SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 22, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, Renwick, Freedman, Manzanet-Daniels, JJ.

6320 The People of the State of New York, Ind. 6250/08
Respondent,

-against-

Carlos Baez,
Defendant-Appellant.

Cardozo Criminal Appeals Clinic, New York (Stanley Neustadter of of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered December 11, 2009, convicting defendant of criminal possession of a weapon in the third degree and sentencing him, as a second felony offender, to a term of two to four years, affirmed.

Defendant claims that the motion court should have suppressed his self-incriminating response to police questioning

because he was not given *Miranda* warnings. During a traffic stop, police officers ordered the vehicle's five occupants to get out and gather behind the vehicle after the officers observed defendant, who was sitting in the rear, reach into the seat pocket in front of him and manipulate an object. An officer retrieved a gravity knife from the seat pocket and, without first administering *Miranda* warnings, threatened that unless the knife's owner came forward, he could arrest the entire group. Defendant then admitted that the knife was his.

The court denied defendant's motion to suppress the confession, finding that he "was not yet in custody for *Miranda* purposes" when he confessed and that questioning the group did not constitute an interrogation. We find that defendant was subjected to a custodial interrogation and accordingly should have received *Miranda* warnings (*see Miranda v Arizona*, 384 US 436, 444 [1966]). The standard for determining if a suspect is "in custody" when making a statement is "whether a reasonable person, innocent of any crime, would have felt free to leave" (*People v Harris*, 48 NY2d 208, 215 [1979]). When he confessed, defendant was one of five people who had first been ordered to get out of their car and stand behind it. An officer approached

the group while holding the gravity knife he had recovered and threatened them with the possibility of arrest if the knife's owner did not identify himself. Under these circumstances, no reasonable person would have believed that the police had not restricted his or her freedom of movement and that he or she was free to leave.

The concurrence does not consider the officer's statement as a threat because he said he "could" arrest the group instead of promising that he "would" arrest them, but we do not view this distinction as material. Any reasonable person in defendant's circumstances would have perceived the statement as coercive.

Moreover, the police officer's threat to arrest the entire group if the owner did not come forward was the functional equivalent of interrogation under *Miranda*, given that the police knew or should have known that the statement "was reasonably likely to elicit an incriminating response" (*People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985] [quotation marks omitted]; *see People v Creary*, 61 AD3d 887, 889 [2009]). In *Creary*, the defendant was a passenger in a car from which the police recovered a gun (61 AD3d at 888). Before the defendant received *Miranda* warnings, he confessed to an officer that the

gun was his after the officer advised him that, unless the police learned who owned the gun, they would charge all the car's occupants with its possession (*id.* at 888-889). The court ruled that the confession should have been suppressed because the officer's statement amounted to interrogation (*id.* at 889).

The concurrence views the officer's question to the group as "permissible clarifying inquiry" as opposed to interrogation, but it overlooks that the officer coupled the question with intimidation by threatening arrest. Thus, the questioning was designed not merely to clarify the situation but also to elicit defendant's inculpatory response (*see People v Bastian*, 294 AD2d 882, 884 [2002], *lv denied* 98 NY2d 694 [2002]; *People v Santarelli*, 268 AD2d 603, 604 [2000], *lv denied* 94 NY2d 952 [2000]; *cf. People v Maldonado*, 184 AD2d 590, 590 [1992]).

However, reversal is unnecessary since at trial the People presented overwhelming proof of defendant's guilt, including the knife retrieved from the seat pocket defendant had reached into and defendant's recorded admission, during a phone call he made while incarcerated, that he had been arrested because he "had a punk-ass knife in the car." In light of this evidence, the erroneous admission of the defendant's incriminating statement at

the scene was harmless error (*see People v Crimmins*, 36 NY2d 230 [1975]; *People v Paulman*, 5 NY3d 122, 134 [2005]).

All concur except Mazzarelli, J.P. and Andrias, J. who concur in a separate memorandum by Mazzarelli, J.P. as follows:

MAZZARELLI, J.P. (concurring)

I agree with the majority that defendant's conviction should be affirmed. However, I disagree that defendant's statement that he owned the gravity knife should have been suppressed. Further, I do not believe that the issue needs to have been reached by the majority.

The police testimony at the suppression hearing can be summarized as follows. On December 27, 2008, at approximately 1:30 A.M., three police officers were in uniform and on routine patrol in their unmarked vehicle in the vicinity of 110th Street in Manhattan. There they observed a car rapidly passing them at about 30-50 miles per hour, changing lanes without signaling, and running through a red light. The officers pulled the car over and, as they approached, an officer observed that three or four people in the vehicle were moving from side to side, reaching, looking at each other and making a lot of hand movements. One of the officers saw defendant, who was sitting in the rear passenger-side seat, reach forward with both hands towards the pocket that was attached to the back side of the car's front seat. Another officer saw defendant placing something in or taking something out of the seat pocket. Fearing for his safety, the officer ordered the occupants out of the car.

After the occupants were removed from the car, defendant was patted down and then the group was told to step to the back of the car. One of the officers pointed his flashlight at the seat pocket in front of where defendant had been sitting and saw a knife. The officer was able to see the knife without touching the pocket, because the pocket was open about three to four inches. After he removed the knife from the car, the officer opened it and concluded that it was a gravity knife. The officer went to the rear of the car and asked the group who owned the knife, telling them that "[u]nless somebody claims responsibility for the knife, you can all be arrested." Defendant then acknowledged that he owned the knife and was arrested. The vehicle's owner and other occupants were allowed to leave in the car. The police did not issue any traffic tickets to the driver of the vehicle.

The only respect in which the testimony of the defense witnesses differed materially from the police testimony concerned what the officer said to the car occupants while holding the knife. According to the driver of the car and one of her passengers, the officer said that if no one acknowledged ownership of the knife, then everyone was "going to jail." However, the hearing court credited the testimony of the police

witnesses as a whole. It declined to suppress defendant's statement that the gravity knife belonged to him, finding that he was not in custody for *Miranda* purposes.

Prior to an interrogation, *Miranda* warnings must be given to any person who "has been taken into custody or otherwise deprived of his freedom of action in any significant way" (*Miranda v Arizona*, 384 US 436, 445 [1966]). "Custody" is "de facto arrest" (*People v Hicks*, 68 NY2d 234, 239-240 [1986]. The standard for determining whether a person is in custody, for purposes of whether *Miranda* warnings must be administered, is "if a reasonable man, innocent of any crime" would have considered himself to be in custody" (*id.* at 240 [internal citation and quotation omitted]). Under this standard, a person can be found to be free of custody even if he is interviewed at a police station (*see People v Yukl*, 25 NY2d 585, 589 [1969]). Further, the fact that the person was "advised" to accompany the police somewhere, rather than "requested" or "invited" to come, does not necessarily mean that he was in custody, because "an assumption that one is required to cooperate with the police can hardly be equated with an arrest; every citizen has a duty to assist police officers up to the point of self-incrimination" (*id.* at 590, quoting *Hicks v United States*, 382 F.2d 158 [DC Cir 1967]).

It is important to note that police roadside questioning of a "seized" motorist during a traffic stop does not by itself constitute custodial interrogation (see *People v Alls*, 83 NY2d 94, 99 [1993]). This is so even though a traffic stop significantly curtails the freedom of action of the driver and passengers of a detained vehicle, and "few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so" (*Berkemer v McCarty*, 468 US 420, 436 [1984]). Rather, roadside detentions have been held to be noncustodial, and reasonable initial interrogation attendant thereto has been held to be merely investigatory (*see People v Gutierrez*, 13 AD3d 268, 269 [2004], *lv denied* 4 NY3d 831 [2005]; *People v Williams*, 81 AD3d 993 [2011], *lv denied* 16 NY3d 901 [2011]; *People v Mathis*, 136 AD2d 746, 748 [1988], *lv denied* 71 NY2d 899 [1988]).

Because the initial direction of defendant and the others to stand behind the car they had been traveling in was incidental to the traffic stop, defendant and his companions were not in custody for *Miranda* purposes merely by dint of their detention there. Further, defendant does not argue that his freedom was restrained by any act of "official force that is normally associated with custody," such as handcuffing or drawing of

weapons (*People v Morales*, 129 AD2d 440, 443 [1987]). Rather, he limits his argument to the contention that custody began when the police collectively asked the group who owned the gravity knife. However, a reasonable, innocent person would not have believed that he was under the functional equivalent of arrest at that point. To the contrary, the question itself expressly stated that the entire group, not just defendant, was subject to arrest *only* if nobody spoke up. Further, as the majority has not set aside the court's credibility findings, it is bound by the police version of the testimony that the car occupants were told that failure to confess to ownership of the knife "can" lead to the arrest of all of the vehicle's occupants. Somehow, the majority characterizes this statement as a "threat" and as "intimidation." However, such an equivocal statement does not rise to the level of coercion that would be necessary to convince an innocent person that he was not free to leave (*contrast People v Reyes*, 77 AD3d 509 [2010] [defendant found to have been in custody for *Miranda* purposes where police told him they had a warrant for his arrest]).

Nor did the question constitute an interrogation designed to elicit an inculpatory statement from the defendant (*see People v Huffman*, 41 NY2d 29, 33 [1976]). *Miranda* warnings are only

required where "criminal events at the crime scene have been concluded and the situation no longer requires clarification of the crime *or its suspects*" (*People v Soto*, 183 AD2d 926, 927 [1992], citing *Huffman*, 41 NY2d at 34 [emphasis added]). Here, while the police could reasonably have concluded that a crime had been committed, they asked the question because they genuinely did not know who of the five people in front of them had committed it. Accordingly, the question did not cross the line from permissible clarifying inquiry to coercive interrogation (*see People v Velasquez*, 267 AD2d 64 [1999], *lv denied* 94 NY2d 886 [2000] [no *Miranda* warnings necessary in connection with a general question, addressed to a group of individuals removed from a vehicle, regarding ownership of a gun found therein]); *People v Nesby*, 161 AD2d 246 [1990], *lv denied* 76 NY2d 793 [1990] [where police were responding to burglary call and encountered a person inside an apartment which was open and had a broken lock, asking the person what he was doing there was not an interrogation that required *Miranda* warnings]. *People v Creary* (61 AD3d 887 [2009]), on which the majority relies, is readily distinguishable. There, when the interrogation took place the defendant and the two other passengers in his vehicle had already been arrested and taken to the station house. Additionally, the

defendant was interrogated separately from the other suspects. Under those circumstances, not only was the defendant in a more vulnerable state of mind than defendant here and thus more likely to inculpate himself, but the police were not dealing with sorting out an active crime scene. Most importantly, in *Creary* the police explicitly stated that they "would" charge all three suspects if the defendant did not confess to owning the gun in question. Again, this contrasts with the instant case, where the police merely stated that all of the suspects "can" be arrested if nobody concedes ownership of the gravity knife.

Of course, the majority agrees that the admissibility of defendant's statement was rendered academic by the harmless error doctrine as there is overwhelming evidence of defendant's guilt. Nevertheless, by addressing the *Miranda* issue, the majority has unnecessarily forced a strictly theoretical debate in which it misapprehends the settled law. The better practice in cases where, as here, there is overwhelming evidence of guilt, is to avoid a distracting, time-consuming and speculative discussion. After all, courts are supposed to refrain from passing on

academic, hypothetical, moot, or otherwise abstract questions (*see Hearst Corp. v Clyne*, 50 NY2d 707, 713-714 [1980]). Here, the majority has ignored that "fundamental principle of our jurisprudence" (*id.* at 713).

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

ENTERED: MAY 22, 2012

CLERK

Mazzarelli, J.P., Saxe, Catterson, Acosta, Román, JJ.

6620 Latisha Jones, Index 113039/05
Plaintiff-Respondent, 590628/06

-against-

Consolidated Edison Company of New York, Inc., et al.,
Defendants,

Nico Asphalt Paving, Inc.,
Defendant-Appellant.

- - - - -

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

-against-

Nico Asphalt Paving, Inc.,
Third-Party Defendant-Appellant,

MEC Construction Corp.,
Third-Party Defendant.

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McMahon, Martine & Gallagher, LLP, Brooklyn (Aoife Reid of counsel), for appellant.

Dinkes & Schwitzer, P.C., New York (Brian J. Vannella of counsel), for respondent.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 14, 2011, which denied the motion of defendant/third-party defendant Nico Asphalt Paving, Inc. for summary judgment dismissing the complaint, third-party complaint and all claims against it, unanimously reversed, on the law,

without costs, the motion granted, and the complaint, third-party complaint and all claims dismissed as against Nico. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured when, while disembarking from a bus, she stepped into a hole in the pavement immediately surrounding a maintenance hole cover. Defendant Consolidated Edison Company of New York, Inc. had performed work underneath the street approximately two years earlier. That work consisted of making nine openings in the street, performing work on the electrical conduit system underneath the roadway, and then backfilling the openings. The cutting and backfilling was performed by defendant MEC Construction Corp. Nico paved over the areas where the roadway had been disturbed.

The Con Edison construction inspector for the project testified at his deposition that in connection with the conduit work, MEC opened up a trench, which extended across the roadway and ended near the maintenance hole cover where plaintiff fell. However, he explained that the cover was located in the middle of the hole itself, and that the trench did not extend past the outer wall of the hole. Another Con Edison witness, who inspected the paving performed by Nico on the subject project, was unable to recall whether Nico paved right up to the cover in

question. However, he did testify that if the trench had stopped at the outer wall of the hole and had not extended to the cover, Nico would not have been responsible for paving around the cover. The only witness for Nico, a superintendent, gave no testimony as to whether or not Nico paved around the subject maintenance hole.

Nico moved for summary judgment dismissing the complaint, the third-party complaint and all cross claims and counterclaims against it. Nico argued, inter alia, that the collective deposition testimony established that it did not pave around the maintenance hole cover where plaintiff fell and so could not have contributed to the defect that caused the accident. In opposition, plaintiff argued that Nico did not establish that it did not pave around the maintenance hole, since none of the witnesses had firsthand knowledge of whether it did or did not.

The court denied Nico's motion, finding that it had not established as a matter of law that it did not pave the area where plaintiff fell. The court stated that photographs submitted with the motion did not clearly show the place of the accident in relation to the cover or whether the paving included the area immediately adjacent to the maintenance hole cover.

Nico, through the deposition testimony of the Con Edison employees who supervised the project in question, made a prima

facie showing of entitlement to judgment as a matter of law dismissing plaintiff's complaint as against it (*see Resto v 798 Realty, LLC*, 28 AD3d 388 [2006]). The testimony of the construction inspector established that the trench that extended towards the maintenance hole in question stopped short of the cover. The paving inspector confirmed that, had this been the case, Nico would not have been required to pave around the maintenance hole cover.

In opposition to the motion, plaintiff failed to offer any evidence sufficient to raise a triable issue of fact. Significantly, she did not dispute the testimony that the trench did not extend to the maintenance hole cover and that only the areas where the trench had existed would have been paved. Instead, she argues that summary judgment is precluded by the Con Edison paving inspector's initial statement at his deposition that Nico did work in the "immediate area of a [maintenance] hole cover." However, that witness had no independent recollection of the job and stated that he had to rely on documents. When his recollection was refreshed with Nico's paving order, which did not reflect that work would be done around the cover, he stated that he did not recall Nico having paved in the immediate vicinity of the maintenance hole cover.

It is noted that, even had Nico paved around the cover, plaintiff has presented no evidence that it did the work defectively. Indeed, Con Edison approved the work, and there was a gap of almost two years between the time the work was completed and the accident. Because plaintiff failed to submit evidence establishing a connection between Nico's work and the defect that caused her accident, Nico should have been granted summary judgment (*see Robinson v City of New York*, 18 AD3d 255, 256 [2005]).

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

ENTERED: MAY 22, 2012

CLERK

Saxe, J.P., Sweeny, Moskowitz, Renwick, Abdus-Salaam, JJ.

7375-
7376N Index 603423/06

Kenneth Orr,
Plaintiff-Appellant,

-against-

Daniel Yun, et al.,
Defendants-Respondents.

Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), and Richard Paul Stone, New York, for appellant.

Heller, Horowitz & Feit, P.C., New York (Martin Stein of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 24, 2011, which denied plaintiff's recusal motion, unanimously affirmed, with costs. Order, same court and Justice, entered on or about October 24, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment, unanimously modified, on the law, to deny defendants' motion as to the first, third, and fourth causes of action, and otherwise affirmed, without costs.

Plaintiff contends that the court should have recused itself because its "impartiality might reasonably be questioned" (22

NYCRR 100.3[E][1]). However, a judge's decision not to recuse herself on this ground will not be reversed unless there has been an abuse of discretion (*Matter of Johnson v Hornblass*, 93 AD2d 732, 733 [1983]). We find no such abuse. Nor do we find any ruling by Justice Scarpulla that demonstrates bias (*see Anderson v Harris*, 68 AD3d 472, 473 [2009]).

The court erred in granting summary judgment dismissing the first, third, and fourth causes of action based on collateral estoppel. One of the requirements for invoking collateral estoppel is that "the identical issue necessarily must have been decided in the prior action and be decisive of the present action" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). It is true that, on an appeal in a prior action among the parties (the note action), we stated that defendants "executed [a promissory] note in exchange for rescinding their pre-existing agreement" (83 AD3d 525, 525 [2011]). However, as plaintiff noted in footnote 2 of his brief on the prior appeal, there was more than one agreement among the parties. On their summary judgment motion, defendants did not demonstrate as a matter of law that the note rescinded the February 2006 agreement at issue in the instant case.

Defendants' argument that plaintiff obtained a favorable

result in the note action by arguing that the note terminated the February 2006 agreement and that, therefore, he is judicially estopped to argue the contrary in the present action is without merit. While, in the note action, plaintiff argued to the motion court that the note was consideration for canceling an agreement with his then employer, he argued to this Court that the consulting relationship that was being terminated was different from the February 2006 agreement, which says nothing about consulting.

Plaintiff's argument that his cross motion for summary judgment on liability on his contract claim should be granted because defendants relied solely on collateral and judicial estoppel below is also without merit. In opposition to plaintiff's cross motion, defendants argued that there were factual issues regarding fraudulent inducement and mutual termination. It is true that the motion court dismissed defendants' counterclaim for fraudulent inducement and that defendants have not cross-appealed. However, drawing all

inferences in defendants' favor on plaintiff's summary judgment motion, we find that Yun's deposition testimony raises an issue of fact whether he paid plaintiff $100,000 to, inter alia, terminate the February 2006 agreement.

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

ENTERED: MAY 22, 2012

CLERK

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

7409-
7410-
7411 Index 115092/08

Joseph W. Sullivan,
Plaintiff-Respondent,

-against-

William F. Harnisch, et al.,
Defendants-Appellants.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellants.

Law Offices of Daniel Felber, New York (Benjamin N. Leftin of counsel), for respondent.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered July 15, 2011, which granted plaintiff's motion for summary judgment dismissing defendants' first counterclaim, alleging a breach of confidentiality, unanimously affirmed, without costs. Order, same court and Justice, entered December 8, 2011, which, insofar as appealed from, upon defendants' motion to renew and reargue and for leave to amend their answer, directed that the issue of nominal damages on the first counterclaim be heard by a referee, and denied leave to amend, unanimously affirmed, without costs.

In this action, plaintiff asserts claims arising out of the termination of his employment by defendant investment companies.

The facts underlying this case are discussed in a decision on a prior appeal (81 AD3d 117 [2010]).

Defendants' first counterclaim alleges that plaintiff's disclosure of clients' identities in the complaint, and to the media, caused defendants to sustain damages. Plaintiff's motion for summary judgment dismissing this counterclaim was supported by the testimony of representatives of two former clients who were alleged by defendants to have left defendant companies as a result of the disclosure of their identities. This testimony established that the two clients left the defendant companies because of the allegations contained in the instant action and an action brought by defendants against plaintiff, and the existence of the lawsuits, and not due to the disclosure of the clients' identities. In opposition, defendants failed to establish a triable issue of fact as to the existence of consequential damages resulting from the disclosure of clients' identities, via admissible evidence (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The court properly rejected defendant William Harnisch's hearsay testimony concerning the reasons that clients left his companies. While "[h]earsay evidence may be sufficient to demonstrate the existence of a triable fact where it is not the

only evidence submitted" (*Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [2002] [citation omitted]), no such additional evidence was submitted here.

The trial court properly denied defendants' motion to renew as to consequential damages, as defendants did not assert additional material facts which existed at the time of the original motion but were unknown to them, and failed to demonstrate a reasonable excuse for not presenting such evidence earlier (*see* CPLR 2221[e]; *Haussmann v Wolf*, 187 AD2d 371, 373 [1992]). The subsequent retention of an expert is not proper grounds for renewal (*see Mundo v SMS Hasenclever Maschinenfabrik*, 224 AD2d 343, 344 [1996], *lv dismissed in part, denied in part* 88 NY2d 1014 [1996]). In any event, the purportedly new evidence would not have altered the initial determination on that issue. The court properly granted renewal to allow nominal damages, and appropriately referred the issue to a referee.

Finally, the trial court did not abuse its discretion in denying defendants' motion for leave to amend the answer to supplement the claimed breaches of confidentiality as defendants failed to establish that the proposed amended pleading was

meritorious and not duplicative of dismissed claims (*see Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22 [2003]).

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

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

ENTERED: MAY 22, 2012

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, JJ.

7505 The People of the State of New York, Ind. 3139/08
Respondent,

-against-

Kwame S.,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

Judgment, Supreme Court, New York County (James A. Yates, J. at plea; Lewis Bart Stone, J. at sentencing), rendered July 1, 2010, convicting defendant of robbery in the first degree, and sentencing him to a term of five years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of vacating the conviction, adjudicating defendant a youthful offender, and reducing the sentence to an indeterminate term of 1 1/3 to 4 years of imprisonment, and otherwise affirmed.

Since defendant did not move to withdraw his plea or vacate the judgment, his challenge to the voluntariness of his plea is unpreserved and we decline to review it in the interest of justice. We conclude that defendant's utterances overall in this case did not engender "significant doubt" on the voluntariness of

his plea. His plea allocution does not qualify for the narrow, "rare case" exception to the preservation doctrine described in *People v Lopez* (71 NY2d 662, 666 [1988]) (see *People v Toxey* (86 NY2d 725, 726 [1995]).

Defendant also contends that the sentence imposed upon him was excessive. He also maintains that it was an improvident exercise of discretion for the sentencing court to refuse to accord him youthful offender status. We agree.

In view of the defendant's young age, the lighter sentences of his codefendants and his complete lack of any juvenile or prior criminal record, we find that the sentence imposed was excessive to the extent indicated. Moreover, under the circumstances of this case, including the facts that his subsequent arrests were directly related to drug use and the presentence report recommended youthful offender adjudication

(*see* CPL 720.10[3][I]), we find that "the interest of justice would be served by relieving the [defendant] from the onus of a criminal record" (CPL 720.20[1][a]; see *People v Bruce L.*, 44 AD3d 688 [2007]; *People v Nadja B.*, 23 AD3d 394 [2005]).

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

ENTERED: MAY 22, 2012

CLERK

Mazzarelli, J.P., Freedman, Catterson, Richter, Manzanet-Daniels, JJ.

7697 Susan Silvis, Index 103415/06
Plaintiff-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 13, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's action for alleged discrimination was properly dismissed since none of the employment actions complained of by plaintiff was an adverse employment action (*see Messinger v Girl Scouts of the U.S.A.*, 16 AD3d 314, 314-15 [2005]). Plaintiff's transfer from the position of literacy coach to a classroom teacher was "merely an alteration of her responsibilities," and not an adverse employment action. Apart from a change in the nature of her duties, plaintiff "retained the terms and conditions of her employment, and her salary remained the same"

(*Matter of Block v Gatling*, 84 AD3d 445, 445 [2011], *lv denied* 17 NY3d 709 [2011]). Plaintiff's contention that she was discriminated against based on evidence that, after her transfer back to the classroom teaching position, she was subjected to a relentless stream of reprimands is not sufficient to establish a prima facie case of discrimination. Notwithstanding the frequent reprimands, she received a satisfactory end-of-year performance rating, and none of the reprimands resulted in any reduction in pay or privileges (*id.*). Nor can plaintiff establish a claim of discrimination based on a failure to reasonably accommodate her disabling condition. Plaintiff concedes that defendants provided her with a "satisfactory" accommodation, in the form of moving her classroom from the fourth to the second floor, with "no escort duty."

Plaintiff has similarly failed to show that her "workplace was 'permeated with "discriminatory intimidation, ridicule and insult" that [was] sufficiently severe or pervasive to alter the terms or conditions of'" employment, so as to make out a claim for hostile work environment (*Ferrer v New York State Div. of Human Rights*, 82 AD3d 431 [2011], quoting *Harris v Forklift Sys.*,

Inc., 510 US 17, 21 [1993]). Plaintiff complained of only a single potentially derogatory remark related to her age and did not complain of any remarks regarding her disability (*Ferrer*, 82 AD3d 431).

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

ENTERED: MAY 22, 2012

CLERK

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

7698 In re Lisa S.,
Petitioner-Respondent,

-against-

William V.,
Respondent-Appellant.

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

Anne Reiniger, New York, for respondent.

Order, Family Court, Bronx County (Andrea Masley, J.), entered on or about January 26, 2011, which, after a hearing in a proceeding brought pursuant to article 8 of the Family Court Act, granted petitioner's application for a final order of protection in her favor which expires on January 25, 2013, unanimously affirmed, without costs.

The record amply supports Family Court's determination that a two-year order of protection is warranted. The court's

credibility determinations, made in connection with this determination, should be accorded deference, and we find no basis to disturb them (*see Matter of F.B. v W.B.*, 248 AD2d 119 [1998]; *Matter of Baez v Martinez*, 255 AD2d 131, 132 [1998]).

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

ENTERED: MAY 22, 2012

CLERK

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

7699 Wayne Chambers, Index 309351/08
Plaintiff-Appellant,

-against-

Robert Tom, et al.,
Defendants-Respondents,

Rodney Joseph, et al.,
Defendants.

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

Brand, Glick & Brand, P.C., Garden City (Andrew Federman of counsel), for respondents.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered April 4, 2011, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained by plaintiff while working on defendant Tom's house, granted defendant Tom's motion for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

Defendant established his entitlement to judgment as a matter of law. Defendant submitted evidence showing that he fell within the exemption from liability pursuant to Labor Law § 241(6), as an owner of the one-family dwelling who contracted

for, but did not direct or control the subject work. Defendant's instructions to plaintiff and his employer were limited to indicating generally where the wood should be installed. Plaintiff and defendant both testified that defendant provided no instructions on how to cut the wood, nor did he provide the circular saw that plaintiff was using at the time of the accident. Accordingly, defendant's involvement in the project did not constitute direction or control over plaintiff's work, and plaintiff's opposition failed to raise a triable issue of fact (*see Affri v Basch*, 13 NY3d 592 [2009]; *see also Thompson v Geniesse*, 62 AD3d 541 [2009]).

We decline to consider plaintiff's argument regarding his Labor Law § 200 claim since it was raised for the first time in his reply brief (*see e.g. Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 511 [2011]).

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

ENTERED: MAY 22, 2012

CLERK

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

7700-
7700A Noldalia Escotto,
Plaintiff-Appellant,

-against-

Roque Vallejo, et al.,
Defendants-Respondents,

Index 301955/07

Richard G. Monaco, Bronx, for appellant.

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

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 6, 2011, which, to the extent appealed from as limited by the briefs, granted defendants Roque Vallejo and NYLL Management Ltd's (defendants) motion for summary judgment dismissing the complaint insofar as it alleged serious injuries of plaintiff's left knee under the permanent consequential limitation of use and/or significant limitation of use categories of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied as to said claim. Appeal from order, same court, Justice, and date of entry, which dismissed the complaint as against the City, unanimously dismissed, without costs, as abandoned.

On April 2, 2007, plaintiff sustained injuries when a

vehicle operated and owned, respectively, by defendants Roque Vallejo and NYLL Management Ltd. struck her as she was crossing the street.

Defendants failed to meet their initial burden of establishing that plaintiff did not sustain a serious injury to her knee as a result of the accident. In support of their summary judgment motion, defendants submitted the report of their orthopedist, Dr. Gregory Montalbano, who examined plaintiff in November 2008 and found full range of motion, absence of valgus and varus instability, and negative McMurray, Lachman, and anterior and posterior drawer tests. He also noted in his report pain to patella compression, and ambulation with an unsteady gait. Based on his examination and review of plaintiff's medical records, he concluded that plaintiff had sustained left knee contusion/strain, and that such condition has resolved. He also opined that any persisting symptoms were caused by advanced degenerative conditions, which included osteoarthritis and medial and lateral meniscal tears.

However, the MRI reports of defendants' radiologist, one of which was relied upon by Dr. Montalbano, concluded that a finding of traumatic injury could not be ruled out given the evidence of an ACL and a meniscal tear. Such contradictory evidence as to

whether the tears were chronic or acute in nature creates issues of fact as to whether the persisting knee symptoms were causally related to the accident (*see Suazo v Brown*, 88 AD3d 602 [2011]). Further, defendants have not established that the persisting limitations are not "consequential" or "significant" (*see Licari v Elliott*, 57 NY2d 230, 236 [1982]). Dr. Montalbano did not indicate the extent of plaintiff's pain on patella compression, and noted that plaintiff was ambulating with an unsteady gait. Because defendants failed to meet their prima facie burden, their motion must be denied, regardless of the claimed insufficiency of the opposing papers (*see Feaster v Boulabat*, 77 AD3d 440 [2010]).

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

ENTERED: MAY 22, 2012

CLERK

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

7701 Harper Investments, Inc., et al., Index 650998/11
Plaintiffs-Appellants,

-against-

Harper-Kilgore, LLC, now known as KilGore Companies, LLC, et al.,
Defendants-Respondents.

Duval & Stachenfeld LLP, New York (Richard J. Schulman of counsel), for appellants.

Gibson, Dunn & Crutcher LLP, New York (Marshall R. King of counsel), for respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 29, 2011, which, to the extent appealed from as limited by the briefs, directed that the matter be submitted to an independent accountant, as provided for under section 2.10(c) of the parties' asset purchase agreement, unanimously affirmed, with costs.

As a threshold matter, this appeal is properly before us, as the motion to reargue before Supreme Court was limited to a request to reinstate the complaint, and did not change any aspect of the issue now on appeal — namely, Supreme Court's referral of the matter to the accountant without any limitation on the issues

to be decided (*see Fox v Issler*, 77 AD2d 860 [1980]; CPLR 5517[a][1]).

On the merits, we perceive no basis to require the court to determine or limit the issues to be decided by the accountant, where the agreement between the parties is sufficient to inform the accountant and the parties as to the proper scope of the accounting. Indeed, plaintiffs have not even articulated a disagreement with defendants as to the scope of the accounting. Moreover, where, as here, the issues before Supreme Court and the accountant appear inextricably intertwined, as in an arbitration, "the proper course is to stay judicial proceedings pending completion of the [accounting]," since "the determination of issues in [the accounting] may well dispose of non[accounting] matters" (*Country Glass & Metal Installers, Inc. v Pavarini McGovern, LLC*, 65 AD3d 940, 940 [2009], quoting *Cohen v Ark Asset Holdings*, 268 AD2d 285, 286 [2000]).

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

ENTERED: MAY 22, 2012

CLERK

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

7702-
7702A Index 401609/08

Sun Gold, Corp.,
Plaintiff-Appellant,

-against-

Moon Stillman, etc., et al.,
Defendants,

Mark B. Stillman, et al.,
Defendants-Respondents.

_____

Eliot F. Bloom, Williston Park, for appellant.

Jordan A. Wolff, Hastings-on-Hudson, for Mark B. Stillman, respondent.

Rizpah A. Morrow, New York, for R.A. 35 West 43 Enterprises, Inc., respondent.

_____

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 1, 2010, which, insofar as appealed from, granted the motions of defendants Mark B. Stillman and RA 35 West 43 Enterprises, Inc. (landlord) for summary judgment dismissing the complaint as against them and all cross claims as against Stillman, unanimously affirmed, with costs.

The court properly awarded summary judgment dismissing plaintiff's causes of action for breach of contract, trespass, wrongful eviction, and tortious interference with contract. The claims were all premised upon plaintiff's assertion that

defendants engaged in a scheme to deprive it of an interest in leased premises by inducing the landlord to enter into new leases with third parties for the same premises and term as provided for in plaintiff's lease. However, the undisputed evidence shows that prior to the alleged misconduct, plaintiff's lease was rendered void by its illegal use of the premises. The leased premises were equipped and advertised for the provision of massage services by unlicensed masseuses, constituting a public nuisance and violating applicable statutory, administrative code and zoning provisions (*see* Administrative Code of City of NY § 7-703[f], [k]; Zoning Resolution of the City of New York § 12-10; Education Law §§ 7802, 6512, § 6513). The use of the premises also breached the terms of plaintiff's lease requiring compliance with all relevant laws and regulations, and was a non-complaint use under the premises' certificate of occupancy.

Accordingly, the court properly dismissed plaintiff's cause for breach of contract against the landlord, as plaintiff cannot establish proper performance under the lease (*see Hart v City Theatres Co.*, 215 NY 322 [1915]). The claims against the landlord alleging wrongful eviction and trespass were also properly dismissed since plaintiff's illegal use of the premises voided the lease and authorized the landlord to reenter (Real

Property Law § 231[1]). Plaintiff's claim against Stillman alleging tortious interference with contract is also not viable because plaintiff cannot show that "but for" Stillman's conduct, the lease would not have been breached (*see Lana & Samer v Goldfine*, 7 AD3d 300 [2004]). Moreover, the claims for wrongful eviction and trespass against Stillman were properly dismissed because the lease was rendered unenforceable by plaintiff's violation of its terms and illegal use of the premises, vitiating plaintiff's leasehold interest prior to Stillman's alleged malfeasance (*see* Real Property Law § 231[1]).

Dismissal of plaintiff's causes of action for conversion of its leasehold and future business interests was also appropriate. The conversion of intangible property is not actionable (*see Sporn v MCA Records*, 58 NY2d 482, 489 [1983]). Moreover, plaintiff failed to establish that the landlord and Stillman, as opposed to other named defendants, "exercised unauthorized dominion over plaintiff's assets or equipment to the exclusion of

the plaintiff's rights" (*MBF Clearing Corp. v Shine*, 212 AD2d 478, 479 [1995]).

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

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

ENTERED: MAY 22, 2012

CLERK

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

7705-
7705A The People of the State of New York,
Respondent,

-against-

Dwight Giles,
Defendant-Appellant.

Ind. 6804/01

Robert S. Dean, Center for Appellate Litigation, New York (Jonathan M. Kirshbaum of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered September 10, 2009, convicting defendant, after a jury trial, of attempted burglary in the second degree and criminal possession of burglar's tools, and sentencing him, as a persistent felony offender, to an aggregate term of 20 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence for the attempted burglary conviction to a term of 15 years to life, and otherwise affirmed. Judgment of resentence, same court, (Charles H. Solomon, J.), rendered January 27, 2009, resentencing defendant, as a persistent felony offender, to a concurrent aggregate term of 20 years to life upon his conviction, after a

jury trial, of two counts of criminal possession of stolen property in the fourth degree, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentences to concurrent terms of 15 years to life, and otherwise affirmed.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of strategy not reflected in the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Defendant raised one of his attacks on counsel's strategy in a CPL 330.30(1) motion to set aside the verdict. However, that motion was procedurally defective, and "[t]o the extent the motion could be deemed a de facto or premature motion to vacate judgment pursuant to CPL 440.10, the issues raised in the motion are unreviewable since defendant failed to obtain permission from this Court to appeal" (*People v Ai Jiang*, 62 AD3d 515, 516 [2009], *lv denied* 14 NY3d 769 [2010]).

To the extent that the existing record permits review, either standing alone or supplemented by the submissions on the CPL 330.30(1) motion, we find that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that either or both of counsel's alleged deficiencies fell below a objective standard of reasonableness, or that they deprived defendant of a fair trial, affected the outcome of the case, or caused defendant any prejudice.

Defendant did not preserve his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]). Any improprieties in the summation constituted harmless error (*see People v Crimmins*, 36 NY2d 230 [1975]). We have considered and rejected defendant's ineffective assistance claim relating to these issues.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). In a compromise ruling that was generally favorable to defendant, the court only permitted the People to elicit part of defendant's extensive record, and only permitted

those convictions to be identified as unspecified felonies.

The trial court, as well as the court that resentenced defendant on the possession of stolen property convictions following remand from the Court of Appeals (11 NY3d 495, 500 [2008]), each properly exercised its discretion in adjudicating defendant a persistent felony offender. Defendant's challenge to the constitutionality of those adjudications is unavailing (*see People v Battles*, 16 NY3d 54, 59 [2010]). However, we find the sentence and resentence excessive to the extent indicated.

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

ENTERED: MAY 22, 2012

CLERK

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

7706 Kristen McRedmond, et al., Index 112845/06
Plaintiffs-Respondents,

-against-

Sutton Place Restaurant
and Bar, Inc., et al.,
Defendants-Appellants.

Weg & Myers, P.C., New York (Joshua L. Mallin of counsel), for appellants.

Law Offices of Rosemarie Arnold, New York (Paige R. Butler of counsel), for respondents.

Order, Supreme Court, New York County (Debra A. James, J.), entered April 19, 2011, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing plaintiff McRedmond's hostile work environment claim and McRedmond's and plaintiff Lipton's retaliatory termination claims under the New York State Human Rights Law (State HRL) and New York City Human Rights Law (City HRL), McRedmond's false imprisonment claim and both plaintiffs' battery claims, unanimously affirmed, with costs.

Plaintiff McRedmond testified that over a two-year period she was constantly subjected to vulgar sexual comments, comments about her weight and appearance, and inappropriate touching of

her buttocks and breasts by defendant Neil "Doe" (Hanafy). She testified that Hanafy repeatedly asked her how much she weighed and that on one occasion he attempted to weigh her by forcibly lifting her onto a scale. McRedmond testified that these kinds of comments and physical contact were directed at female employees only, and that she complained about them to Hanafy directly as well as to defendant Selena Steddinger, her supervisor, many times. McRedmond's testimony was corroborated by that of coworkers who witnessed or were themselves subjected to similar behavior by Hanafy.

Viewing the evidence in the light most favorable to McRedmond (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]), a reasonable person could find both that McRedmond subjectively perceived Hanafy's conduct as abusive and that Hanafy's conduct created an objectively hostile or abusive environment, and thus that the State HRL was violated (*see Harris v Forklift Sys., Inc.*, 510 US 17, 21 [1993]; *Forrest*, 3 NY3d at 330 n 3). Hanafy's denial that he engaged in any of the alleged conduct and the other individual defendants' denial of any knowledge of such conduct raises genuine credibility issues that the court may not decide on a motion for summary judgment (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

Defendants argue that McRedmond failed to show that Hanafy's conduct interfered with her work performance (*see Forrest*, 3 NY3d at 311). They point out that she continued working at defendant Sutton Place Restaurant and Bar, did not become physically ill, and did not have panic attacks or seek psychiatric help. However, a plaintiff need not demonstrate that she sustained a psychological injury to prove a hostile environment claim (*Harris*, 510 US at 21-22). Nor must she resign her job or demonstrate that she became physically ill. A hostile work environment is measured by the totality of the circumstances, of which no single one is determinative (*see id.* at 23).

As the City HRL provides broader protection than the State HRL (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 74 [2009], *lv denied* 13 NY3d 702 [2009]), and McRedmond has raised issues of fact as to her claim of a hostile work environment under the State HRL, a fortiori, she has raised issues of fact as to the hostile work environment claim under the City HRL.

Contrary to defendants' contention, the individual defendants can be held liable under the State HRL for Hanafy's discriminatory conduct. Hanafy is the alleged perpetrator of the conduct (*see Feingold v New York*, 366 F3d 138, 158 [2nd Cir 2004]). Defendant Richard Kassis is the owner of Sutton Place,

and there is record evidence raising issues of fact whether he condoned or aided and abetted Hanafy's conduct (*Matter of State Div. of Human Rights v St. Elizabeth's Hosp.*, 66 NY2d 684, 687 [1985]). Defendant Alan Bradbury, the general manager of Sutton Place, too can be held liable as an employer if, as the record suggests, he had the authority to do more than carry out personnel decisions and he aided and abetted or participated in the conduct (*see id.*; *Patrowich v Chemical Bank*, 63 NY2d 541, 542 [1984]). As to Steddinger, plaintiffs' supervisor, there is evidence raising issues of fact whether she failed to investigate or take appropriate measures after receiving McRedmond's complaints about Hanafy's alleged conduct (*see Lewis v Triborough Bridge and Tunnel Auth.*, 77 F Supp 2d 376, 384 [SD NY 1999]).

Contrary to defendants' contention, Steddinger's receipt of McRedmond's complaints is sufficient to impute knowledge to Sutton Place although Steddinger was not "upper-level management." McRedmond testified that Steddinger told her to submit any complaints to her, rather than to Kassis. She was not required, "in order to preserve [her] rights, [to] go from manager to manager until [she] [found] someone who [would] address [her] complaints" (*Gorzynski v JetBlue Airways Corp.*, 596 F3d 93, 104-05 [2nd Cir 2010]). Moreover, since Hanafy was also

one of McRedmond's supervisors and the alleged perpetrator, McRedmond's employer can be held liable based on the nexus between Hanafy's supervisory authority and his discriminatory conduct (*see Matter of Father Belle Community Ctr. v New York State Div. of Human Rights*, 221 AD2d 44, 52-53 [1996], *lv denied* 89 NY2d 809 [1997]).

For the same reasons, each of the individual defendants may also be held liable under the City HRL. Moreover, the City HRL imposes strict liability on employers for the acts of managers and supervisors, including where, as here, the "offending employee 'exercised managerial or supervisory responsibility'" (*Zakrzewska v New School*, 14 NY3d 469, 479-480 [2010], quoting Administrative Code of City of NY § 8-107[13][1]).

Both plaintiffs made a prima facie case of retaliation by testifying that they were terminated from their employment shortly after complaining about an incident in which all the female employees were forcibly weighed (*see McDonnell Douglas Corp. v Green*, 411 US 792, 802-804 [1973]). Defendants articulated a nondiscriminatory reason for the terminations, i.e., that plaintiffs had violated various company policies, inter alia, arriving to work late, being rude to customers, and eating without permission during a shift. They also submitted

disciplinary forms that they said they maintained to document each plaintiff's policy violations. However, plaintiffs testified that they never violated any company policies and that they were never reprimanded or disciplined for any policy violations; a coworker also testified that McRedmond was never reprimanded. Moreover, defendants admitted that plaintiffs had never seen or heard of the disciplinary forms they submitted, which raises a suspicion as to the legitimacy and authenticity of the forms. Thus, an issue of fact exists whether defendants' proffered nondiscriminatory reasons were pretextual, and plaintiffs' retaliation claims under the State HRL may proceed (*see McDonnell Douglas*, 411 at 804). Plaintiffs' claims may also proceed under the City HRL, which requires only that a plaintiff show that "at least one of the reasons proffered by [the] defendant is false, misleading, or incomplete" (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 [2011]).

As to McRedmond's false imprisonment claim, the record presents issues of fact whether Hanafy intended to confine McRedmond in the office on the day he tried to weigh her and whether McRedmond consented to her confinement (*see Arrington v Liz Claiborne, Inc.*, 260 AD2d 267 [1999]). Defendants argue that she was free to leave the office at all times, and she eventually

did leave. However, a jury could reasonably find that she was confined when, after closing the door, Hanafy yelled at her to get on the scale, and then picked her up bodily.

As to plaintiffs' battery claims, an issue of fact exists whether Hanafy touched plaintiffs without their consent in an offensive manner (*see Sola v Swan*, 18 AD3d 363 [2005]). Contrary to defendants' contention, an intent to do harm is not an element of a battery cause of action (*Jeffreys v Griffin*, 1 NY3d 34, 41 n 2 [2003]).

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

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

ENTERED: MAY 22, 2012

CLERK

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

7707-
7708 In re 51-53 West 129th Street HDFC, Index 107352/11
107353/11
Petitioner-Appellant,

-against-

Attorney General of the State
of New York, et al.,
Respondents-Respondents.

- - - - -

In re 31-33 West 129th Street HDFC,
Petitioner-Appellant,

-against-

Attorney General of the State
of New York, et al.,
Respondents-Respondents.

_____

Daniel A. Eigerman, New York, for appellants.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for Attorney General, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Paul T. Rephen of counsel), for municipal respondents.

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Orders, Supreme Court, New York County (Paul Wooten, J.), entered November 29, 2011, which, inter alia, denied the petitions pursuant to Not-For-Profit Corporation Law § 511 for court approval authorizing the sale of substantially all the assets of petitioners' not-for-profit Housing Development Funds, unanimously affirmed, without costs.

As a threshold issue, petitioners have failed to show that the proposed sales of their properties are even possible. Petitioner 31-33 West 129th Street HDFC included only portions of its contract for sale in the record which indicate that it must convey a fee simple interest in the property that can receive title insurance. Petitioner 51-53 West 129th Street HDFC, which went to contract on the same date with the same purchaser, failed to include any portion of its contract of sale in the record. However, given that the properties were foreclosed in tax proceedings more than four months ago and that petitioners' interests are subject to imminent extinguishment by ministerial act of the Commissioner of Finance (*see* Administrative Code of City of NY § 11-412.1; *O'Bryan v Stark*, 77 AD3d 494 [2010], *lv denied* 17 NY3d 704 [2011]), it would appear that petitioners' interests would likely be deemed uninsurable in any case.

Even if this proceeding is not moot, respondent NYC Department of Housing Preservation and Development's approval of these transactions, which effectively result in the dissolutions of petitioners, is required (N-PCL 1002[c]). The transactions were properly reviewed under N-PCL 511, with notice to the Attorney General. Section 511(d) provides that such transactions may be approved if their commercial terms are fair and

reasonable, and if either the purpose of the corporation or the interests of the members are advanced by the transaction. Here, there is no dispute that the purchase prices of the properties are commercially reasonable. However, the purposes of the corporations are clearly served better by disapproval. The purpose of the petitioners is the provision of low income housing. Both the proposed sales will be to the same for-profit landlord. By contrast, with no sale, the properties will be transferred to qualified third-party, low-income landlords.

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

ENTERED: MAY 22, 2012

CLERK

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

7709 Giovonnie Perez, etc., et al., Index 20852/01
Plaintiffs-Appellants, 42060/02

-against-

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

Fort Independence Houses,
Defendant.

- - - - -

New York City Housing Authority,
Third-Party Plaintiff-Respondent,

-against-

Chatterjee International
Contracting Corp., et al.,
Third-Party Defendants-Respondents.

_____

Rosenbaum & Rosenbaum, P.C., New York (Matthew T. Gammons of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for City of New York and NYC Department of Housing Preservation and Development, respondents.

Law Offices of Charles X. Connick, P.L.L.C., Mineola (Gerald T. Murphy, Jr. of counsel), for New York City Housing Authority and Chatterjee International Contracting Corp., respondents.

Law Office of Lori D. Fishman, Tarrytown (Louis H. Liotti of counsel), for Pacific Iron Works, Inc., respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 14, 2011, which denied plaintiffs' motion for an order declaring the dismissal of the action null and void or

vacating the dismissal, and substituting plaintiff Perez as administrator in place of plaintiff Velez, deceased, and granted defendants' separate cross motions to the extent they sought dismissal of the complaint pursuant to CPLR 3216, 3126(3) and 1021, unanimously affirmed, without costs.

The action, commenced in 2001 by plaintiff Velez individually and as natural guardian of plaintiff Perez, arose out of a playground accident that occurred in 1999, when plaintiff Perez was 13 years old. In an order dated April 1, 2004, the IAS court stated that a motion by one defendant to dismiss the action as time-barred was granted as to plaintiff Velez, but inadvertently recited at the end of the order that the motion was denied. Velez died on May 12, 2005, by which time Perez had reached the age of majority and had capacity to appear for himself in the action (*see* CPLR 105[j]; CPLR 1201). Perez did not inform his counsel of Velez's death until in or about March 2007.

Meanwhile, on November 7, 2005, the court had issued a notice pursuant to CPLR 3216 demanding that plaintiffs resume prosecution and file a note of issue within 90 days, and warning that default on the demand will serve as a basis for the court to dismiss the action on its own motion. Plaintiffs' counsel

obtained two extensions of the deadline, but on June 4, 2007, the case was marked dismissed by the court pursuant to CPLR 3216 for failure to prosecute. Plaintiff Perez was eventually appointed administrator in November 2008, and moved in October 2010, three years after the order of dismissal, for an order of substitution and to have the case restored to the calendar. Plaintiff moved on grounds that the dismissal order was null and void. In the alternative, plaintiff maintained that he had shown justifiable excuse for the delay and a meritorious cause of action pursuant to CPLR 3216(e).

Assuming arguendo that Velez's claim was not dismissed prior to her death, plaintiff Perez's excessive delay in seeking substitution after her death clearly warranted dismissal of the action as to Velez pursuant to CPLR 1021 (*see Sanders v New York City Hous. Auth.*, 85 AD3d 1005 [2011]; *Washington v Min Chung Hwan*, 20 AD3d 303 [2005]; *Palmer v Selpan Elec. Co.*, 5 AD3d 248 [2004]). Further, the action was properly dismissed as to plaintiff Perez for failure to prosecute pursuant to CPLR 3216(a), and he failed to show a justifiable excuse for the failure to file the note of issue after two extensions were granted. It is settled that "the death of a party stays the action as to him or her pending the substitution of a legal

representative, and any determination rendered without such a substitution is generally deemed a nullity" (*Hicks v Jeffrey*, 304 AD2d 618, 618 [2003]; *see also Silvagnoli v Consolidated Edison Empls. Mut. Aid Socy.*, 112 AD2d 819, 820 [1985]; *see* CPLR 1015). Although the 90-day notice was issued after Velez died, neither the other parties nor the court were informed of her death for over five years. Further, plaintiffs' counsel continued to participate in the proceedings after Velez's death, and plaintiff Perez has failed to provide any reasonable excuse for his failure to communicate with his counsel for extended periods of time, or for the two-year delay in seeking substitution after he was finally appointed administrator of his mother's estate. Under all the circumstances, the court had jurisdiction to dismiss plaintiff's claims pursuant to CPLR 3216(a) for failure to prosecute, and his motion to vacate pursuant to CPLR 3216(e) was properly denied (*see Sanders*, 85 AD3d at 1006; *Anjum v Karagoz*, 48 AD3d 605, 605-606 [2008]; *Washington*, 20 AD3d at 305).

Alternatively, the court properly granted the cross motions to dismiss pursuant to CPLR 3126(3), since the extended failure to comply with discovery orders warrants an inference of willful

noncompliance (*see Bryant v New York City Hous. Auth.*, 69 AD3d 488 [2010]; *Henry Rosenfeld, Inc. v Bower & Gardner*, 161 AD2d 374, 375 [1990]), and the extensive delays in prosecuting the eleven-year-old case have prejudiced the ability of defendants and third-party defendants to defend the action (*see Almanzar v Rye Ridge Realty Co.*, 249 AD2d 128 [1998]).

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

ENTERED: MAY 22, 2012

CLERK

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

7713 The People of the State of New York, Respondent, Ind. 2922/09

-against-

Christopher Martinez, Defendant-Appellant.

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

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

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered March 10, 2011, as amended March 31, 2011, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing him to a term of one to three 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 assessment of the matters cited by defendant that allegedly affected the victim's credibility. We also note that the fact that the jury convicted defendant and the codefendant of different degrees of attempted robbery does not warrant a different conclusion regarding the weight of the evidence (*see*

People v Rayam, 94 NY2d 557 [2000]).

The victim identified defendant as one of the two men who robbed him, even though defendant wore a mask and did not speak during the robbery. Defendant and the victim lived in the same building and the victim saw defendant almost daily. The victim was able to identify defendant by a distinctive body movement, which the victim had seen defendant make many times. A distinctive gait or body movement may be a valid means of identification (*see People v Bale*, 10 NY2d 515 [1961]). Furthermore, the trial court granted defendant permission to demonstrate his gait or body movements, and the jury had an opportunity to make its own judgment regarding their distinctiveness.

In addition, there was ample evidence that the other robber was the jointly tried codefendant. The codefendant is defendant's brother, who also lived in the building. This evidence tended to connect defendant with the crime circumstantially and thus corroborate the victim's identification (*see e.g. People v Hinton*, 252 AD2d 428 [1998], *lv denied* 92 NY2d 1033 [1998]; *People v Hurd*, 160 AD2d 199, 200 [1990], *lv denied* 76 NY2d 789 [1990]). Furthermore, the victim testified that in the course of defending himself, he struck the codefendant in the

head. When the codefendant was arrested later that day, he had a "fresh cut" on his head.

The court properly exercised its discretion in declining to deliver an adverse inference charge relating to the loss of the original handwritten version of a police report. There was no evidence of bad faith on the part of the People or prejudice to defendant (*see People v Martinez*, 71 NY2d 937, 940 [1988]; *see also* CPL 240.75).

Defendant's remaining claim is unpreserved (*see People v Buckley*, 75 NY2d 843 [1990]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: MAY 22, 2012

CLERK

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

7715 Rayfus Butler, Index 309400/09
Plaintiff-Appellant-Respondent,

-against-

Quest Property Management V. Corp.,
Defendant,

Cablevision Systems Corp.,
Defendant-Respondent-Appellant.

_____

David P. Kownacki, New York, for appellant-respondent.

Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for respondent-appellant.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered August 5, 2011, which, inter alia, denied plaintiff's motion for partial summary judgment on the issue of defendant Cablevision Systems Corp.'s Labor Law § 240(1) liability, denied Cablevision's cross motion for dismissal of plaintiff's § 240(1) claim, and granted Cablevision's cross motion for summary judgment dismissing plaintiff's Labor Law §§ 241(6) and 200 claims and common-law negligence claims, unanimously modified, on the law, to grant Cablevision's cross motion for summary judgment dismissing plaintiff's § 240(1) claim, and otherwise affirmed, without costs.

Labor Law 240(1) does not apply here as plaintiff was not

engaged in any alteration of the building at the time of the occurrence. The argument that his inspection might have led to additional work is mere speculation.

The motion court properly dismissed the Labor Law §§ 241(6) and 200 and common-law negligence claims. There is no evidence that plaintiff was engaged in construction, excavation or demolition work that would bring his work within the ambit of § 241(6). With regard to the § 200 and common-law negligence claims, there is also no evidence that Cablevision exercised supervision or control over the work performed at the premises (*Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268 [2008]).

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

ENTERED: MAY 22, 2012

CLERK

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

7716N- Index 603146/08
7717N-
7718N Epstein Engineering P.C.,
Plaintiff-Respondent,

-against-

Thomas Cataldo, et al.,
Defendants-Appellants,

Steven Gregorio,
Defendant.

Jane M. Myers, P.C., Central Islip (James E. Robinson of counsel), for appellants.

Warshaw Burstein Cohen Schlesinger & Kuh, LLP, New York (Bruce H. Wiener of counsel), for respondent.

Orders, Supreme Court, New York County (Judith J. Gische, J.), entered February 28, June 1, and June 14, 2011, which, to the extent appealed from as limited by the briefs, decided defendants Thomas Cataldo and Cataldo Engineering, P.C.'s motion for a protective order upon a determination that plaintiff is entitled to damages incurred after the date of Thomas Cataldo's resignation from it arising from defendants' work for clients obtained before Cataldo's resignation, unanimously modified, on the law, to limit plaintiff's entitlement to lost profits after Cataldo's resignation to those arising from defendants' work for

clients obtained before his resignation who had been clients of plaintiff, and otherwise affirmed, without costs.

The evidence of record establishes that plaintiff is entitled to recover the compensation Cataldo received from plaintiff during the period of Cataldo's disloyalty, i.e., from April 2007, when he formed Cataldo Engineering, to September 2, 2008, when he resigned from plaintiff (*see Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 88, 91 [1984], *appeal dismissed* 63 NY2d 675 [1984]). Additionally, plaintiff "is entitled to damages for the wrongful diversion of its business measured by the 'opportunities for profit on the accounts diverted from it through defendants' conduct'" (*Maritime Fish Prods.,* 100 AD2d at 91). Finally, if defendants poached plaintiff's clients, plaintiff may recover the profits that it would have made from those clients either through trial or judgment or for some reasonable period (*see e.g. Duane Jones Co. v Burke*, 306 NY 172, 192 [1954]; *E.W. Bruno Co. v Friedberg*, 21 AD2d 336, 339 & 341 [1964]; *McRoberts Protective Agency v Lansdell Protective Agency*, 61 AD2d 652, 655-656 [1978]). However, plaintiff is not entitled to lost profits after September 2, 2008 from individuals and entities who were never its clients (*see Town & Country House & Home Serv. v Newbery*, 3

NY2d 554, 560 [1958]). The customers for Local Law 11 services were "readily ascertainable outside the employer's business as prospective users or consumers of the employer's services" (*see Leo Silfen, Inc. v Cream*, 29 NY2d 387, 392-395 [1972]). Thus, trade secret protection will not attach.

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

ENTERED: MAY 22, 2012

CLERK

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

7719N Kiwon S., Index 307023/10
Plaintiff-Respondent,

-against-

Daniel S.,
Defendant-Appellant.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for appellant.

Cohen Goldstein Silpe, LLP, New York (Jeffrey R. Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Saralee Evans, J.), entered September 15, 2011, which, to the extent appealed from, granted plaintiff's motion for pendente lite relief to the extent of directing defendant to pay plaintiff's attorney interim counsel fees in the amount of $100,000, subject to reallocation at trial, unanimously affirmed, without costs.

The court providently exercised its discretion in awarding counsel fees, given the evidence of the large discrepancy in the parties' respective incomes, the significant business investments within defendant's control, the nature of the issues in dispute, and plaintiff's lack of sufficient funds of her own to compensate counsel without depleting her limited assets (*see* Domestic Relations Law § 237[a]; *Charpié v Charpié*, 271 AD2d 169, 173

[2000]; *see also Dodson v Dodson*, 46 AD3d 305 [2007]).

Plaintiff's moving papers included both the requisite statement of net worth and affirmation of counsel (*see* 22 NYCRR 202.16[k][2], [3]. The court properly exercised its discretion in concluding that plaintiff's failure to provide an updated statement of net worth was not fatal to her motion. Although an updated net worth statement would have given the court the most current information, there was no evidence that plaintiff's economic condition had substantially changed from what had been reported on her previously-submitted recent net worth statement. Nor was movant required to submit a personal affidavit (*see* 22 NYCRR 202.16[k][2],[3]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7720 The People of the State of New York, Ind. 14637/91
Respondent,

-against-

Larry Morales,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Christine L. Olson, New York, for appellant.

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

_____

Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about June 18, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of defendant's

motion. Defendant's very extensive criminal history, along with other negative factors in his background, outweighed evidence of his rehabilitation (*see e.g. People v Correa*, 83 AD3d 555 [2011], *lv denied* 17 NY3d 805 [2011]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7721 In re Stephen Mikes, Index 115491/09
Petitioner-Appellant,

-against-

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

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 14, 2010, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78, which sought to annul respondents' determination denying petitioner's application for accident disability retirement (ADR) benefits, unanimously affirmed, without costs.

Credible evidence supported the conclusion that petitioner's injuries did not warrant a 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]). The Medical Board, upon repeated reviews of the relevant medical evidence and multiple examinations of petitioner, concluded that petitioner's complaints were not consistent with its objective physical

findings, or were the result of degenerative conditions, not the result of a line-of-duty incident. The Board of Trustees was entitled to rely on the Medical Board's findings (*see Matter of Appleby v Herkommer*, 165 AD2d 727 [1990]).

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

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7722 & M-1863 In re Isabelita Gonzalez, Petitioner-Appellant, Index 400151/08

Emadelin Omar, Petitioner,

-against-

Division of Housing and Community Renewal of the State of New York, Respondent-Respondent,

168-170 West 25th Street Associates, et al., Respondents.

Isabelita Gonzalez, appellant pro se.

Gary R. Connor, New York (Mark L. Tyler of counsel), for respondent.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered May 6, 2010, dismissing the proceeding brought pursuant to CPLR article 78, and bringing up for review an order, same court and Justice, entered July 17, 2009, which denied the petition to annul a determination of respondent Division of Housing and Community Renewal (DHCR), dated November 19, 2007, which affirmed an order of the DHCR Rent Administrator, dated January 11, 2007, granting respondents-owners' application for a substantial rehabilitation exemption from rent stabilization, unanimously affirmed, without costs.

DHCR's determination was rationally based on the record and not arbitrary and capricious or contrary to law (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). Indeed, the record supports DHCR's finding that the building had been substantially rehabilitated within the meaning of Rent Stabilization Code (9 NYCRR) § 2520.11(e) and DHCR's Operational Bulletin 95-2 (*cf. Matter of Pavia v New York State Div. of Hous. & Community Renewal*, 22 AD3d 393 [2005]). There is no evidence that the documents and affidavits submitted by the owners to DHCR were fabricated or fraudulent, or that DHCR was biased.

To the extent petitioner relies on the equitable doctrines of laches and estoppel, those doctrines cannot be invoked against the agency to prevent it from discharging its statutory duties (*see Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349, 350 [1996]).

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

M-1863 - Gonzalez v DHCR

Motion seeking to enlarge the record denied.

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7723 Sara Martinez, Index 305663/09
Plaintiff-Respondent,

-against-

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

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

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

Order, Supreme Court, Bronx County (Stanley Green, J.), entered August 12, 2011, which denied 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 grant the motion as to the "permanent consequential limitation of use" and "significant limitation of use" categories of serious injury, and otherwise affirmed, without costs.

Defendants established prima facie that plaintiff suffered neither a "permanent consequential limitation of use" nor a "significant limitation of use" of her left knee or lumbar spine. The orthopedic surgeon who examined plaintiff in August 2010 reported findings of a full range of motion in her lumbar spine

and a range of motion in her left knee that was identical to that of her uninjured right knee, and the finding of a mere contusion on the left knee that had since resolved. The radiologist who reviewed MRIs of plaintiff's lumbar spine and the x-ray of plaintiff's left tibia and fibula found no evidence of trauma or causally related injury (*see e.g. Antonio v Gear Trans Corp.*, 65 AD3d 869 [2009]; *Thompson v Abbasi*, 15 AD3d 95 [2005]).

Plaintiff failed to present any evidence of a recent examination supporting the alleged "permanent consequential" or "significant limitation" injuries (*see e.g. Shu Chi Lam v Wang Dong*, 84 AD3d 515 [2011]). Her treating orthopedic surgeon had not examined her since October 2009, which was about one month after her surgery and nearly 10 months before defendants' orthopedic surgeon examined her, and did not quantify any limitations or opine as to qualitative limitations at that time (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]).

Although defendants made out their prima facie case as to plaintiff's 90/180-day claim, plaintiff raised an issue of fact by submitting her orthopedic surgeon's determination, made during the relevant period, that she was not able to work, was totally disabled, and required arthroscopic surgery to repair her knee, and her testimony that she was confined to her home for eight

months after the accident and had only recently resumed her customary daily activities (*see e.g. Williams v Tatham*, 92 AD3d 472, 473 [2012]). We note that if plaintiff ultimately prevails on her 90/180-day claim, she will be "entitled to recover damages that justly and fairly compensate . . . her for *all* injuries proximately caused by the accident" (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [2010]; *see Delgado v Papert Tr., Inc.*, 93 AD3d 457 [2012]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7724 Zbigniew Augustyn, et al., Index 106934/08
Plaintiffs-Appellants, 590921/09

-against-

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

- - - - -

City of New York, et al.,
Third-Party Plaintiffs,

-against-

AAAA Asbestos Abatement Services Corp.,
Third-Party Defendant-Respondent,

SND Construction, Inc.,
Third-Party Defendant.

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Dinkes & Schwitzer, P.C., New York (Brian J. Vannella of counsel), for appellants.

Cornell Grace, P.C., New York (Keith D. Grace of counsel), for municipal respondents.

Wade Clark Mulcahy, New York (Cheryl Fuchs of counsel), for Dean Builders Group, Inc., respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Ellen E. Mooney of counsel), for AAAA Asbestos Abatement Services Corp., respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 6, 2011, which, to the extent appealed from, denied plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim, granted the

motion of defendants City of New York and New York City Department of Design and Construction (collectively the City) for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) claims asserted against them, and, upon a search of the record, granted defendant Dean Builders Group, Inc. summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) claims asserted against it, unanimously modified, on the law, to deny the City's motion insofar as it sought summary judgment dismissing the Labor Law § 240(1) claim, reinstate that claim as against the City and Dean, and grant plaintiffs' motion for partial summary judgment on the issue of liability on the § 240(1) claim, and otherwise affirmed, without costs.

Plaintiff Zbigniew Augustyn allegedly sustained injuries when he fell from a sidewalk bridge while engaging in lead paint removal work at a building owned by the City. Dean was the general contractor, and plaintiff was the foreman for subcontractor AAAA Asbestos Abatement Services Corp.

Contrary to Dean's and AAAA's contention, plaintiff was engaged in protected activity under Labor Law § 240(1) at the time he fell from the sidewalk bridge. Although he was not removing lead paint from a fire escape at the time of the fall,

he was walking across the bridge to set up a tent in preparation for lead paint removal work at another fire escape. This work was part of the overall lead paint removal project and was performed at an elevated level, thus requiring proper protection from falling off the bridge (*see Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 48 [2005]; *Ageitos v Chatham Towers*, 256 AD2d 156 [1998]; *see also Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]).

Plaintiff made a prima facie showing that the City and Dean violated Labor Law § 240(1) by failing to provide adequate safety devices, and that such violation proximately caused his injuries. Although plaintiff could not remember how he fell, he submitted evidence showing that he could have fallen when the sidewalk bridge partially collapsed under him, through an existing hole, or through a gap between the facade of the building and the bridge. Under any of the proffered theories, plaintiff showed that the absence of protective devices proximately caused his injuries (*see Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [2005]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [2002]; *John v Baharestani*, 281 AD2d 114, 118-119 [2001]).

In opposition, defendants failed to raise a triable issue of fact as to whether plaintiff was the sole proximate cause of his

injuries. Contrary to Dean's and AAAA's contention, the evidence does not show that plaintiff was expected to, or instructed to, use a harness while walking along the sidewalk bridge (*see Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [2011]; *Gallagher v New York Post*, 14 NY3d 83, 88-89 [2010]). Rather, plaintiff and the owner of AAAA testified that the harnesses were available for use only on the fire escapes, that workers were not expected to use harnesses while on the sidewalk bridge, and that no rigging existed for the use of harnesses on the bridge.

Although plaintiff was not required to show that defendants exercised supervision and control over his work (*see Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 n [2008]), his common-law negligence and Labor Law § 200 claims were properly dismissed, as there is no evidence showing that defendants created or had actual or constructive notice of a hazardous condition on the sidewalk bridge. In fact, plaintiff testified that he did not notice any defects in the sidewalk bridge before the accident.

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7725 Fortress Credit Corp., et al., Index 651023/10
Plaintiffs-Respondents,

-against-

Ruskin Moscou Faltischek P.C.,
Defendant-Appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Lawrence A. Steckman of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Cindy Caranella Kelly of counsel), for respondents.

Order, Supreme Court, New York County (Charles Edward Ramos, J.), entered March 29, 2011, which denied defendant's motion to dismiss the complaint, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

For the reasons stated in *Fortress Credit Corp. v Dechert LLP* (89 AD3d 615 [2011]) — a case involving virtually identical facts and allegations — the complaint in this action fails to state claims for fraud, legal malpractice, negligence, negligent misrepresentation, and breach of fiduciary duty. Plaintiffs have not distinguished this case from *Dechert* and there has been no change in the law to warrant reexamination of the issues (*see*

NAMA Holdings, LLC v Greenberg Traurig, LLP, 92 AD3d 614 [2012]; *compare George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 105-106 [2012]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7726 Peter McHugh, et al., Index 8726/07
Plaintiffs-Respondents,

-against-

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

_____

Gruvman, Giordano & Glaws, LLP, New York (Charles T. Glaws of counsel), for appellants.

O'Dwyer & Bernstein, LLP, New York (Steven Aripotch of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 6, 2011, insofar as appealed from as limited by the briefs, after a jury trial, awarding plaintiffs Peter McHugh and Kevin McHugh the amounts of $82,944 for loss of past guidance and support and $414,720 for loss of future guidance and support, unanimously affirmed, without costs.

The decedent was struck and killed by a Transit Authority bus. The jury awarded plaintiffs, the decedent's two adult sons, the foregoing sums as pecuniary damages for decedent's wrongful death. Plaintiffs established a claim for such damages where the proof established that decedent, who, up until the time of her death, still resided with her older son, provided him with financial assistance, kept the home, and worked full-time.

Moreover, she maintained contact on a regular basis with her younger son who, although he lived in an adjacent state, visited her frequently, and relied on her for counsel, guidance and support in his life and career matters. She also provided him with financial assistance, namely the payment of a student loan (*see Ramos v La Montana Moving & Stor.*, 247 AD2d 333 [1998]).

The amounts awarded do not deviate materially from what would be reasonable compensation under the circumstances (*see e.g. id* at 334*; Perez v St. Vincents Hosp. & Med. Ctr. of N.Y.*, 66 AD3d 663 [2009]; *Glassman v City of New York*, 225 AD2d 659, 660 [1996]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7728-
7729 The People of the State of New York,
Respondent,

-against-

Nathaniel Harrison,
Defendant-Appellant.

Ind. 6501/04

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

Cyrus R. Vance, Jr., District Attorney, New York (Karinna M. Arroyo of counsel), for respondent.

Order, Supreme Court, New York County (Ruth Pickholz, J.), entered on or about December 17, 2009, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the assessment of points for defendant's history of drug abuse (*see e.g. People v Wilkens*, 33 AD3d 399 [2006], *lv denied* 8 NY3d 801 [2007]). In any event, regardless of whether defendant's correct point score is 95 or 80, there is no basis for a discretionary downward departure to level one (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). The seriousness of the underlying crime

outweighs the mitigating factors asserted by defendant, which were adequately taken into account by the risk assessment instrument (*see e.g. People v Hansford*, 67 AD3d 496 [2009]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7730 Bank of New York, etc., Index 116822/06
Plaintiff-Respondent,

-against-

Jonathan M. Hunt, etc., et al.,
Defendants,

Amalfi Abstract, Inc.,
Nonparty Respondent-Appellant.

_____

Harris Beach, PLLC, Uniondale (William J. Garry of counsel), for appellant.

Frankel Lambert Weiss Weisman & Gordon, LLP, Bay Shore (Joseph F. Battista of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 8, 2011, which denied nonparty Amalfi Abstract, Inc.'s motion for leave to renew a prior motion brought by plaintiff Bank of New York ("BNY") to, *inter alia*, hold Amalfi in default for failure to close as the successful auction bidder on defendants' foreclosed condominium unit, direct that Amalfi's $76,000 deposit be forfeited and the condominium unit resold at auction, and charge Amalfi with any deficiency upon resale, plus costs and disbursements in the resale, unanimously affirmed, with costs.

The motion to renew relied upon generalized news articles

reporting “robo-signing” practices by a bank that had acquired BNY’s loan servicing agent. Such non-specific news articles offered insufficient factual evidence to warrant a change of the motion court’s prior order finding that Amalfi was in default under the terms of sale and the judgment of foreclosure, directing that Amalfi forfeit its deposit and the apartment be resold at auction (*see CPLR* 2221[e][2]). Nor was any new information provided regarding BNY’s alleged lack of standing to commence this foreclosure action. Lack of standing is not properly raised by Amalfi and, in any event, is belied by an affidavit from its loan servicing agent stating that BNY was assigned both the note and mortgage in connection with the condominium apartment.

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7731-
7732 Soldiers’, Sailors’, Marines’ and Airmen’s Club, Inc.,
Plaintiff-Appellant,

-against-

The Carlton Regency Corp.,
Defendant.
- - - - -
The Carlton Regency Corp.,
Third-Party Plaintiff,

-against-

James Conforti, III, et al.,
Third-Party Defendants and
Counterclaim Plaintiffs-Respondents,

-against-

The Commingled Pension Trust Fund (Mortgage Private Placement) of JP Morgan Chase Bank, N.A.,
Counterclaim-Defendant.
- - - - -
[And a Fourth-Party Action]
- - - - -
Soldiers’, Sailors’, Marines’ and Airmen’s Club, Inc.,
Plaintiff,

-against-

The Carlton Regency Corp.,
Defendant/Third-Party Plaintiff-Respondent,

-against-

Index 600813/07
601554/09
590181/09

James Conforti, III, et al.,
Third-Party Defendants and
Counterclaim Plaintiffs-Respondents,

-against-

The Commingled Pension Trust
Fund (Mortgage Private Placement)
of JP Morgan Chase Bank, N.A.,
Counterclaim-Defendant.
- - - - -
James Conforti, III, et al.,
Fourth-Party Plaintiffs-Appellants,

-against-

Chicago Title Insurance Company, et al.,
Fourth-Party Defendants-Respondents,

Robert C. Wilson, et al.,
Fourth-Party Defendants.

_____

McLaughlin & Stern, LLP, New York (Richard L. Farren of counsel), for Soldiers', Sailors' Marines' and Airmen's Club, Inc., appellant.

Windels, Marx, Lane & Mittendorf, LLP, New York (Mark A. Slama of counsel), for James Conforti, III, appellant/respondent.

Bragar Wexler Eagel & Squire, P.C., New York (Raymond A. Bragar of counsel), for Dean Stephen Lyras, appellant/respondent.

Gallet Dreyer & Berkey, LLP, New York (Jerry A. Weiss of counsel), for Carlton Regency Corp., Marc Putterman and David May, respondents.

Loeb & Loeb LLP, New York (David M. Satnick of counsel), for Chicago Title Insurance Company, respondent.

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Order, Supreme Court, New York County (Charles E. Ramos,

J.), entered February 23, 2011, which, to the extent appealed from, denied plaintiff's motion for summary judgment on its cause of action seeking a declaration that the lease at issue violated the rule against perpetuities and, sua sponte, dismissed that cause of action, granted fourth-party defendants Marc Putterman and David May's motion to dismiss the cause of action for negligence and negligent misrepresentation as against them, granted fourth-party defendant Chicago Title Insurance Company's motion to dismiss the cause of action seeking a declaration in favor of fourth-party plaintiffs on their insurance coverage claim against it, and granted third-party plaintiff Carlton Regency Corp.'s motion to dismiss third-party defendants and counterclaim plaintiffs' counterclaims for unjust enrichment, promissory estoppel (to the extent not premised on the 1980, 2003 and 2006 agreements), preliminary injunctive relief, and breach of the implied covenant of good faith and fair dealing, unanimously modified, on the law, to deny Carlton Regency's motion as to the counterclaims for promissory estoppel premised on the 1980, 2003 and 2006 agreements and for breach of the implied covenant of good faith and fair dealing, to reinstate plaintiff's cause of action for a declaration that the lease violated the rule against perpetuities, and to declare that the

lease does not violate the rule against perpetuities, and to deny Chicago Title's motion to dismiss the cause of action seeking a declaration and to declare in its favor on the fourth-party insurance coverage claim against it, and otherwise affirmed, without costs.

As an initial matter, plaintiff appears not to dispute the motion court's finding that the two 25-year lease renewal options do not violate the rule against perpetuities. Rather, plaintiff argues that once it is forced to vacate the premises, its obligation to maintain them for another 60 years, receiving rent of only $30,000 per year, will become so burdensome as to constitute an unreasonable restraint (*see* Restatement of Property § 395). Plaintiff argues further that the option contract violates the rule against perpetuities because it requires Carlton to purchase the property at a rate that was fixed for longer than the period allowed by statute (*see* EPTL 9-1.1[b]). These arguments are unavailing.

While it may be that, without the right to possession of the demised premises, plaintiff will suffer economic hardship as a result of the lease, that does not render the lease an unreasonable restraint on alienation. In other words, the property can be "alienated" – only not in a manner economically

beneficial to plaintiff. However, that is the deal that plaintiff struck. Represented by competent counsel, it negotiated and executed the lease, then the sublease, without regard to its own rights during the remainder period, and "the courts will not interfere" with the economically harsh result (*see Murray Hill Mews Owners Corp. v Rio Rest. Assoc. L.P.*, 92 AD3d 453, 454 [2012]; *George Backer Mgt. Corp. v Acme Quilting Co.*, 46 NY2d 211, 218 [1978]; *CBS Inc. v P.A. Bldg. Co.*, 200 AD2d 527 [1994]).

Plaintiff also argues that the lease creates an "unlawful suspension of a possessory interest," because after plaintiff vacates the premises, no other party has a right to occupancy. However, when plaintiff vacates, in 2013, Carlton, pursuant to certain assignments by the developers (the fathers of Conforti and Lyras), will have 60 years remaining on the lease. Thus, the right of possession will revert to Carlton.

As to the option contract, the rule against perpetuities is not implicated, because only plaintiff – the owner of the demised premises – can compel specific performance of the option, and plaintiff has no obligation to sell to Carlton. Essentially, plaintiff has an irrevocable offer to purchase the demised premises, albeit for a certain price. The fixed price purchase,

however, does not impair the power of alienation, because plaintiff may sell the property to anyone else at any time for a different price (Restatement of Property § 372 [“any interest which is (a) neither a remainder nor an executory interest, and (b) left in, or limited in favor of, the conveyor, or the successors of the conveyor is not required to comply with the rule against perpetuities”]). Rather than dismissing the cause of action against Carlton for a declaratory judgment, however, the motion court should have declared in favor of Carlton (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

Plaintiff’s standing argument fails with the failure of its argument that the option contract violates the rule against perpetuities.

The court appropriately resolved Conforti and Lyras’ counterclaim against Chicago Title in favor of the latter, but, again, rather than dismissing the claim, it should have issued a declaration (*id.*). The title policy covered the leasehold as vested in the developers. When the developers transferred their interests to Carlton without including in the documentation any guaranty or covenant of warranty, the leasehold was no longer vested in the developers, and Chicago Title’s obligations under the title policy ceased to exist. Conforti and Lyras have not

identified any clause of the contracts assigning the developers' interest that reserved any leasehold interest to the developers.

The court correctly granted Carlton's motion to dismiss Conforti and Lyras's counterclaims for unjust enrichment and temporary injunctive relief as against it. The unjust enrichment claim was premised upon the annual rent payments, but the payments were made either at the behest of plaintiff or in return for an interest in the lease remainder (*see Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [2011]; *Kagan v K-Tel Entertainment*, 172 AD2d 375, 376 [1991]).

Conforti and Lyras admit that they never requested temporary injunctive relief, so the claim may not proceed because Carlton was never put on notice of it (*see* CPLR 6311).

The court correctly dismissed the fourth-party negligence and negligent misrepresentation claims as against Putterman and May, since Conforti and Lyras allege no facts establishing a duty owed to them independent of the 2003 and 2006 contracts signed by Putterman and May in their capacities as representatives of Carlton (*see Vue Mgt., Inc. v Photo Assoc.*, 81 AD3d 569 [2011]).

As to Conforti and Lyras's promissory estoppel claims against Carlton, since there is a bona fide dispute as to the viability of the 2003 and 2006 agreements and as to whether the

1980 agreement was breached, to the extent the claim is premised on those agreements it may proceed, even to the extent the promises asserted are subsumed by the agreements (*see Meyers Assoc., L.P. v Conolog Corp.*, 61 AD3d 547, 548 [2009]). However, to the extent the claim is premised on the lease, sublease and option contract, it is not viable, because Carlton was not a party to those contracts, and the developers could not have relied on any promises it made in the execution thereof.

As to the good faith and fair dealing claim against Carlton, pursuant to the 2003 and 2006 agreements, Carlton agreed, essentially, to do nothing adverse to the rights of Conforti and Lyras, and, in fact, to aid Conforti and Lyras in obtaining further rights to the demised premises. However, after executing these agreements, it entered into a settlement agreement with plaintiff, promising, inter alia, not to confer any additional

rights on Conforti and Lyras. While not every term of the settlement agreement violated the promises made by Carlton in the 2003 and 2006 agreements, Carlton's entering into the settlement agreement plainly violated the spirit of those agreements.

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7733 The People of the State of New York, Respondent, Ind. 4137/08

-against-

Mark Inesti, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Rebekah J. Pazmiño of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered February 25, 2010, convicting defendant, after a nonjury trial, of robbery in the first degree (two counts), robbery in the second degree, assault in the second degree (two counts) and criminal possession of a weapon in the third degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

Defendant did not preserve his challenges to the sufficiency of the evidence, and we decline to review them in the interest of justice. As an alternative holding, we find that the verdict was based on legally sufficient evidence. We further find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The court, sitting as trier of fact, properly rejected defendant's psychiatric defense, in which he asserted that, as the result of mental illness, he lacked the intent to commit robbery. Although defendant had a background of psychiatric treatment, he had a history of feigning or exaggerating psychiatric symptoms. Defendant's expert psychologist was thoroughly impeached, and the court had ample basis upon which to reject his testimony. Furthermore, although defendant testified that at the time of the crime he was fleeing from men with firearms and from demons, and performing rituals with a knife to ward the demons off, none of the eyewitnesses to the crime described any bizarre behavior by defendant, and defendant never reported this version of the incident to his own expert psychologist. Accordingly, nothing in the record casts doubt on defendant's ability to form the intent to commit robbery.

Defendant's other challenges to the sufficiency and weight of the evidence are unavailing. The trier of fact could have reasonably concluded that when defendant fled with a bag of stolen merchandise, stopped, turned around, opened a gravity knife, and said to the pursuing store manager, "Come on, come on," defendant threatened the use of a dangerous instrument (*see People v Boisseau*, 33 AD3d 568 [2006], *lv denied* 8 NY3d 844

[2007]), thus supporting the first-degree robbery conviction (*see* Penal Law § 160.15[3]). Defendant's alternative explanation of this behavior is without merit. With respect to the convictions requiring proof of physical injury, there was ample evidence to support the conclusion that the police lieutenant's injury caused him "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]).

The court correctly permitted the People to rebut defendant's psychiatric defense by introducing tape recordings of telephone calls made by defendant while incarcerated, in which he did not exhibit any indicia of mental illness. These conversations were relevant and tended to disprove the psychiatric defense, particularly since an important basis for defendant's expert's opinion was the expert's examination of defendant during the same time period as the phone calls. The possibility that defendant's mental condition might vary from time to time went to the weight to be accorded the rebuttal evidence, rather than its admissibility.

Defendant's constitutional challenge to his sentencing as a persistent violent felony offender is without merit (*see People v Bell*, 15 NY3d 935 [2010], *cert denied* 563 US __, 131 S Ct 2885 [2011])

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7734 Wells Fargo Bank, NA, etc., Index 7969/07
Plaintiff-Respondent,

-against-

Sheila Edwards,
Defendant-Appellant,

New York City Environmental Control Board, et al.,
Defendants.

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Clair & Gjertsen, Scarsdale (Patricia M. Lattanzio of counsel), for appellant.

Rosicki, Rosicki & Associates, P.C., Plainview (Edward Rugino of counsel), for respondent.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 26, 2010, which denied defendant Sheila Edwards's cross motion to dismiss the summons and complaint on the ground of lack of personal jurisdiction based upon improper service, and granted plaintiff's motion for a judgment of foreclosure and sale, to confirm the referee's report and for attorneys' fees, unanimously affirmed, without costs.

The court properly found that defendant's allegations were insufficient to rebut plaintiff's prima facie showing of proper service. Defendant's denial of service did not controvert the veracity or content of the affidavit of service so as to require

a traverse hearing (*see generally NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [2004]). In addition, her correspondence to her mortgage loan servicer made shortly after the date of service, indicating that she sought to recommence payment of her mortgage in order to suspend the pending foreclosure action under the instant index number, contradicted her claim that she was not served with the summons and complaint.

Contrary to defendant's contention, the court did not err in determining that she waived the issue of standing by failing to timely appear or answer (*see* CPLR 3211[a][3], [e]). In any event, the action was expressly maintained in plaintiff's capacity as trustee under a pooling and servicing agreement dated October 1, 2006, before the date of the commencement of the action (*see CWCapital Asset Mgt. LLC v Charney-FPG 114 41st St., LLC*, 84 AD3d 506 [2011]).

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: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7735- Index 20854/05
7736 Andre Dasent, etc.,
Plaintiff-Appellant,

-against-

William S. Schechter, M.D., et al.,
Defendants-Respondents,

Philip J. Houck, M.D., et al.,
Defendants.

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Law Offices of Joseph M. Lichtenstein, P.C., Mineola (Joseph M. Lichtenstein of counsel), for appellant.

Heidell, Pittoni, Murphy & Bach, LLP, White Plains (Daniel S. Ratner of counsel), for William S. Schechter, respondent.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Columbia Presbyterian Medical Center, respondent.

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Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about April 19, 2011, to the extent appealed from as limited by the briefs, dismissing the complaint as against defendants-respondents, and bringing up for review an order, same court and Justice, entered March 28, 2011, which, to the extent appealed from, granted defendants-respondents' motions for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs. Appeal from the order, unanimously dismissed, without costs, as subsumed in the appeal

from the judgment.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting detailed expert affidavits averring that the treatment of decedent did not deviate from good and accepted medical practice (*see Ramirez v Cruz*, 92 AD3d 533, 533 [2012]).

In opposition, plaintiff failed to raise a triable issue of fact. His expert opined that defendants should have known that decedent had an extreme sensitivity to the anesthesia agent that was used during decedent's open-heart surgery, because he had experienced a bad reaction to a much smaller amount of the same drug in a prior heart catheterization procedure. However, the decedent's medical records contain no evidence of a "bad reaction" during the prior procedure; rather, the records indicate that the decedent tolerated the procedure well. Thus, plaintiff's expert's affidavit, which contradicts the record, is insufficient to defeat defendants' motions for summary judgment (*see Fleming v Pedinol Pharmacal, Inc.*, 70 AD3d 422 [2010]).

Plaintiff's expert's opinion that there must have been a bad reaction, since a vasodilator was administered during the procedure, is speculative and unsupported by the evidence (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7737 Denny Castro,
Plaintiff,

Index 305304/09
84223/09
83968/10

-against-

Prana Associates Twenty One, LP,
Defendant.
- - - - -
[And a Third-Party Action]
- - - - -
Prana Associates Twenty One, LP,
Second Third-Party
Plaintiff-Respondent,

-against-

Northland Insurance,
Second Third-Party
Defendant-Appellant,

The Insurance Company of the
State of Pennsylvania,
Second Third-Party Defendant.

Kenney Shelton Liptak Nowak LLP, Buffalo (Judith Treger Shelton of counsel), for appellant.

Edward A. Frey, White Plains, for respondent.

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered April 21, 2011, which, to the extent appealed from as limited by the briefs, granted Prana's motion for summary judgment seeking enforcement of the default judgment obtained by Prana against Four Star to the extent of

declaring that Northfield, Four Star's insurer, is required to indemnify Prana in the underlying action, and denied Northfield's motion for summary judgment against Prana, unanimously reversed, on the law, with costs, Prana's motion denied, and Northfield's motion granted to the extent of declaring that Northfield has no obligation to defend or indemnify Prana in the underlying personal injury action.

Prana's September 29, 2009 letter notifying Northfield of the underlying action and requesting defense and indemnification as an additional insured under the Northfield policy, did not trigger Northfield's duty to disclaim coverage as to Four Star, its named insured. Indeed, under the Northfield policy, both primary and additional insureds were required to provide notice of a claim; accordingly, notice provided by Prana could not be imputed to Four Star (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 43 [2002]). This is especially true given that Prana has taken a position adverse to Four Star in the underlying litigation (*id.*).

Even if Prana's September 29, 2009 letter had provided sufficient notice with respect to both Prana and Four Star, Four Star's failure to provide timely notice of Prana's third-party lawsuit against it vitiated coverage under the Northfield policy

(*see American Tr. Ins. Co. v Rechev of Brooklyn, Inc.*, 57 AD3d 257, 257 [2008]). Indeed, Northfield did not receive notice from, and did not even learn that a claim had been made against, Four Star until it received notice of the suit and default judgment from Prana on May 25, 2010, and notice of the summons and complaint from Four Star's broker on June 2, 2010. Using either notice date (May 25, 2010 or June 2, 2010), Northfield's disclaimer letter, dated June 14, 2010, was timely as a matter of law (*see Public Serv. Mut. Ins. Co. v Harlen Hous. Assoc.*, 7 AD3d 421, 423 [2004]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7738 In re Relly Adler, Index 111817/10
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

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Tenenbaum, Berger & Shivers LLP, Brooklyn (David M. Berger of counsel), for appellant.

Sonya M. Kaloyanides, New York (Andrew M. Lupin of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Anil C. Singh, J.), entered March 29, 2011, which denied the petition brought pursuant to CPLR article 78, seeking to annul respondent's determination dated May 5, 2010, denying petitioner succession rights, as a remaining family member to the subject apartment, and dismissed the proceeding, unanimously affirmed, without costs.

Petitioner did not sustain her burden of establishing entitlement to succession rights as a remaining family member to the apartment held by her husband, because the record demonstrates that her occupancy was not pursuant to respondent's written permission, nor was it reflected in the affidavits of income submitted by her husband to respondent (*see Matter of*

Echeverria v New York City Hous. Auth., 85 AD3d 580 [2011]; *Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 [2008]).

Given the fact that petitioner cannot show that her husband, as the tenant of record, received written consent for her to reside in the apartment and that she was an authorized occupant of the apartment for a one-year period before his death, respondent's decision to deny her remaining family member status was neither arbitrary nor capricious *(see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]). Even if NYCHA were aware she was residing there, the agency is not estopped from denying her remaining-family-member status (*see Rosello v Rhea*, 89 AD3d 466, 466-467 [2011]). Moreover, the payment of rent did not confer legitimacy on petitioner's occupation of the apartment (*see Matter of Barnhill v New York City Hous. Auth.*, 280 AD2d 339, 339 [2001]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7739N Bank of New York Mellon Trust Company NA, etc., Plaintiff-Respondent, Index 380904/09

-against-

Eddie Sachar, Defendant-Appellant,

New York City Environmental Control Board, et al., Defendants.

Christopher Thompson, West Islip, for appellant.

Hogan Lovells US, LLP, New York (Chava Brandriss of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about March 11, 2011, which, inter alia, granted plaintiff's motion for summary judgment on its complaint as against defendant Sachar, unanimously affirmed, without costs.

Plaintiff proved its standing to commence this foreclosure action by demonstrating that it was both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action was commenced (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2009]). Defendant is correct that, although Mortgage Electronic Registration System (MERS) validly assigned the mortgage to plaintiff, and the

assignment was properly recorded in the public records, MERS had not been given any interest in the underlying note by the lender (*see Bank of N.Y. v Silverberg*, 86 AD3d 274, 283 [2011]). However, the complaint and the documents annexed to plaintiff's motion establish that an assignment of the note had been effectuated by physical delivery of the note before this action was commenced (*see id*. at 280; *Collymore*, 68 AD3d at 754).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Sweeny, Renwick, Freedman, Abdus-Salaam, JJ.

7742N Paul Solomons, Index 110636/10
Plaintiff-Appellant,

-against-

Douglas Elliman LLC, etc., et al.,
Defendants,

23 Manhattan Valley North LLC, et al.,
Defendants-Respondents.

Giskan Solotaroff Anderson & Stewart LLP, New York (Amanda Masters of counsel), for appellant.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered September 23, 2011, which, insofar as appealed from, in this action alleging that defendants discriminated against prospective tenants using a Section 8 voucher for the payment of rent, denied plaintiff's motion to compel the discovery of documents relating to piercing the corporate veil between defendants 23 Manhattan Valley North LLC and Baruch Singer, with leave to renew in the event plaintiff obtains a judgment in the action, unanimously affirmed, without costs.

The court providently exercised its discretion in denying plaintiff's motion since there is no basis, at this stage of the

proceedings, to seek to pierce the corporate veil. The general statutory exemption from personal responsibility for an organization's debts, obligations and liabilities does not extend to discriminatory acts by a person with an ownership interest in, or the power to make decisions for the organization (*see Pepler v Coyne*, 33 AD3d 434, 435 [2006]; Administrative Code of City of NY § 8-107[5]).

It is noted that contrary to defendants' contention, the subject order is appealable as of right. Plaintiff's motion was made on notice and affected a substantial right of the parties, namely the ability to pursue a theory of the case (*see* CPLR 5701[a][2][v]).

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

ENTERED: MAY 22, 2012

CLERK

Tom, J.P., Catterson, Acosta, Freedman, JJ.

7470- Index 650702/10
7471- 600736/10
7472 Rubin Schron, et al.,
Plaintiffs,

Cammeby's Equity Holdings LLC,
Plaintiff-Respondent,

-against-

Troutman Saunders LLP, et al.,
Defendants,

Leonard Grunstein, et al.,
Defendants-Appellants.

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Mich II Holdings LLC, et al.,
Plaintiffs,

SVCare Holdings, LLC, et al.,
Plaintiffs-Appellants,

-against-

Rubin Schron, et al.,
Defendants,

Cammeby's Equity Holdings LLC,
Defendant-Respondent.

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DLA Piper LLP (US), New York (Shand S. Stephens and Anthony P. Coles of counsel), for appellants.

Dechert LLP, New York (Andrew J. Levander of counsel), for respondents.

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Order, Supreme Court, New York County (James A. Yates, J.), entered January 25, 2011, affirmed, with costs. Appeals from order, same

court (O. Peter Sherwood, J.), entered September 15, 2011, and October 11, 2011, dismissed, with costs, as academic.

Opinion by Catterson, J. All concur.

Order filed.

CORRECTED ORDER - June 12, 2012

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
James M. Catterson
Rolando T. Acosta
Helen E. Freedman, JJ.

7470-7471-7472
Index 650702/10
600736/10

Rubin Schron, et al.,
Plaintiffs,

Cammeby's Equity Holdings LLC,
Plaintiff-Respondent,

-against-

Troutman Saunders LLP, et al.,
Defendants,

Leonard Grunstein, et al.,
Defendants-Appellants.

- - - - -

Mich II Holdings LLC, et al.,
Plaintiffs,

SVCare Holdings, LLC, et al.,
Plaintiffs-Appellants,

-against-

Rubin Schron, et al.,
Defendants,

Cammeby's Equity Holdings LLC,
Defendant-Respondent.

Leonard Grunstein, Murray Forman, Canyon Sudar Partners LLC, and SVCare Holdings, LLC, appeal from the order of the Supreme Court, New York County (James A. Yates, J.), entered January 25, 2011, which, granted Cammeby's Equity Holdings LLC's motions to exclude parol evidence of whether a loan was a condition precedent to the validity of its option to purchase the bulk of SVCare Holdings LLC (in *Schron v Grunstein*, Index No. 650702/10), and to dismiss the cause of action for a declaration that the option is void (in *Mich II Holdings LLC v Schron*, Index No. 600736/10), from the order, same court (O. Peter Sherwood, J.), entered September 15, 2011, which upon reargument, adhered to the original determination, and from the order, same court and Justice, entered October 11, 2011, which, clarified that the reargument order entered in *Mich II Holdings LLC v Schron* also applied to *Schron v Grunstein*.

DLA Piper LLP (US), New York (Shand S. Stephens, Anthony P. Coles and Michael R. Hepworth of counsel), for appellants.

Dechert LLC, New York (Andrew J. Levander, Steven A. Engel and Nicolle L. Jacoby of counsel), for respondent.

CATTERSON, J.

In this action, the defendants are seeking to avoid the plain language of an option to purchase a national nursing-home company by incorporating into it a separate loan agreement through the use of parol evidence. Two motion courts correctly rejected this tortured argument and we therefore affirm.

Plaintiff Rubin Schron is a real estate investor who operates through various entities using the names Cammeby's and Cam-Elm (all managed by Schron and majority-owned by his immediate family). Defendant-appellant Leonard Grunstein (hereinafter referred to as "Grunstein"), a partner at Troutman Sanders LLP (formerly at Jenkens Gilchrist Parker Chapin LLP), was formerly Schron's attorney. Defendant-appellant Murray Forman (hereinafter referred to as "Forman"), an investment banker, was formerly Schron's investment banker.

In December 2004, at Grunstein's and Forman's urging, Schron and his companies (sometimes hereinafter referred to collectively as "Schron") financed a $1.3 billion acquisition of the assets of Mariner Health Services, Inc., a public company operating numerous nursing homes. Schron paid $14 million to a small investment bank predominantly owned by Forman and Grunstein, who had structured the deal. Grunstein and his law firm (then Jenkens & Gilchrist) drafted the 2004 transactional documents and

the 2006 amended refinancing documents.

Schron provided $1.1 billion in cash, lines of credit and mortgages, and effectively guaranteed the remaining loans from a third-party lender. It is undisputed that neither Grunstein or Forman contributed any funds to the transaction.

A Schron entity, SMV Property Holdings LLC (hereinafter referred to as "SMV") acquired Mariner's real estate. Grunstein persuaded Schron to lease the nursing home facilities to Grunstein's brother; SVCare (managed by Grunstein and Forman) and its operating subsidiary, Sava, were formed for that purpose. Less than two months after the closing, Grunstein's brother transferred SVCare to Canyon Sudar Partners, LLC, which was wholly-owned by Grunstein and Forman, for the nominal sum of $10.

In connection with the Mariner transaction, a Schron entity, Cammeby's Funding III, LLC, agreed to make a $100 million loan to SVCare; the loan agreement was amended in 2006. The 2004 loan agreement contained a merger clause, as did its 2006 amendment.

Prior to the amendment, the loan had been described as collateral for other loans made to SMV; Grunstein and Forman had certified to third-party lenders that the loan had been made; the loan was reflected in Sava's audited financial statements; and Grunstein and Forman had their attorneys describe the loan as

outstanding in communications with the Department of Justice.

Also in connection with the Mariner transaction, SVCare and Canyon Sudar granted Cammeby's Equity Holdings LLC (hereinafter referred to as "Cam Equity") an option to purchase SVCare. The option, as amended in 2006, had a five-year term permitting its exercise by June 9, 2011.

The consideration for the option was "the mutual covenants and agreements hereinafter set forth, *and other good and valuable consideration (the receipt and adequacy of which is hereby acknowledged* by the Parties)" (emphasis added). The consideration for exercising the option was $100 million, "all or a portion of which may be paid through assumption, satisfaction or other elimination of [SVCare's] liability on debt in the dollar amount of the component of the exercise price paid by this method." The manner of payment was at Cam Equity's discretion. If, after exercising the option, Cam Equity sold SVCare, any net proceeds over $400 million would be paid to SVCare.

The option agreement also contained a merger clause: it "supersedes and completely replaces all prior and other representations, ... other agreements and understandings ... with respect to the matters contained in this Agreement." It is undisputed that the agreement did not mention the $100 million

loan from Cammeby's Funding III LLC (an entity separate from option-holder Cam Equity), or that the option was security for a loan from another party.

On March 23, 2010, Grunstein and Forman filed Mich II Holdings LLC v Schron (Index No. 600736/2010), seeking, inter alia, to declare the option invalid. In the complaint, Grunstein and Forman alleged that the option agreement is one of the loan documents, the option was granted in consideration for cancellation of the $100 million loan indebtedness, but the option was void because the loan was never made.

On June 22, 2010, Cam Equity gave written notice to SVCare of its intent to exercise the option. In August 2010, Schron filed the amended verified complaint in Schron v. Grunstein (Index No. 650702/2010), alleging that Grunstein and Forman had structured the Mariner deal, drafted the documents and induced him to enter into the transaction, breaching their fiduciary duties and committing related business torts. Schron sought specific performance of the option.

In October 2010, Cam Equity moved in limine in Schron to exclude parol evidence that Grunstein claimed would show that 1) the $100 million loan was the "other good and valuable consideration" for the option, and 2) the loan was not funded,

rendering the option void for lack of consideration. Schron also moved in Mich II to dismiss Grunstein's cause of action to declare the option void. The arguments on the motions are identical and our analysis applies to each motion equally.

Cam Equity relied on the merger/integration clause in the option agreement in support of its argument that no understanding extrinsic to the option agreement could be used to interpret it. It maintained that the "mutual covenants and agreements" constituting the consideration were the promises to pay SVCare $100 million at closing and to pay it the excess above $400 million if Mariner's operations were sold to a third party.

Cam Equity further contended that the option agreement should be construed against Grunstein, whose (conflicted) law firm had drafted it; it was simply not plausible that they would have omitted $100 million in consideration from the option's terms. Finally, Cam Equity argued that Grunstein was estopped from denying that the loan funds had never been provided, since Grunstein and his co-defendants in Schron had repeatedly acknowledged that the $100 million loan was made.

In opposition, Forman simply reiterated his and Grunstein's pleadings, that the loan was the consideration for the option and that the option was security for the loan. He averred that

Schron had stated that he always understood that the option was merely security for the loan. Although Forman admitted signing papers stating that the loan had been funded, he claimed those statements were not accurate and had only been made under the belief that the funds would be provided; however, he asserted that the funds were never provided.

The motion court (Justice Yates) granted the motion in limine and granted the motion to dismiss Grunstein and Forman's cause of action to declare the option void. The motion court found the loan and option agreements to be separate, not interdependent, because, although executed and amended on the same date, they had separate "assents," contained no cross references and had only a partial identity of parties (i.e., since one had Cam Equity and the other had Cam Funding). Also, they were drafted by sophisticated parties, including attorneys.

The court found that the proffered parol evidence was inadmissible based on the merger clause in the option agreement showing that it was a fully integrated document. Furthermore, the evidence that Grunstein and Forman sought to introduce would modify the agreement to require new and additional consideration not included in the option agreement itself.

Finally, the motion court held that the option agreement was unambiguous as to the meaning of consideration. The option price and the loan amount were both $100 million. However, this did not create an ambiguity, but merely constituted a coincidence. While the court recognized that parol evidence is admissible to explain consideration or to show whether it had in fact been given even where its receipt is recited in an agreement, the court found that the option agreement contemplated the exchange of mutually beneficial covenants whereby Grunstein and Forman would not only receive $100 million upon exercising the option, but also the promise of any excess above $400 million if Mariner's operations were sold. The court reasoned that, had the sophisticated parties intended to make the loan a condition precedent to the right to exercise the option, they could have expressly done so; however, there was no clear language of condition.

After Justice Yates retired, Grunstein and Forman moved for reargument before Justice Sherwood, who granted reargument and adhered to Justice Yates' determination. Justice Sherwood rejected Grunstein and Forman's arguments that Justice Yates had overlooked the phrase "other good and valuable consideration" and had misapplied the parol evidence rule.

The motion courts correctly found that the loan agreement and option agreement involved separate assents, the Schron-controlled parties to each agreement were different (an equity entity and a funding entity), and the agreements contained no cross references to each other. Thus, the loan agreement and the option agreement were not interdependent and should not be read as a unitary obligation even though they were executed at the same time. See Rudman v. Cowles Communications, 30 N.Y.2d 1, 13, 330 N.Y.S.2d 33, 42, 280 N.E.2d 867, 873 (1972) ("when two parties have made two separate contracts it is more likely that promises made in one are not conditional on performances required by the other") (internal quotation marks omitted); Applehead Pictures LLC v. Perelman, 80 A.D.3d 181, 189, 913 N.Y.S.2d 165, 172 (1st Dept. 2010); Unclaimed Prop. Recovery Serv., Inc. v. UBS PaineWebber Inc., 58 A.D.3d 526, 870 N.Y.S.2d 361 (1st Dept. 2009) (no cross references identifying referenced documents beyond all reasonable doubt); cf. Movado Group, Inc. v. Mozaffarian, 92 A.D.3d 431, 938 N.Y.S.2d 27 (1st Dept. 2012) (terms and conditions of another document were incorporated).

The courts correctly recognized that there was absolutely no language of condition making the funding of the loan an express condition precedent to the right to exercise the $100 million

option. See Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co., 86 N.Y.2d 685, 691, 636 N.Y.S.2d 734, 737, 660 N.E.2d 415, 418 (1995). Further, we find that the parol evidence rule precluded the use of extrinsic evidence to show the claimed interdependence. See Transammonia, Inc. v. Enron Capital & Trade Resources Corp., 278 A.D.2d 152, 153, 718 N.Y.S.2d 62, 63 (1st Dept. 2000).

The motion courts correctly found that the option agreement provided that the parties' stated mutually beneficial covenants constituted the consideration, and that any additional consideration for the option, such as the claimed loan funds, was impermissibly at variance with that provision pursuant to the merger and integration clauses. The merger and integration clauses are explicit and therefore bar the use of parol evidence of the parties' intent and of any other agreements or understandings. Fundamental Long Term Care Holdings, LLC v. Cammeby's Funding LLC, 92 A.D.3d 449, 938 N.Y.S.2d 57 (1st Dept. 2012); Torres v. D'Alesso, 80 A.D.3d 46, 910 N.Y.S.2d 1 (1st Dept. 2010). The defendants' attempt to distinguish our holding in Torres on the grounds that fulfillment of the loan agreement constituted consideration for the option agreement whereas Torres dealt with a condition precedent to closing of title in a real

estate transaction, is unavailing.

Because consideration was unambiguously acknowledged, parol evidence was inadmissible as an aid in interpretation. Further, absent ambiguity, there was also no reason to resort to contra proferentum to construe the option agreement against the drafter-attorney. See Fernandez v. Price, 63 A.D.3d 672, 676, 880 N.Y.S.2d 169, 173 (2d Dept. 2009) (contra proferentum is a last resort); Stern v. Cigna Group Ins., 2008 WL 4950067, *2, 2008 U.S. App. LEXIS 24017, *4 (2d Cir. 2008) (same).

Defendants' argument that Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 521 F.Supp. 104 (S.D.N.Y. 1981), aff'd 691 F.2d 1039 (2d Cir. 1982), cert. denied, 460 U.S. 1012, 103 S.Ct. 1253 (1983), and Travelers Cas. & Sur. Co. of Am. v. Trataros Constr., Inc., 11 Misc.3d 1092(A), 2006 N.Y. Slip Op. 50829(U) (2006) support the use of parol evidence in the instant case is in error. In Travelers, the court allowed parol evidence only on the factual dispute over whether the listed consideration was actually received by one party to the contract. Of course, in this case, defendants are seeking to redefine "consideration" in the option agreement itself, not whether an enumerated consideration was actually received. Indeed, in Travelers, Supreme Court held that "the 'parol evidence rule pertains to contract terms, not assertions of fact.'" Id. at *6, quoting TIE

Communications, Inc. v. Kopp, 589 A.2d 329, 334 (Conn. 1991). This is consistent with precedent that parol evidence can be used to establish or rebut asserted facts, not to vary the unambiguous terms of a contract. See e.g. Ehrlich v. American Moninger Greenhouse Mfg. Corp., 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970); Adirondack Bank v. Simmons, 210 A.D.2d 651, 619 N.Y.S.2d 383 (3d Dept. 1994).

The District Court in Sharon Steel, on the other hand, allowed parol evidence to establish "the understanding of the parties" with respect to "good and valuable consideration" in the context of the boilerplate provision of the contract at issue. 521 F.Supp. at 111. The motion court correctly distinguished Sharon Steel from the instant case because the SVCare option agreement expressly defines consideration by reference to the mutual exchange of promises in the agreement.

Because the consideration consisted of mutual covenants, and not the loan, there was no occasion to use parol evidence to show that consideration was lacking because the loan funds had not been advanced (see Ehrlich, 26 N.Y.2d at 258, 309 N.Y.S.2d at 343), or that there was a condition precedent to the effectiveness of the contract and it had not been satisfied (see Mack-Lowe v. Picault-Cadet, 33 A.D.3d 504, 823 N.Y.S.2d 55 (1st Dept. 2006), citing Hicks v. Bush, 10 N.Y.2d 488, 491, 225

N.Y.S.2d 34, 36, 180 N.E.2d 425, 427 (1962)).

We reject the defendants' argument that parol evidence was necessary to show that the option agreement was not intended to be an option at all, but a security device. Cf. Lombard & Co., Inc. v. De La Roche, 235 A.D.2d 333, 652 N.Y.S.2d 965 (1st Dept. 1997). The rule allowing parol evidence to show that a security device was intended applies only to documents appearing to be absolute conveyances (see Marsh v. McNair, 99 N.Y. 174, 178-179, 1 N.E. 660, 662 (1885)); the option agreement was not and did not purport to be one.

We recognize that the foregoing analysis appears to render the "other consideration" phrase in the option agreement meaningless, in violation of a cardinal rule of interpretation. See Ronnen v. Ajax Elec. Motor Corp., 88 N.Y.2d 582, 589, 648 N.Y.S.2d 422, 424-425, 671 N.E.2d 534, 536-537 (1996). However, some documents do use meaningless boilerplate and, in our view, the rule should not be carried to absurd lengths to imbue meaning into every legalistic jotting.

Accordingly, the order of Supreme Court, New York County (James A. Yates, J.), entered January 25, 2011, which granted plaintiff Cammeby's Equity Holdings LLC's motions to exclude parol evidence of whether a loan was a condition precedent to the validity of **the option to purchase up to 99.99% of all membership**

units in SVCare Holdings LLC (in Schron v. Grunstein, Index No. 650702/10) and to dismiss the cause of action for a declaration that the option is void (in Mich II Holdings LLC v. Schron, Index No. 600736/10), should be affirmed, with costs. The appeals from the order of the same court (O. Peter Sherwood, J.), entered September 15, 2011, which upon reargument, adhered to the original determination, and the order, same court and Justice, entered October 11, 2011, which clarified that the reargument order entered in Mich II Holdings LLC v. Schron also applied to Schron v. Grunstein, should be dismissed, without costs, as academic.

All concur.

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

ENTERED: MAY 22, 2012

CLERK