indicated that the infant was in the care of the respondent father and not the respondent mother at the time the infant was injured).

In this case, although all three respondents denied culpability, none of the respondents established that Victoria

was not in his or her care at the time of any of the injuries. Nor could they do so, since, by the respondents' own argument, the specific dates of the injuries could not be determined. As the court observed "there is no medical proof pinpointing the timing of Victoria's injuries to a time period specific enough to exculpate or inculpate any of the three [r]espondents."

The court, relying on Matter of Seamus K. (33 A.D.3d 1030, 822 N.Y.S.2d 168 (3d Dept.), supra), observed that "[t]he respondents' attempts to implicate each other [...] fall short of being satisfactory explanations to rebut the evidence of abuse [...] [a] respondent's failure to explain a child's injuries with only a denial that they are at fault is insufficient to rebut a prima facie case of abuse." Indeed, the court found that there were serious credibility issues with each respondent, and, as the Court of Appeals has observed, the Family Court is in the best position to assess the respondents and their characters. Matter of Irene O., 38 N.Y.2d 776, 381 N.Y.S.2d 865, 345 N.E.2d 337 (1975).

Finally, the finding of derivative neglect with respect to Matthew, Katherine and Samantha was supported by substantial evidence. FCA 1046(a)(i) states that "[p]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal

responsibility of, the respondent." A finding of abuse with regard to a sibling can constitute a prima facie case of neglect of the other children, if the conduct which constituted abuse "is so proximate in time to the derivative proceeding that it can reasonably be concluded that the condition still exists." Matter of Cruz, 121 A.D.2d 901, 903, 503 N.Y.S.2d 798, 800 (1st Dept. 1986). It is not necessary for a sibling to suffer physical injury in order for the court to find derivative neglect or abuse of a sibling. See Matter of Jorge S., 211 A.D.2d 513, 621 N.Y.S.2d 66 (1st Dept. 1995), lv. denied 85 N.Y.2d 810, 629 N.Y.S.2d 724, 653 N.E.2d 620 (1995). Evidence of the abuse of one child supports the conclusion that "the parents have a faulty understanding of the duties of parenthood and that [any] other child [of the family] is therefore neglected because there is a substantial risk that his or her mental, emotional or physical condition is in imminent danger of becoming impaired" by the same abusive conduct. Matter of Christina Maria C., 89 A.D.2d 855, 855, 453 N.Y.S.2d 33, 34 (2d Dept. 1982), citing FCA 1046(a)(i), and 1012(f)(i)(B). Thus, in this case, while there is no evidence that Victoria's siblings suffered any physical harm, the repeated and severe injuries inflicted upon Victoria indicate that her caregivers failed to understand their duties to the children, and that Victoria's siblings were in imminent danger of

being injured.

Accordingly, the order of disposition of the Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about June 7, 2010, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination that respondents had abused the youngest subject child and derivatively neglected the other children, should be unanimously affirmed, without costs.

All Concur.

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

ENTERED: DECEMBER 13, 2012

CLERK