SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 4, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, DeGrasse, Román, Gische, JJ.

8662- Index 303169/08
8662A Carmen Polanco,
Plaintiff-Appellant,

-against-

Mary Reed, M.D., et al.,
Defendants-Respondents,

Martin Luther King, Jr. Health Center,
Defendant.

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Alpert, Slobin and Rubenstein, New York (Gary Slobin of counsel), for appellant.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliott J. Zucker of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered September 13, 2011, dismissing the complaint as against defendants-respondents Mary Reed, M.D. and Bronx-Lebanon Hospital Center, and bringing up for review an order, same court and Justice, entered July 25, 2011, which granted defendants-respondents' motion for summary judgment dismissing the complaint, reversed, on the law, without costs, the judgment vacated, the motion denied, and the complaint reinstated. Appeal

from the forgoing order, dismissed, without costs, as subsumed in the appeal from the judgment.

In this medical malpractice appeal, defendants do not dispute that they departed from the accepted standard of care by incorrectly informing plaintiff that her April 9, 2007 PET scan was negative for recurrent cancer and not correcting that misinformation until November 2007. Defendants argue that the six month delay in notification did not cause plaintiff any injury. Defendants met their initial burden of establishing their entitlement to judgment as a matter of law (*Weingrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]). However, the motion court erred in finding that plaintiff failed to raise an issue of fact requiring the denial of defendants' motion and a trial. The issue of whether a doctor's negligence is more "likely than not a proximate cause of [a plaintiff's] injury" is usually for the jury to decide *(Stewart v New York Health & Hosps. Corp*., 207 AD2d 703,704 [1st Dept 1994], *lv denied* 85 NY2d 809 [1995]).

In November 2001, plaintiff was diagnosed by nonparty Montefiore Hospital Center with stage IIB breast cancer of her right breast. She underwent a lumpectomy followed by radiation and chemotherapy. Plaintiff continued treating at Montefiore through 2006 at which time she transferred to defendant Martin Luther King, Jr., Health Center, a clinic affiliated with Bronx-

Lebanon Hospital Center, where she consulted with defendant Dr. Reed. After discussing plaintiff's history and hearing her complaints of back pain and pain in her right arm, Dr. Reed ordered a bone scan, a PET scan and some other tests to "rule out metastasis." On the April 9, 2007 pre-certification PET scan form Dr. Reed wrote that "[i]f the PET scan is positive, patient will be initiated on hormone therapy and/or chemotherapy." At her deposition, Dr. Reed testified that it is her "custom and practice" to tell a patient that if the PET scan comes back with a positive result showing a recurrence of cancer, the patient will be advised to undergo hormonal therapy. Plaintiff underwent all of the tests that Dr. Reed ordered, including the PET scan. The report of the PET scan was issued on April 30, 2007.

On July 2, 2007, plaintiff had a follow up visit with Dr. Reed who told her, erroneously, that the PET scan was negative for recurrent disease when, in fact, the scan had revealed lymph nodes in her underarm and above her collar bone that were "highly suspicious for metastatic disease . . ." The report also indicated "left hilar [lung]" activity that was "likely inflammatory . . ." The report recommended a biopsy and followup to correlate the findings. Dr. Reed had not reviewed a written report of the PET scan before meeting with plaintiff, but had admittedly relied solely on information she was given when she

called for the test results. Dr. Reed first saw a written copy of the PET scan report on October 29, 2007, the same day that plaintiff came to her office, without an appointment, complaining of increased breast pain and demanding to know what the results of her PET scan were. It was then that Dr. Reed informed plaintiff, for the first time, that there were signs of possible metastasis, and she ordered that plaintiff undergo a second PET scan.

The second PET scan, performed November 7, 2007, showed a "progression of disease" and an "[i]ncreasing size and intensity of [the] right axillary and right supraclavicular lymph nodes . . ." Additionally, whereas the April PET scan was equivocal and had shown inflammatory hilar activity in a region measuring approximately 1 cm, the November PET scan revealed a larger 2 cm apical density of the left lung. Dr. Reed referred plaintiff to a breast surgeon for a biopsy and to a pulmonologist for evaluation of the enlarged hilar lymph node. Plaintiff, however, opted for treatment with another physician and never returned to see Dr. Reed.

Defendants moved for summary judgment dismissing the complaint on the basis that plaintiff was unable to show a causal connection between her claimed injuries and the six month delay in learning the results of the April 30, 2007 PET scan.

Defendants' motion relied primarily on the 3½ page affidavit of their expert, Dr. Grossbard, an oncologist. Without providing any statistical or empirical data to support his opinion, Dr. Grossbard stated that the delay in notifying plaintiff of the April 2007 positive PET scan results showing a recurrence of cancer and metastasis "was of no proximate cause whatsoever" and that it "did not deprive her of any opportunity for any treatment -- be it surgery, chemotherapy or radiation" nor did it "change her life expectancy" or "[i]ncrease the statistical likelihood of further recurrence, as the cancer had already spread to the patient's left lung as of the 4/30/07 study . . ."

In opposition to the motion, plaintiff provided the 3½ page affidavit of Dr. Levin, also an oncologist. He opined that Dr. Reed's departure from accepted standards of care were substantial factors in causing the plaintiff pain and suffering, including increased breast pain, emotional trauma, unnecessary surgery to the lung, a reduced chance of recovery and the diminution of her life expectancy by 10% because the November 2007 PET scan showed "intense" activity in a "2cm left lung apical density." Plaintiff contrasted that result with the April 2007 PET scan study, which only showed "inflammatory" activity "in a region measuring approximately 1cm."

In granting defendants' motion, the court below accepted Dr.

Grossbard's opinion that "there were no viable treatment options for a cure available to plaintiff after the April 2007 study" although it was made without reference to any scientific or statistical studies and despite Dr. Reed's own statement that it is her custom and practice to recommend, among other things, treatment with Tamoxifen if the PET scan is positive. However, in deciding that the plaintiff had failed to raise a triable issue of fact, the court ironically faulted Dr. Levin for providing an opinion that was "incomplete at best" and without any information regarding statistical probabilities.

Were the motion court's criticism of plaintiff's expert's affidavit accepted, it would hold equally for defendants' expert. Both experts, however, have provided affidavits of equal strength, supported by the facts in the record, addressing the essential allegations in the bill of particulars and setting forth their opinions with a reasonable degree of medical certainty (*Roques v Nobel*, 73 AD3d 204, 206 [1st Dept 2010]). Thus, although defendants met their initial burden of establishing their prima facie case, Dr. Levin's affidavit established the requisite nexus between the malpractice allegedly committed by defendants and plaintiff's injury, thereby rebutting the defendants' prima facie showing (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Mignoli v Oyugi*, 82 AD3d 443 [1st Dept

2011]).

By deciding that defendants' departure from accepted medical standards of practice "could not have caused plaintiff's metastatic breast cancer, resulting physical and emotional pain or loss of a chance of cure," the motion court erroneously decided a disputed issue of fact. Where oncological experts present competing opinions on causation, particularly about the progression of the disease, there is an issue of fact for a jury to decide (*see Feldman v Levine,* 90 AD3d 477 [1st Dept 2011] *lv granted* 18 NY3d 809 [2012]).

Dr. Grossbard's opinion that "there were no viable treatment options to *cure* the plaintiff of her disease" (emphasis added) ignores plaintiff's chief claim that, as a result of defendants' negligence, she suffered the spread and advancement of the disease, pain and suffering, emotional trauma and a decreased life expectancy. Curing cancer, while an ultimate and worthy aspiration, is not the only positive treatment outcome. Whether a diagnostic delay affected a patient's prognosis is typically an issue that should be presented to a jury (*Meth v Gorfine,* 34 AD3d 267 [1st Dept 2006]).

Nothing in plaintiff's medical record suggests that plaintiff could not have benefitted from treatment or that the disease was at such an advanced stage that it was untreatable

(*compare Schaub v Cooper*, 34 AD3d 268 [1st Dept 2006] [multiple metastatic lesions in the liver, condition inoperable, only 7% chance of survival] *and Candia v Estepan*, 289 AD2d 38 [1st Dept 2001] [incurable mesothelioma]). Since the report of the April 2007 PET scan only stated that there was "activity" in the "left hilar [lung]" and a followup was recommended, there is also a genuine material issue of fact as to whether Dr. Reed's failure to send plaintiff for a biopsy sooner than November 2007 proximately caused plaintiff's injuries which included the progression of the disease and lung surgery. Contrary to the dissent's position, plaintiff is not foreclosed from claiming injury from the undisputed delay in treatment because the April 2007 PET scan already showed some evidence of cancer metastasises in her lung. Notably, plaintiff has alleged damages beyond unnecessary lung surgery. In any event, the experts' disagreement on whether surgery would have been necessary in April 2007, based upon reading the same medical records, is sufficient to submit the issue to the jury.

Finally, although plaintiff had previously been prescribed Tamoxifen, but stopped taking it because of negative side effects, it is wholly speculative to say that "plaintiff did not wish to avail herself of hormone therapy" or would be

uncooperative with that regimen had it been prescribed to her in connection with the recurrence of the disease.

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

DEGRASSE, J. (dissenting)

As the majority states, defendants Bronx-Lebanon Hospital Center and Mary Reed, M.D., its Chief of Oncology, made a prima facie showing that their conceded delay in informing plaintiff of diagnostic testing results was not a proximate cause of the injuries plaintiff alleges. I respectfully dissent, however, and would affirm the order granting summary judgment because, contrary to the majority's conclusion, plaintiff's opposition is insufficient to raise a triable factual issue regarding proximate cause.

Plaintiff's attorney-verified bill of particulars states that defendants' six-month delay in informing her of the results of an April 30, 2007 PET scan caused her to suffer "[s]pread, advancement and metastasis of breast and lung cancer; spread of lung cancer to liver and other parts of body requiring surgery; physical and emotional pain and suffering; loss of enjoyment of life; depression; fear of dying; loss chance of cure."

Plaintiff began treating with defendants in January 2007. At that time, plaintiff had a history of stage IIB cancer of the right breast which was diagnosed in November 2001. Plaintiff's treatment for the disease by nonparty Montefiore Hospital Center consisted of a lumpectomy, radiation and chemotherapy that was administered in 2002. Plaintiff was also put on a regimen of

Tamoxifen which she discontinued after one year due to its side effects.

The report of the April 30, 2007 PET scan recites an impression of "intense activity in right axillary and supraclavicular lymph nodes highly suspicious for metastatic disease" and called for a correlation of these findings with a biopsy. Plaintiff was not informed of this PET scan report until October 29, 2007. The record contains the report of a subsequent November 5, 2007 PET scan which the examining radiologists compared with the April 2007 report. The findings, set forth in the November 2007 report, that are relevant to this appeal are of "mild activity in a 2 cm left lung apical density which is slightly larger and more intense" and "mild activity in the left hilum[1] that may be inflammatory." On the basis of the two PET scan reports, defendants' oncology expert opined that defendants' delayed reporting of the April 2007 results did not deprive plaintiff of any opportunity for treatment because the cancer had already spread to her left lung as of the April 30, 2007 study. For example, defendants' expert construed the November report's use of the phrases, "slightly larger" and "more intense" as

[1]The hilum is a wedge-shaped depression on the mediastinal surface of each lung where the bronchus, blood vessels, nerves and lymphatics enter and leave the viscus (Stedman's Medical Dictionary 889-890 [28th ed. 2006].

unequivocal concessions that the subject left lung apical density was visible on both the April and November 2007 studies. Defendants have demonstrated the absence of a nexus between their negligence and the injuries plaintiff claims (*see Ferrara v S. Shore Orthopedic Assoc.*, 178 AD2d 364 [1st Dept 1991]). Notwithstanding the majority's view, the conclusions reached by defendants' expert were not undermined by his omission of statistical or empirical data. As this Court has cautioned, proximate cause is a legal concept which cannot be dissected and measured in terms of percentages (*King v St. Barnabas Hosp.*, 87 AD3d 238, 247 [1st Dept 2011][internal quotation marks and citations omitted]). Accordingly, as noted above, defendants made a prima facie showing of their entitlement to summary judgment and thereby shifted the burden to plaintiff to come forward with evidence sufficient to raise a triable issue of fact.

In opposing the motion, plaintiff submitted the affirmation of her own oncology expert who concluded that "[t]he delay in diagnosis was a substantial factor in the patient requiring additional surgery *due to the spread into the lung"* (emphasis added). This conclusion is unsupported by the record in two respects. First, the involvement of plaintiff's left lung was not a new development as it was already noted in the April 2007

study insofar as it spoke of "focal left hilar[2] activity in a region measuring approximately 1 cm." In fact, the November 2007 study describes the mild activity in the left hilum as "unchanged."[3] Second, this record does not contain an operative report, pathology report or any other document that sets forth the description, scope or even the date of plaintiff's surgery. Therefore, in my view, there exists no basis for the expert's assertion that with an appropriate diagnosis, plaintiff "would have likely been able to avoid surgery on her lung." It is settled that opinion evidence must be based on facts in the record or personally known to the witness (*Cassano v Hagstrom,* 5 NY2d 643, 646 [1959]). Moreover, the expert's assertion that plaintiff suffered emotionally is similarly lacking foundation in the record.

Plaintiff cites *Schaub v Cooper* (34 AD3d 268 [1st Dept 2006]) in support of her argument that there is an issue of fact as to whether an earlier disclosure of the April 2007 study would have affected her life expectancy and chance of survival. *Schaub* involved a defense motion for summary judgment in a case where a

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[2]Pertaining to a hilum (*Stedman's Medical Dictionary* at 889).

[3]Plaintiff's expert hedges on this point by stating that the left lung apical density was not previously "significantly reported" on the report of April 30, 2007.

delayed diagnosis allegedly allowed a decedent's stage IA gastric cancer to progress to stage IV which had a significantly lower survival rate (*id.* at 270). *Schaub* is distinguishable insofar as we found an issue of fact as to whether the delayed diagnosis reduced the decedent's life expectancy on the basis of expert opinion regarding the progression of the disease from stage IA to stage IV (*id.* at 270-271). Here, by contrast, Dr. Reed's deposition is uncontradicted insofar as she testified that plaintiff's cancer remains at stage IIB where it was when plaintiff first came under defendants' care.

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

ENTERED: APRIL 4, 2013

CLERK

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

9211 Vilma Grant, Index 305841/08
Plaintiff-Appellant,

-against-

The New York City Transit Authority, et al.,
Defendants-Respondents.

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

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

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Judgment, Supreme Court, Bronx County (Julia Rodriguez, J.), entered September 28, 2011, upon a jury verdict, dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated, the complaint reinstated and the matter remanded for a new trial.

Plaintiff commenced this action against defendant New York City Transit Authority and the City of New York (collectively NYCTA) to recover damages for a fractured ankle she allegedly sustained in 2007 while descending the platform stairs at a subway station in the Bronx. At trial plaintiff testified that as she was descending the stairs, she "stepped on something very hard" which caused her to fall. After her fall, plaintiff noticed a metal bracket protruding from the step where she had fallen. Plaintiff contends that the metal bracket constituted a

dangerous condition which caused her to fall, and that NYCTA was negligent in allowing the metal bracket to exist on the stairway.

NYCTA denied the allegations, and argued at trial that it had rained on the day of plaintiff's accident, which caused plaintiff to fall, and that the fall was not due to the protruding metal bracket as plaintiff testified. To support its position, the NYCTA called as a witness the orthopedic surgeon who examined plaintiff after her accident. The doctor testified, solely based on his hospital notes, and over plaintiff's objection, that when he examined plaintiff, she told him that she sustained a "slip and fall on wet ground." After the trial, the jury rendered a verdict in NYCTA's favor. Plaintiff now appeals, arguing, among other things, that the doctor's testimony that plaintiff told him that she slipped on a wet surface should have been precluded. We agree.

It was harmful error for the trial court to admit into evidence the hearsay hospital notes of the orthopedic surgeon who examined plaintiff after her accident. According to the doctor's notes, plaintiff stated that she slipped and fell on wet ground and complained of severe right ankle pain. However, at trial the doctor testified that he only "assume[d]" that the statement came from plaintiff. Moreover, the doctor admitted that he did not recognize plaintiff and had no independent recollection of the

case; his original history notes were discarded; and he was unsure from whence he received the information.

We disagree with the trial court's ruling that the statement made by the doctor was relevant to plaintiff's fall. Generally, admissions not germane to the treatment or diagnosis of a plaintiff's injuries are not admissible under the business records exception to the hearsay rule (*Beecham v New York City Tr. Auth.*, 54 AD3d 594 [1st Dept 2008]; *see also Williams v Alexander*, 309 NY 283 [1955]). A hearsay entry in a hospital record as to the cause of an injury may be admissible at trial even if not germane to diagnosis, if the entry is inconsistent with a position taken at trial. However, there must be evidence that connects the party to the entry (*Coker v Bakkal Foods, Inc.*, 52 AD3d 765 [2d Dept 2008] *lv denied* 11 NY3d 708 [2008]; *see also Cuevas v Alexander's, Inc.*, 23 AD3d 428 [2d Dept 2005]).

Here, plaintiff testified that she slipped on a metal bracket protruding from a subway step. The hospital record indicating that she slipped on wet ground should not have been presented to the jury since there was no proper foundation for its admission, inasmuch as it was unclear whether plaintiff was the source of that information (*see Echeverria v City of New York*, 166 AD2d 409, 410 [2d Dept 1990]). Indeed, plaintiff testified that she did not tell the orthopedic surgeon that she

slipped on a wet surface. The admission of the hospital record thus was not harmless error since it went to the crux of plaintiff's allegations. NYCTA's primary defense was that plaintiff slipped on wet ground, and not from its negligence (*see generally Stewart v Manhattan & Bronx Surface Tr. Operating Auth.*, 30 AD3d 283 [1st Dept 2006]).

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

ENTERED: APRIL 4, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Abdus-Salaam, Feinman, JJ.

9342-
9343 Index 105179/08

Great Northern Insurance Company
as Subrogee of Margaret Summers,
Plaintiff,

-against-

Zen Restoration Inc.,
Defendant-Appellant,

Patrick Gallagher,
Defendant-Respondent.

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Rosenbaum & Taylor, P.C., White Plains (Scott P. Taylor of counsel), for appellant.

Steven C. Rauchberg, P.C., New York (Steven C. Rauchberg of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered October 7, 2011, which denied defendant Gallagher's post-note of issue motion to compel production of evidence and ordered that defendant Zen Restoration Inc. is precluded from offering certain evidence at trial, unanimously modified, on the law, so much of the order as precluded Zen from offering evidence vacated, and otherwise affirmed, with costs. Appeal from order, same court and Justice, entered May 25, 2012, which granted defendant Gallagher's motion for summary judgment on his cross claim against defendant Zen for breach of contract, unanimously withdrawn in accordance with the terms of the parties'

stipulation.

The motion court appropriately denied defendant Gallagher's post-note of issue motion to compel production of evidence. The parties had previously stipulated that all discovery was complete. Under these circumstances, it was an improvident exercise of discretion for the motion court to preclude Zen from offering evidence at trial, especially since Gallagher sought to compel, and did not move for sanctions pursuant to CPLR 3126 (*cf. Emmitt v City of New York*, 66 AD3d 504, 505 [1st Dept 2009] [not an improvident exercise of discretion for motion court to grant plaintiff's motion to strike defendant's answer to extent of precluding it from offering certain evidence]).

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

ENTERED: APRIL 4, 2013

CLERK

Friedman, J.P., Moskowitz, Degrasse, Richter, Gische, JJ.

9617 The People of the State of New York, Respondent, Ind. 1090/09

-against-

Jose Oquendo, Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Ravi Kantha of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eugene Oliver, J.), rendered September 16, 2011, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second felony offender, to a term of six years, to be followed by five years of postrelease supervision, unanimously affirmed.

We find that defendant's purported waiver of his right to appeal was invalid. At the plea proceeding, the court told defendant that the promised sentence would be six years of incarceration, with five years of postrelease supervision, and that the waiver of appeal was part of the sentence. Other than this brief reference, the court said nothing more about the appellate waiver. Defendant also executed a written waiver of appeal.

A waiver of the right to appeal is effective "'only so long as the record demonstrates that it was made knowingly, intelligently and voluntarily'" (*People v Bradshaw*, 18 NY3d 257, 259 [2011], quoting *People v Lopez*, 6 NY3d 248, 256 [2006]). Although a court need not engage in any particular catechism to find a valid appeal waiver, it must make certain that the defendant has "a full appreciation of the consequences of [the] waiver" (*Bradshaw*, 18 NY3d at 264 [internal quotation marks omitted]). A necessary component of a knowing and voluntary appeal waiver is evidence that "the defendant understood that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*Lopez*, 6 NY3d at 256).

We conclude that defendant here did not knowingly, voluntarily, and intelligently waive his appellate rights. The court made only a fleeting reference to the appeal waiver, and included it in the description of defendant's sentence. By conflating the waiver of appeal with the sentence to be imposed, the court failed to adequately ensure that defendant had a "full appreciation of the consequences of [the] waiver" (*Bradshaw*, 18 NY3d at 264 [internal quotation marks omitted]), and that he was giving up something more than what is ordinarily forfeited upon a guilty plea (*see Lopez*, 6 NY3d at 256).

Although defendant did sign a waiver of his right to appeal, "a written waiver is not a complete substitute for an on-the-record explanation of the nature of the right to appeal, and some acknowledgment that the defendant is voluntarily giving up that right" (*People v Bradshaw*, 76 AD3d 566, 569 [2d Dept 2010], *affd* 18 NY3d 257 [2011]). Moreover, here, the written waiver form states that the court had advised defendant of the nature of the appellate rights being waived. The record of the proceedings, however, contains no such statements by the court. Under these circumstances, there is an insufficient basis to conclude that defendant's purported waiver was knowing, voluntary and intelligent (*see People v Elmer*, 19 NY3d 501, 510 [2012]).

We note that litigation over the validity of appeal waivers, which arises regularly from many courts, can best be avoided if trial judges separately allocute defendants on the waiver of the right to appeal (*see People v Braithwaite*, 73 AD3d 656, 657 [1st Dept 2010], *lv denied* 15 NY3d 849 [2010]). We again remind the courts that the better practice is to secure a written waiver, along with a thorough colloquy to ensure the defendant's understanding of its contents (*id.*). It would be best if the court made clear that this is a separate and important right being waived, and that by signing the waiver, the plea and sentence are final, and the defendant agrees to accept the

sentence imposed. The court cannot rely solely on defense counsel to explain the significance of the written waiver.

Although we find that defendant's waiver of the right to appeal was invalid, we perceive no basis for reducing the sentence. This is defendant's third felony conviction, and the sentence imposed was well below the sentence defendant would have faced had he been found guilty at trial.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9709 Gladys Igbodudu-Edwards, Index 301935/10
Plaintiff-Appellant,

-against-

Board of Managers of the Parkchester North Condominium, Inc., et al.,
Defendants-Respondents.

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Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Douglas H. Sanders of counsel), for appellant.

McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered May 15, 2012, which, in this personal injury action, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff does not contest defendants' and the motion court's reliance on the storm-in-progress doctrine (*see Pippo v City of New York*, 43 AD3d 303, 304 [1st Dept 2007]). Moreover, plaintiff's expert's affidavit fails to raise any triable issue of fact as to whether the alleged violation of the 1938 and 1968 New York City Building Codes, as to the configuration of the handrails of the stairs, was a proximate cause of plaintiff's accident. First, the expert's own affidavit disavows the applicability of these codes to these exterior stairs, given "the

construction and location of the structure." Nor does the expert cite to any specific section for his proposition that the two handrails, being 109 inches apart, required an intermediate handrail. In any event, even assuming such a violation, given that plaintiff was holding the right-side handrail at the time she fell, it would require pure speculation to assume that had there been an intermediate handrail, she would have been able to grasp it as she fell, avoiding her injury (*see Ridolfi v Williams*, 49 AD3d 295, 296 [1st Dept 2008]; *Bitterman v Grotyohann*, 295 AD2d 383, 384 [2d Dept 2002]). Finally, the expert's conclusion that "[t]here was no handrail or other handhold within arm's reach to assist [plaintiff] in recovering her footing" was properly given no weight, as it is contrary to plaintiff's own testimony that she was holding onto the right handrail when she fell, and it is not supported by any applicable safety standards (*see Cassano v Hagstrom*, 5 NY2d 643, 646 [1959]; *Criscenti v Verizon*, 99 AD3d 478 [1st Dept 2012]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9710-
9711-
9711A In re Elijah J., and Another,

Children Under the Age
of Eighteen Years, etc.,

Yvonda M.,
Respondent-Appellant,

Administration for
Children's Services,
Petitioner-Respondent.

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Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Patricia Colella of counsel), attorney for the children.

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Order of fact-finding, Family Court, Bronx County (Jane Pearl, J.), entered on or about January 18, 2012, which, after a hearing, found that respondent mother had neglected the subject children, unanimously affirmed, without costs. Appeal from orders of disposition, same court and Judge, entered on or about April 9, 2012, unanimously dismissed as abandoned, without costs.

A preponderance of the evidence supports the findings of neglect (*see* Family Ct Act § 1046[b][i]). Family Court properly found that the subject children's physical, mental or emotional condition is in imminent danger of becoming impaired, since the

mother left the children, then ages 4 and 15, with their 21-year-old brother for over a week without sufficient food, shelter, or clothing (*see* Family Ct Act § 1012[f][i][A]; *Matter of Lah De W. [Takisha W.]*, 78 AD3d 523, 523-524 [1st Dept 2010]).

The Family Court also properly found neglect based on the mother's regular misuse of marijuana (*see* Family Ct Act § 1012[f][i][B]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]). The mother's entry into a drug treatment program after the relevant statutory time period is unavailing (*see Matter of Messiah C. [Laverne C.]*, 95 AD3d 449, 450 [1st Dept 2012]). Under the circumstances, petitioner agency was not required to prove actual or imminent impairment to the children (*see Matter of Keoni*, 91 AD3d at 415).

There is no basis to disturb the court's credibility determinations (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9712 Latoya Verdejo, Index 301037/08
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

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Herzfeld & Rubin, New York (Miriam Skolnik of counsel), for appellant.

Lesch & Lesch, P.C., Bronx (David P. Lesch of counsel), for respondent.

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Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered on or about August 6, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that she was injured when she slipped and fell on a wet foliage condition located on defendant's grounds. Defendant made a prima facie showing of entitlement to summary judgment as to this open and obvious condition, which was not inherently dangerous (*see Misir v Beach Haven Apt. No. 1, Inc.*, 32 AD3d 1002 [2d Dept 2006]; *see also McGuire v 3901 Independence Owners, Inc.*, 74 AD2d 434 [1st Dept 2010]). Defendant's meteorologist stated that the wind was sufficient to create the foliage condition and that light rain, two hours earlier,

accounted for the wetness of the leaves. Moreover, the supervisor of grounds at the subject development stated that the grounds crew took reasonable efforts to remove fallen foliage from the development's extensive property, by patrolling the grounds daily. Under the circumstances, defendant established that it met its duty to maintain its property in a reasonably safe condition (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), and that it lacked prior notice of any dangerous condition (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Busterna v Branch Off. Assoc.*, 253 AD2d 837 [2d Dept 1998]).

Plaintiff's opposition fails to raise a triable issue of fact. Plaintiff's theory of liability, raised for the first time in opposition to the motion, that the slippery condition was caused by insufficient drainage for the sprinkler system, is precluded since it was not set forth in the notice of claim (*see Chieffet v New York City Tr. Auth.*, 10 AD3d 526, 527 [1st Dept 2004]). In any event, the opinion of plaintiff's expert that the

drainage was inadequate is speculative and insufficient to defeat the motion (*see generally Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9713 D'Mel & Associates, Index 602486/09
Plaintiff-Respondent-Appellant,

-against-

Athco, Inc., et al.,
Defendants,

Stuart Goldman, et al.,
Defendants-Appellants-Respondents.

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Sullivan & Worcester LLP, New York (Andrew T. Solomon of counsel), for appellants-respondents.

Jeffrey M. Cassuto, New York, for respondent-appellant.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered September 13, 2012, which, insofar as appealed from, denied the motion of defendants-appellants Stuart Goldman and Michael Goldman for summary judgment dismissing the ninth and tenth causes of action, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of the Goldmans, in their individual capacities, dismissing the complaint.

Plaintiff is a creditor of defendants Athco, Inc. (Athco) and Athco Imports, Inc. (Imports). At all relevant times, defendant Stuart Goldman (Stuart) was the 100% shareholder, president, and CEO of Athco. From the time Imports was incorporated until March 26, 2009, defendant Michael Goldman

(Michael) – Stuart's son – was the 100% shareholder of Imports. Stuart was the CEO of Imports.

Plaintiff contends that the following constituted fraudulent conveyances: Athco's transfer of certain orders that it was unable to fill to Imports, for no consideration; and Michael's transfer of his Imports shares to defendant Liberty Apparel, Inc., for no consideration. The ninth cause of action seeks to pierce Athco's corporate veil to impose personal liability on Stuart, and the tenth cause of action seeks to pierce Imports' corporate veil to impose personal liability on Michael.

"In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation *and* abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011] [emphasis added; internal quotation marks omitted]). "Factors to be considered in determining whether the owner has abused the privilege of doing business in the corporate form include whether there was a failure to adhere to corporate formalities, inadequate capitalization, commingling of assets,

and use of corporate funds for personal use" (*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009] [internal quotation marks omitted], *affd* 16 NY3d 775 [2011]). In opposition to the Goldmans' motion for summary judgment, plaintiff failed to proffer any evidence of the above factors. Contrary to plaintiff's claim, the factors mentioned in *East Hampton* remain relevant even in a fraudulent conveyance case (*see Symbax, Inc. v Bingaman*, 219 AD2d 552, 554 [1st Dept 1995]).

It is true that, as a general rule, "a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced" (*Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012] [internal quotation marks omitted]). However, that is not the theory of the ninth and tenth causes of action; they specifically allege that the corporate entities of Athco and Imports should be disregarded. Moreover, as far as appears in the record, plaintiff did not request leave to replead in opposition to the Goldmans' motion. In any event, in the specific context of fraudulent conveyances (as opposed to torts generally), the Goldmans – who were not transferees of either conveyance – cannot be held liable without piercing the corporate veil unless they benefited from the conveyances (*see Federal Deposit Ins. Corp. v Porco*, 75 NY2d 840, 842 [1990]).

There is no evidence in the record that Michael benefited from either conveyance. It is true that Stuart became the CEO of Imports. "However, receipt of a salary from the transferee corporation as an officer of the corporation is not sufficient to render the officer a transferee or beneficiary of the transfer" (*Roselink Invs., L.L.C. v Shenkman*, 386 F Supp 2d 209, 227 [SD NY 2004]). As for the second transfer, there is no evidence in the record that Stuart benefited from the sale of Michael's Imports shares for no consideration.

The tenth cause of action should have been dismissed for the additional reason that Michael's sale of his Imports shares did not constitute a fraudulent conveyance vis-à-vis plaintiff. Debtor and Creditor Law § 273 states, "Every conveyance made . . . by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made . . . without a fair consideration." The tenth cause of action alleges that Michael transferred his Imports shares without fair compensation, but it does not allege that this transfer rendered Michael insolvent. Second, plaintiff is not a creditor of *Michael*, as opposed to *Imports* (*see Martes v USLIFE Corp.*, 927 F Supp 146, 148 [SD NY 1996]). Third, the sale of Michael's Imports *shares* to Liberty did not affect Imports'

assets, i.e., its ability to pay plaintiff's commissions (*see id.*).

Even if, arguendo, the sale of Michael's Imports shares for no consideration constituted a fraudulent conveyance and if Michael benefited therefrom, plaintiff's remedy is not to obtain $140,000 in damages from Michael; rather, it is to set aside the conveyance or attach the shares (*see* Debtor and Creditor Law § 278[1]).

The Goldmans' notice of appeal was limited to their motion and the ninth and tenth causes of action; it did not mention plaintiff's cross motion or the eighth cause of action. Therefore, we cannot consider their argument – which relates to plaintiff's cross motion on the eighth cause of action – that the court erred by finding, as a matter of law, that the transfer from Athco to Imports was made for inadequate consideration and with actual intent to hinder, delay, or defraud creditors (*see Torres v City of New York*, 41 AD3d 312, 313 [1st Dept 2007]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9714 Yimi Desay, an Infant, by her Mother and Legal Guardian, Sara Yard, et al., Plaintiffs-Appellants, Index 350196/09

-against-

COPO Management, LLC, et al., Defendants-Respondents,

Francisco Colon, Defendant.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellants.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for COPO Management, LLC, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for municipal respondents.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered January 25, 2012, which granted the motions of defendants COPO Management LLC (COPO), The City of New York and The New York City Department of Education (collectively City) for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff Yimi Desay was allegedly bitten by a pitbull that entered a public park, owned and operated by the City, through a hole in the fence between the park and the adjacent premises, which is owned by COPO. The dog belonged to a tenant in COPO's

premises.

COPO established its entitlement to judgment as a matter of law by presenting the testimony of its sole member who stated that he had no knowledge of the dog's existence, let alone its vicious propensities, until after it bit Desay (*see Strunk v Zoltanski*, 62 NY2d 572, 575 [1984]; *Smedley v Ellinwood*, 21 AD3d 676 [3d Dept 2005]). Even if COPO could be deemed to have constructive knowledge of the dog's existence by virtue of its regular inspections of the premises, such knowledge is insufficient to impute knowledge of vicious propensities (*see Balla v Jones*, 305 AD2d 1103 [4th Dept 2003]). Moreover, it is undisputed that the bite did not occur on COPO's premises (*see Walker v Gold*, 70 AD3d 1349 [4th Dept 2010], *lv denied* 14 NY3d 712 [2010]).

Plaintiffs argument that COPO was vicariously liable based upon the theory that the dog's owner, COPO's tenant, was COPO's agent, is unavailing, since it was advanced for the first time in opposition to COPO's motion (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]), and is based upon a mischaracterization of the testimony.

Dismissal of the complaint as against the City was also proper. Even assuming that the City knew or should have known that a vicious dog was present at the adjacent premises, it was

not foreseeable that because a hole in the fence existed, a vicious animal would enter the playground through the hole and attack a person on the premises (*see Di Ponzio v Riordan*, 89 NY2d 578, 585 [1997]; *Lee v New York City Hous. Auth.*, 25 AD3d 214, 217 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]). Here, the dog owner's failure to adequately restrain the dog proximately caused Desay's injuries, and was a superceding or intervening occurrence that broke any causal nexus between the hole in the fence and Desay's injuries (*see e.g Campbell v Central N.Y. Regional Transp. Auth.*, 7 NY3d 819, 820-821 [2006]; *Maheshwari v City of New York*, 2 NY3d 288, 295 [2004]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9715-
9716 Juan Vargas, Index 302608/08
83947/10
Plaintiff-Respondent,

-against-

Peter Scalamandre & Sons, Inc., et al.,
Defendants-Respondents-Appellants,

Rad & D'Aprile Construction Corp.,
Defendant-Appellant-Respondent,

Total Safety Consulting, L.L.C.,
Defendant,

AB Green Gansevoort, LLC.,
Defendant-Respondent.

[And a Third Party Action]

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise Cherkis of counsel), for appellant-respondent.

White Quinlan & Staley, Garden City (Joanne Emily Bell of counsel), for Peter Scalamandre & Sons, Inc., respondent-appellant.

Burke, Gordon & Company, White Plains (Ashley E. Sproat of counsel), for Ferrara Bros. Building Materials Corp., respondent-appellant.

McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel), for Interstate Industrial, Inc. and Interstate Industrial Corp., respondents-appellants.

Hoffmaier & Hoffmaier, P.C., New York (Neva Hoffmaier of counsel), for Juan Vargas, respondent.

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for AB Green Gansevoort, LLC, respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 1, 2011, which, to the extent appealed from as limited by the briefs, denied the motion of Rad & D'Aprile Construction Corp. (Rad) for summary judgment dismissing the Labor Law § 241(6) and common law negligence claims against it, unanimously reversed, on the law, without costs, and the motion granted. Order, same court and Justice, entered July 30, 2012, which, to the extent appealed from as limited by the briefs, denied the motions for summary judgment of defendant Peter Scalamandre & Sons, Inc. (Scalamandre), defendants Interstate Industrial Corp. and Interstate Industrial, Inc. (Interstate) and defendant Ferrara Bros. Building Materials Corp. (Ferrara), unanimously modified, on the law, to grant Interstate summary judgment dismissing the complaint and all cross claims against it, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendants Rad and Interstate.

Labor Law § 241(6) does not automatically apply to all subcontractors on a site or in the "chain of command" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011]). Rather, for liability under the statute to attach to a defendant, a plaintiff must show that the defendant exercised

control, either over the plaintiff, the specific work area involved or the work that gave rise to the injury (*see Nascimento*, 86 AD3d 193).

Here, while there is evidence connecting defendant concrete supplier Ferrara and concrete contractor Scalamandre to the particular pile of material over which plaintiff fell, there is insufficient evidence connecting bricklayer Rad and concrete contractor Interstate to that pile. Plaintiff's supervisor testified that the pile that caused plaintiff to fall had been caused earlier that day by a Ferrara truck driver washing out his truck onto the ground after delivering a load of concrete to Scalamandre. This supervisor claims to have alerted Scalamandre's supervisor of the condition, who told him he would get to it when he had a chance. Thus, Ferrara and Scalamandre's motions seeking dismissal of plaintiff's Labor Law § 241(6) claims against them were properly denied, since questions of fact exist as to whether those defendants exercised control over the work that gave rise to the injury, the disposal of excess concrete in the course of their operations.

That defendant Interstate received a delivery from Ferrara to a different area of the site does not connect them to the accident, and the fact that Rad may have left mortar on the ground on past occasions is irrelevant since there is no evidence

in the record that the pile of material over which plaintiff fell was left by Rad. That Rad or Interstate may have contributed to other accumulations of debris is irrelevant as those accumulations were not implicated in plaintiff's accident.

On the same facts, plaintiff's common law claims against Rad and Interstate, and his Labor Law § 200 claim against Interstate are dismissed. However, in that evidence was adduced that Ferrara created the pile (*see Hernandez v Argo Corp.*, 95 AD3d 782 [1st Dept 2012]), that Scalamandre was obligated by contract to clean the concrete wash down area during pour operations (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]), and that Scalamandre was placed on actual notice that its vendor had created the pile, their motions to dismiss plaintiff's common law and Labor Law § 200 claims were properly denied (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9717 The People of the State of New York, Respondent, SCI. 1774/10

-against-

Rhea Pisciotta, also known as Alyssa Vacca, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at plea; Marcy L. Kahn, J. at sentencing), rendered August 5, 2010, convicting defendant of assault in the second and third degrees, and sentencing her, as a second felony offender, to an aggregate term of four years, unanimously affirmed.

Defendant's claim that the court improperly enhanced her bargained-for sentence without sufficient inquiry is unpreserved since defendant neither requested a hearing nor moved to withdraw her plea (*see e.g. People v Malaj*, 69 AD3d 487 [1st Dept 2010], *lv denied* 15 NY3d 776 [2010]), and we decline to review it in the interest of justice. As an alternate holding, we find that the court conducted a sufficient inquiry and properly imposed an enhanced sentence based on reliable information that defendant

violated the terms of her plea agreement (*see People v Jenkins*, 11 NY3d 282 [2008]). There were no disputed factual issues that required a hearing as a matter of due process (*see People v Valencia*, 3 NY3d 714 [2004]; *compare Torres v Berbary*, 340 F3d 63 [2d Cir 2003]). The record also establishes that defendant was sufficiently warned of the meaning and consequences of absconding from her drug program.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9718 In re Paola Mireya Canahuati Bendeck,
Petitioner-Respondent,

—against—

Oscar Ivan Larach Zablah,
Respondent-Appellant.

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Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Einiger, LLP, Lake Success (Samuel J. Ferrara of counsel), for appellant.

Daniel R. Katz, New York, for respondent.

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Order, Family Court, New York County (Jody Adams, J.), entered on or about November 10, 2011, denying respondent's objection to an order of the Support Magistrate, dated May 4, 2011, which denied respondent's motion seeking, inter alia, to vacate prior default orders awarding child support and counsel fees, unanimously affirmed, without costs.

The Family Court correctly upheld the Support Magistrate's denial of the father's motion to vacate his defaults. A party seeking to vacate a default judgment must demonstrate both a reasonable excuse and a meritorious defense (*see* CPLR 5015 [a][1]; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454 [1st Dept 2010], *lv dismissed* 15 NY3d 863 [2010]). Respondent father's reasons for nonappearance were unpersuasive.

His claim that he was unable to obtain a visa for entry into the United States was belied by travel documents establishing that he entered the United States three days prior to the hearing. Although he was not held in default for his failure to make that appearance, the Support Magistrate found that his reason for failing to appear one month later at the adjourned hearing was also not reasonable. While the father asserted that the mail system in Honduras was disrupted by a military coup, the affidavit from a postal administrator in the town in which he lived in Honduras did not support his claim.

Since the father failed to establish a reasonable excuse for his defaults, we need not reach the issue of whether he presented a potentially meritorious defense (*see Caba v Rai*, 63 AD3d 578, 582 [1st Dept 2009]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Abdus-Salaam, Gische, JJ.

9720 In re Steven Kobrick, et al., Index 102267/12
Petitioners-Respondents,

-against-

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

Sherwood 34 Associates,
Intervenor-Respondent-Appellant.

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Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

David Rozenholc & Associates, New York (David Rozenholc of counsel), for Steven Kobrick and Gary Schwedock, respondents.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered August 23, 2012, which, to the extent appealed from, denied intervenor respondent's motion to dismiss the petition for failure to join a necessary party, or to transfer the proceeding to another Justice of the Supreme Court, unanimously affirmed, without costs.

Intervenor respondent is not a necessary party to this CPLR article 78 proceeding, because the proceeding will not determine whether its building is subject to rent regulation or otherwise establish the parties' rights; the best possible result favorable

to petitioners is a remand to respondent Division of Housing and Community Renewal for an administrative hearing, at which intervenor respondent will have the opportunity to appear and be heard (*see Matter of Whitney Museum of Am. Art [New York State Div. of Hous. & Community Renewal]*, 139 AD2d 444, 446-447 [1st Dept 1988], *affd for reasons stated* 73 NY2d 938 [1989]; *see also Matter of Notre Dame Leasing Ltd. Partnership v Division of Hous. & Community Renewal*, 22 AD3d 667, 670 [2d Dept 2005]).

There is no showing in the record that Supreme Court improperly refused to transfer this matter to the Justice who handled a prior related article 78 proceeding.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9721 William Bravo, Index 300141/09
Plaintiff-Appellant,

-against-

Jose Martinez, et al.,
Defendants-Respondents.

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Goldstein & Handwerker LLP, New York (Steven Goldstein of counsel), for appellant.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered March 16, 2012, which granted defendants' motion for summary judgment dismissing plaintiff's complaint alleging a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer a serious injury as a result of the subject accident with evidence that plaintiff had normal range of motion in his neck, back and right shoulder, that he had preexisting injuries to each of those parts resulting from prior motor vehicle accidents in 2000, 2001 and 2006, and that his claimed shoulder injury was degenerative in origin (*see Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of

fact on the issue of causation. Indeed, his expert's report did not mention the back injuries sustained by plaintiff as a result of the 2006 accident, or adequately differentiate between the shoulder condition shown in the MRI taken after the 2000 accident and that shown in the MRI taken after the subject accident (*see Mitrotti*, 91 AD3d at 450; *see also Jimenez v Polanco*, 88 AD3d 604 [1st Dept 2011]).

The court properly dismissed plaintiff's 90/180-day claim because, among other things, his bill of particulars alleged just two months of confinement to home as a result of the subject accident (*see Mitrotti*, 91 AD3d at 450). Moreover, there was insufficient evidence that plaintiff's injuries were caused by the accident (*see Jimenez*, 88 AD3d at 604).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9725 Mt. Hawley Insurance Company, Index 100812/09
Plaintiff-Appellant, 116634/05
591075/08

-against-

Interstate Fire and Casualty Company,
Defendant-Respondent.

- - - - -

Daniel Gutowski,
Plaintiff,

-against-

GDM Hudson Laight Street, LLC, et al.,
Defendants,

48 Laight Street Associates, LLC,
Defendant-Respondent.

- - - - -

48 Laight Street Associates, LLC,
Third-Party Plaintiff-Respondent,

-against-

The Helix Group, Inc.,
Third-Party Defendant-Respondent.

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Goldberg Segalla LLP, Buffalo (Brian R. Biggie of counsel), for appellant, and The Helix Group, Inc., respondent.

Rivkin Radler LLP, Uniondale (Stuart M. Bodoff of counsel), for Interstate Fire and Casualty Company, respondent.

Milber Makris Plousadis & Seiden, Woodbury (Sarah M. Ziolkowski of counsel), for 48 Laight Street Associates, LLC, respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered August 1, 2012, as amended by order entered November 16, 2012, which granted defendant/third party plaintiff 48 Laight

Street's motion for summary judgment on its claim for contractual indemnification against third-party defendant The Helix Group, Inc. and denied third party defendant's motion to dismiss, unanimously dismissed, without costs.

In this declaratory judgment action originating out of an underlying personal injury action in which the plaintiff, an employee of third-party defendant Helix, sought damages as a result of bodily injuries sustained when he fell from the first floor to the basement level of a building undergoing renovations. The complaint in the personal injury action named GDM Hudson Laight Street, LLC, Car-Win Construction, Inc., and 48 Laight Street Associates as defendants. 48 Laight Street had retained Helix to perform work at the site.

48 Laight moved for summary judgment, and Helix, not Mt. Hawley, its general liability insurer, cross-moved for summary judgment in the third-party action for contractual indemnity. Mt. Hawley was not a party to the third-party action. Thus, Mt.

Hawley's appeal must be dismissed because it is not an aggrieved party under CPLR 5511. Mt. Hawley's argument that it is the real party in interest in the contractual indemnity case is unavailing (*see Compton v D'Amore*, 101 AD2d 800, 801 [2d Dept 1984]).

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9726 Index 602244/09

George Karfunkel,
Plaintiff-Appellant-Respondent,

-against-

Philip S. Sassower,
Defendant-Respondent-Appellant.

_____

Kane Kessler, P.C., New York (Jeffrey H. Daichman of counsel), for appellant-respondent.

Pillsbury Winthrop Shaw Pittman LLP, New York (Eric Fishman of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 27, 2012, dismissing the complaint, and bringing up for review an order, same court and Justice, entered September 13, 2012, which granted defendant's motion for summary judgment, unanimously affirmed, with costs.

In this action seeking damages for investment fraud, plaintiff was on notice that the transaction orally agreed to would not be structured as discussed based on e-mails and a draft agreement provided to him. Despite being on notice, plaintiff failed to inquire about the specifics of the transaction or to conduct due diligence. This failure precludes his claim of justifiable reliance on defendant's alleged oral representations as a matter of law (*see Centro Empresarial Cempresa S.A. v*

América Móvil, S.A.S. de C.V., 17 NY3d 269, 279 [2011]; *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195 [1st Dept 2012]). In view of the foregoing, we need not address the contentions regarding proof of scienter or defendant's cross appeal.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9727 In re Minerva Guzman, Index 106140/11
Petitioner-Appellant,

-against-

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

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

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 5, 2012, confirming an arbitration award, dated May 4, 2011, which terminated petitioner's employment as a public school teacher upon a finding that she engaged in a fraudulent scheme to enroll her granddaughter in public school using a false address, and dismissing the proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, unanimously modified, on the law, to vacate the finding of guilt as to Specification 1-A-1 (that petitioner engaged in the scheme to avoid payment of non-resident tuition) and vacate the penalty of termination, and to remand the matter for the imposition of an appropriate penalty, and otherwise affirmed, without costs.

Respondent Department of Education conceded at the hearing

that petitioner's granddaughter was entitled to a tuition-free education in New York City public schools, and the hearing officer made no finding that the child was not a City resident. Nor does the record establish that the child was not a City resident. Thus, there is no rational basis upon which to conclude that petitioner engaged in a scheme with the purpose of defrauding respondent out of non-resident tuition (*see Motor Veh. Mfrs. Assn. of U.S. v State of New York*, 75 NY2d 175, 186 [1990]; *Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567 [1st Dept 2008]).

However, as petitioner concedes, substantial evidence supports the charge that she acted in concert to file a false instrument (Specification 1-B), to wit, engaged in a scheme to use a school aide's address to enroll her granddaughter in the school at which she taught, and that she improperly obtained the school's services (Specification 1-A-2), since the child should

not have been enrolled there.

In light of the foregoing, we remand for the imposition of an appropriate lesser penalty.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9728 The People of the State of New York, Respondent, Ind. 1052/08

-against-

Christopher DeJesus, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered January 26, 2010, as amended March 22, 2010, convicting defendant, upon his plea of guilty, of assault in the first and second degrees and criminal possession of a weapon in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of four years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. In a thorough colloquy, the court carefully separated the right to appeal from the rights automatically given up by a guilty plea (*see People v Lopez*, 6 NY3d 248, 257 [2006]).

Regardless of whether defendant made a valid waiver of his right to appeal, and regardless of whether the waiver applied to post-plea sentencing enhancement issues, defendant's claim that

the court improperly enhanced his bargained-for sentence without sufficient inquiry into the validity of his post-plea arrests is unpreserved since defendant neither requested a hearing nor moved to withdraw his plea (*see e.g. People v Malaj*, 69 AD3d 487 [1st Dept 2010], *lv denied* 15 NY3d 776 [2010]; *People v Carrillo*, 2 AD3d 260 [1st Dept 2003], *lv denied* 2 NY3d 797 [2004]), and we decline to review it in the interest of justice. As an alternate holding, we find that the court conducted a sufficient inquiry and properly imposed an enhanced sentence (*see People v Outley*, 80 NY2d 702, 713-714 [1993]). Since defendant did not challenge the validity of his post-plea arrests or deny his involvement in the underlying crimes, the court was under no obligation to conduct an inquiry into the validity of these arrests (*see e.g. People v Pinkston*, 287 AD2d 294 [1st Dept 2001], *lv denied* 97 NY2d 707 [2002]). There were no disputed factual issues that required a hearing as a matter of due process (*see People v Valencia*, 3 NY3d 714 [2004]; *compare Torres v Berbary*, 340 F3d 63 [2d Cir 2003]).

Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9729N Suffolk P.E.T. Management, LLC, et al., Plaintiffs-Respondents, Index 113141/08

-against-

Azad K. Anand, M.D., et al., Defendants-Appellants.

_____

Weber Law Group LLP, Melville (Garrett L. Gray of counsel), for appellants.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondents.

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Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 16, 2012, which granted plaintiff's motion to confirm the report of the Special Referee recommending that defendants' answer be stricken for noncompliance with discovery orders and directives and that a default judgment be entered against defendants on liability, and referred the matter to a special referee to hear and report on the issue of damages, unanimously affirmed, without costs.

The motion was properly granted inasmuch as the record supports the findings that defendants engaged in willful and contumacious conduct by their failure to comply with the court's discovery orders and directives (*see* CPLR 3126[3]; *Jones v Green*, 34 AD3d 260 [1st Dept 2006]; *Hot & Tasty Corp. v IOB Realty*, 270

AD2d 67 [1st Dept 2000]). There exists no basis to disturb the credibility determinations made by the Special Referee (*see Matter of Continental Cas. Co. v Lecei*, 65 AD3d 931 [1st Dept 2009]).

Here, while defendants produced much documentation during discovery, a forensic study of defendants' computer hard drives revealed evidence that conflicted with defendants' assertions that all relevant documents, including electronic information, had been produced. Many of the records that plaintiffs sought and were not provided with were material to plaintiffs' case, and were required to be maintained by defendants, as per the parties' contract. The evidence further shows that defendants, over a two-year period, failed to conduct timely searches for requested documents, failed to preserve material documents despite an awareness of the action and otherwise affirmatively interfered with plaintiffs' efforts to collect discoverable material.

Moreover, defendants were alerted to the potential consequences of incomplete disclosure during the several hearings conducted by the court on the discovery issues.

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

ENTERED: APRIL 4, 2013

CLERK

Tom, J.P., Andrias, Saxe, Abdus-Salaam, Gische, JJ.

9730 Ind. 168/12
[M-857 &
M-1345] In re Waheem Allah,
Petitioner,

-against-

Hon. Michael R. Sonberg, etc., et al.,
Respondents.

_____

Waheem Allah, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Garrett Coyle of counsel), for Hon. Michael R. Sonberg, respondent.

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

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

And a cross motion having been made on behalf of respondent Hon. Michael R. Sonberg to dismiss the petition,

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

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

ENTERED: APRIL 4, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Gische, JJ.

9270 The People of the State of New York, Ind. 6129/05
Respondent,

-against-

Terrell Davis,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Maxwell Wiley, J. at plea and sentencing), rendered June 17, 2009, affirmed.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
Dianne T. Renwick
Helen E. Freedman
Judith J. Gische, JJ.

9270
Ind. 6129/05

_____x

The People of the State of New York,
Respondent,

-against-

Terrell Davis,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Maxwell Wiley, J. at plea and sentencing), rendered June 17, 2009, convicting him of manslaughter in the first degree and criminal possession of a weapon in the third degree, and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sylvia Wertheimer and Eleanor J. Ostrow of counsel), for respondent.

RENWICK, J.

Prior to pleading guilty, defendant moved to suppress a gun, recovered from his pocket, and videotaped statements he made to the prosecution as fruits of an unlawful seizure. He also moved to suppress the statements as obtained in violation of his *Miranda* rights. We conclude that the facts disclosed in the record were such as to warrant a person of reasonable caution to believe that defendant was reaching for a weapon when the arresting officer grabbed his arm. We also find that defendant's videotaped statements were not suppressible, notwithstanding the suppression of prior written statements made more than seven hours earlier to police officers, because the videotaped statements were attenuated by a "definite, pronounced break in the interrogation" (*People v Chapple*, 38 NY2d 112, 115 [1975]).

Procedural and Factual Background

The facts developed at the suppression hearing were based upon the testimony of one of the arresting officers, Officer John Facchini, and the testimony of one of the interrogating officers, Detective Conrad Crump. Defendant did not testify or present any other evidence at the suppression hearing.

According to Officer Facchini, on November 27, 2005, at approximately 12:05 a.m., he and his partner were on patrol in the lobby of the Rangel Houses, a public housing project.

Facchini heard two gunshots, about four seconds apart, from the direction of another public housing building, the Polo Grounds, which is located about 80-to-100 yards away from the Rangel Houses. About 60 seconds after hearing the shots, Facchini saw "[t]wo males [later identified as defendant and Jeffrey Graves] with hoods and . . . their hands in their pockets" going from the entrance of the Polo Grounds toward the Rangel Houses. Reportedly, defendant and Graves were walking "fast" and "with a purpose," not "calmly."

The officers approached defendant and Graves. No one else was in the area. Facchini spoke with defendant while his partner spoke with Graves. After Facchini identified himself as a police officer, he asked defendant how he was doing. Defendant said, "Good." Facchini asked if he and Graves were "coming from the Polo Grounds"; defendant stated that they were. Facchini asked, "Did you hear the two gunshots?" Defendant answered, "Yes, that's why we are leaving." Facchini asked defendant if they had seen anybody, and defendant stated that they had not. Facchini asked defendant if he "had any ID on him," and defendant said, "Yes." Immediately after asking that question, officer Facchini also asked defendant if he had "any weapons or anything like that on [him,]" and defendant responded, "No."

When Facchini saw that defendant began to place his hand in

his back pocket, Facchini reacted by grabbing defendant's arm. Officer Facchini explained that, given that he had recently heard gunshots in the area, he wanted to frisk defendant before allowing him to reach in his pockets. Facchini attempted to pat down defendant's waistband to check for weapons, but before he could do so, defendant used both of his hands to push Facchini away. Facchini then grabbed defendant somewhere on his upper body. Defendant struggled to escape and ran into a fence located about four feet behind them. This caused Facchini to strike the fence too. They fell to the ground, with defendant lying on his stomach and Facchini on top of defendant's back. At that point, Facchini saw the handle of a firearm sticking out of defendant's back pocket. Facchini pulled the gun out of defendant's pocket and placed him in handcuffs. Facchini unloaded the gun, which felt warm, and discovered it had three cartridges and two empty shell casings. Meanwhile, Facchini's partner arrested Graves. Soon thereafter, Facchini learned that a dead body with gunshot wounds had been found near the Polo Grounds.

At approximately 12:45 a.m., Facchini and his partner transported defendant and Graves to the police station. Defendant was placed in Room 219 for interrogation.

Detective Crump, the "lead investigating officer," was the only witness who testified about the interrogation. Crump

testified that during the interview, he provided defendant with cigarettes and never threatened or made any promises to him. Crump asked defendant what happened between him and the shooting victim, and why he had the gun. Defendant initially denied knowing anything about the shooting. Instead, he explained that he had found the gun somewhere, picked it up, put it in his pocket, and planned to give it to the police. Crump repeatedly asked defendant if he was "sure" that he did not shoot someone with the gun, and defendant responded that he did not.

Detective Crump did not believe defendant's account, and temporarily left the room. When he returned, he told defendant that the shooting might have been "an accident," adding that Crump had been informed by defendant's uncle that defendant and the victim were "friends." (They were actually cousins.) Defendant then admitted that he had been "playing with the gun" when it suddenly fired and shot the victim in the head. Crump then asked defendant to write a statement.

At the suppression hearing, Crump initially testified that he read defendant his *Miranda* rights "[b]efore [he] spoke with the defendant," which was "approximately about . . . 2:00 [a.m.]" However, he later testified that he read the *Miranda* rights from a sheet which was signed by defendant with the time marked "3:45 [a.m.]" When the court asked Crump about this discrepancy, he

responded that 3:45 a.m. was "the time I actually started speaking to him about interviewing him and I Mirandized him first before I started speaking to him and g[o]t a statement from him."

Defendant wrote a statement in which he crossed out some words, and then wrote another statement, which was substantially identical to, but neater than, the first. On both statements, Crump wrote the approximate time as 3:50 a.m. According to the second written statement, on the night of the shooting, defendant and his cousin, Dickey, had been drinking alcohol, smoking marijuana, and having "mad fun" with "a couple of ladies." Graves was also present. Defendant was "drunk and high." The group headed for a friend's apartment, planning to have an "orgy." They stopped at two stores to buy liquor and juice. Then, Dickey asked defendant if he would like to "bust some shots in the air." Defendant agreed, and followed Dickey's instructions to pull a gun from the purse of one of their friends. Defendant started "playing" with the gun, but did not know how to use it. One of the women shouted, "Stop playing!" As defendant was attempting to fire a shot into the air, "the gun went off twice by accident." At first Dickey appeared to be ducking, but then he fell to the ground. Realizing that he had shot Dickey, defendant started "walking fast" away from the area, accompanied by Graves. Two police officers approached, "grabbed"

them, retrieved the gun, told them to get on the floor, and arrested them. Defendant added that he loved Dickey and did not mean to shoot him.

Crump further testified that Detectives Stewart and Imbornoni also spoke with defendant, sometime after Crump had read defendant his *Miranda* rights. Crump did not know when Stewart or Imbornoni arrived at the station, when they spoke with defendant, or the length or content of those conversations, other than that they were about the shooting. Crump added, "We was [*sic*] in the room till approximately 5:45 [a.m.]"

Seven hours later, defendant agreed to provide a videotaped statement to the prosecutor, which began shortly after 1:00 p.m. Assistant District Attorney (ADA) O'Connell began by introducing herself and another ADA in the room. The ADA also mentioned that defendant already knew Crump and Stewart, who were seated near defendant in the small room. Prior to any interrogation, the ADA verbally administered the *Miranda* warnings. When asked if he was willing to answer questions, defendant responded, "Yes, I don't have any problem," and acknowledged that he had previously signed a written waiver of his *Miranda* rights. Before the interrogation began, defendant asked the ADAs for their business cards, which they handed to him.

Defendant began to describe the incident on videotape,

beginning at 1:05 p.m. in response to the ADA's questions. The videotaped statement was more detailed than, but generally consistent with, his handwritten statement. At various points in the video, defendant reenacted the moment when he shot Dickey, as Crump stood up from his chair and played the role of Dickey, demonstrating his distance of four-to-five feet from defendant at the time as well as how he turned around and fell when he was shot. After the ADA told defendant that this account was inconsistent with a medical examiner's report on Dickey, defendant again reenacted the moment, but indicated that the barrel of his gun was only about eight inches away from Dickey's head. Then, the ADA told defendant, "So, now, earlier, when you were talking to the detectives, that isn't what you told them. You told the female detective, [Imbornoni] . . . that you were probably . . . three yards away from [Dickey] when this happened." Defendant, gesturing toward Crump, responded that he had told Kim Imbornoni the same thing he had told Crump. The ADA then asked, "Well, what about when Detective Stewart was talking to you? That's Detective Stewart right there." Defendant admitted that Stewart told him that his story didn't "match," but added, "[T]hat's what happened."

The ADA then asked defendant why his reenactments during the videotaped interrogation were inconsistent with each other.

Defendant responded, "Because everything happened so fast." About 10 minutes later, defendant stated, "I intentionally pulled the trigger. I didn't intentionally . . . hit him."

About 45 minutes into the video, Officer Stewart repeated defendant's earlier answer (during the videotaped interrogation) that the reason he fled the area after shooting Dickey was that he had the gun on his person. Defendant nodded affirmatively. Officer Stewart then asked, "Do you remember telling me earlier [referring to the prior interrogation] when I spoke to you, that you had ample time to get rid of the gun before the police arrrived." Defendant interjected, "Yes, if I had intentionally wanted to shoot him, I had ample time to get rid of the gun. I could have run the other way." Stewart asked, why he did not do just that, and defendant stated that he was stopped by the police before he could do so. Stewart asked only one other question later in the interrogation.

Almost an hour into the video, the ADA showed defendant his two handwritten statements. She asked him how long it took him to write each one, and defendant said that he wrote both of them within about five to ten minutes. Defendant admitted that he initially did not want to be videotaped, but then decided to put "everything" on the record, since he was "trying to cooperate." Defendant also stated: "I know I'm going to do jail time because

what I did was wrong. I'm wrong. They just told me to talk to you, so that's what I'm doing."

The court denied the motion to suppress the gun. The court found that the arresting officer properly exercised the common-law right to stop and question defendant. The court further found that the officer's action of grabbing defendant's arm as he was reaching for his back pocket was a reasonable precautionary measure to protect the officers' safety. The court also found that once the officer discovered the gun as a result of seeing its handle sticking out of defendant's pocket following their tussle, the officer had probable cause to seize the gun and arrest defendant.

The court granted the motion to suppress defendant's written statements as tainted by the immediately preceding interrogation without *Miranda* warnings. Preliminarily, the court found "incomprehensible" Crump's claim that he gave defendant *Miranda* warnings at 2:00 a.m., but did not start interrogating him until 3:45 p.m. as indicated in the sheet defendant signed waiving his *Miranda* rights. Thus, the Court resolved the inconsistency by finding that "defendant did not waive his *Miranda* rights until 3:45 a.m.," which was more than two hours after the interrogation started, and immediately before defendant wrote the confession. The court found that "there was no break between the oral

statement that [defendant] gave in response to Crump's questions and the written statement that he began at 3:50 [a.m.]." The court also noted that after the *Miranda* warnings were administered, defendant remained in the same room and continued to be interrogated by Crump, who had also been the primary interrogator before the warnings were given.

The court, however, denied the motion to suppress the videotaped interrogation, finding that it was attenuated from the prior *Miranda* violations. The court noted that this interrogation was led by the ADA who administered new *Miranda* warnings at the outset; further, the ADA did not refer to defendant's written statement until the very end of her questioning. The court also noted that while two officers, who had previously interrogated defendant, were present, their participation was infrequent and resulted in merely tangential statements. Finally, the court noted that one of the officers merely "made two or three isolated references to discussions between" defendant and the interrogating detectives.

Plea and Sentence

After the adverse suppression rulings, defendant pleaded guilty to manslaughter in the first degree and criminal possession of a weapon in the third degree, in full satisfaction of the indictment. In accordance with the plea agreement, he was

sentenced, as a second violent felony offender, to an aggregate term of 32 years, to run concurrently with a sentence imposed on his conviction in a different case. This appeal ensued.

Discussion

Defendant contends that Supreme Court erred when it refused to suppress the gun and the videotaped statement. We find that the court properly denied defendant's motion to suppress the firearm recovered from his person as the fruit of an illegal seizure. At the inception, the arresting officer had a founded suspicion of criminality when, immediately after he heard gunshots, he saw defendant and another man walking quickly away from the area from which the shots emanated. This was a deserted area and no one else was present. Thus, the officer properly exercised the common-law right to inquire (*see People v De Bour*, 40 NY2d 210, 223 [1976]; *People v Forelli*, 58 AD2d 76 [2d Dept 1977]), including the right to ask about the presence of any weapons (*see People v Ward*, 22 AD3d 368 [1st Dept 2005], *lv denied* 6 NY3d 782 [2006]).

Moreover, when defendant reached for his back pocket, the officer was justified in grabbing defendant's arm as a minimal self-protective measure (*see e.g. People v Wyatt*, 14 AD3d 441 [1st Dept 2005], *lv denied* 4 NY3d 837 [2005]; *People v Campbell*, 293 AD2d 396 [1st Dept 2002], *lv denied* 98 NY2d 695 [2002];

People v Ortiz, 186 AD2d 505 [1st Dept 1992], *lv denied* 81 NY2d 845 [1993]). It was objectively reasonable, under all the circumstances, for the officer to be concerned that defendant might be reaching for a weapon rather than producing identification. Defendant then pushed the officer, leading to a struggle in which defendant fell to the ground. This revealed the handle of a weapon, at which point the officer had probable cause to lawfully seize and arrest defendant.

We also find unpersuasive defendant's argument that the court erred in denying his request to suppress the videotaped statement as not sufficiently attenuated from the initial unlawful questioning. When, "as part of a continuous chain of events," a defendant is subjected to custodial interrogation without *Miranda* warnings, any statements made in response, as well as any additional statements made after the warnings are administered and questioning resumes, must be suppressed (*People v Bethea*, 67 NY2d 364, 366, 368 [1986] [internal quotation marks omitted]; *see People v Chapple,* 38 NY2d at 114-115). If, however, "there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning," his statements in answer to renewed questioning after he has received the warnings and waived his constitutional

rights may be admitted (*Chapple* at 115).

In *People v Paulman* (5 NY3d 122 [2005]), the Court of Appeals delineated the various factors to be considered in determining whether there is a sufficiently "'definite, pronounced break in the interrogation'" to remove the taint from a prior *Miranda* violation (*id.* at 131 quoting *Chapple*, 38 NY2d at 115). Those factors include: "the time differential between the *Miranda* violation and the subsequent admission; whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police" (*Paulman* at 130-131). While "[n]o one factor is determinative and each case must be viewed on its unique facts" (*id.* at 131), the Court of Appeals has stated that the purpose of the inquiry is to assess whether "there was a sufficiently 'definite, pronounced break in the interrogation' to dissipate the taint from the *Miranda* violation" (*id.*, quoting *People v Chapple*, 38 NY2d at 115).

Such a definite, pronounced break in the interrogation occurred in this case (*see e.g. People v Bastidas*, 67 NY2d 1006, 1007 [1986]; *People v Rodriguez*, 49 AD3d 431, 433 [1st Dept

2008], *lv denied* 10 NY3d 964 [2008]; *People v Vientos*, 164 AD2d 122, 127 [1st Dept 1990], *affd* 79 NY2d 771 [1992]; *People v Kern*, 149 AD2d 187 [2nd Dept 1989], *affd* 75 NY2d 638 [1990]). Preliminarily, it should be noted that the failure to provide *Miranda* warnings was the only reason to suppress the post-*Miranda* written statements. There is no claim by defendant nor a factual finding by the court that the detectives had engaged in any coercive tactics before or after the administration of the initial *Miranda* warnings.

Moreover, a significant amount of time passed between the *Miranda* violation and the videotaped statement. The court found that the pre-*Miranda* two-hour questioning by Detective Crump ended at or about 3:45 a.m. on November 7, 2005. At that point, Detective Crump advised defendant of his *Miranda* rights and defendant waived them. Defendant then made written statements consistent with his pre-*Miranda* oral statements. The court found that such written statements, followed by some sporadic questioning ending at 5:45 a.m., were not sufficiently attenuated by the *Miranda* warnings. The ADA did not began to interview defendant until 1:00 p.m. Therefore, by the time defendant spoke to the ADA, at least seven hours had elapsed since the police questioning had ended at 5:45 a.m.

We agree with the court that this seven-hour intervening

break and the re-administration of *Miranda* warnings attenuated any taint of the suppressed statements, returning defendant to "status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d at 115; *see also People v Malaussena*, 10 NY3d 904, 905 [2008]; *People v Santos*, 3 AD3d 317 [1st Dept 2004], *lv denied* 2 NY3d 746 [2004]; *People v Rodriguez*, 49 AD3d at 433; *People v Nova*, 198 AD2d 193, 195 [1st Dept 1993], *lv denied* 83 NY2d 808 [1994]; *People v Vientos*, 164 AD2d at 127 [1st Dept 1990]).

Contrary to defendant's allegations, the record supports the court's factual findings that the videotaped statement was preceded by a seven-hour break in questioning. As indicated, Detective Crump testified that defendant completed his written statement at or about 3:50 a.m. Crump also testified that two other detectives spoke with defendant, some time after Crump had read defendant his *Miranda* rights. Although Crump vaguely stated that "[w]e was [*sic*] in the [interrogation] room till approximately 5:45 [a.m.]," the court reasonably inferred that he meant *all* interrogators left the room at that point, and that an interrogation did not resume until the videotape started. There is no basis for disturbing this credibility determination, which is supported by the record (*see People v Prochilo*, 41 NY2d 759, 761 [1977]).

Furthermore, while all interviews took place in the same location (interrogation room), the prolonged break and re-administration of *Miranda* warnings clearly signaled a change in the nature of the interrogation (*see People v Morales*, 279 AD2d 362 [1st Dept 2001], *lv denied* 76 NY2d 803 [2001]; *People v Hotchkiss*, 260 AD2d 241, 242 [1st Dept 1999], *lv denied* 93 NY2d 1003 [1999]; *People v Dunkley*, 200 AD2d 499 [1st Dept 1994], *lv denied* 83 NY2d 871 [1994]; *People v Nova*, 198 AD2d at 195). In fact, defendant's demeanor at the inception of the interview reflected his willingness to participate in the ADA interview. At the outset, defendant asked for the prosecutors' business cards. In addition, in response to the prosecutor's inquiry, defendant stated that everyone had treated him well at the precinct and that there had been "no problem." The ADA read him his *Miranda* rights - including his right to remain silent - and defendant waived them. Defendant acknowledged that the police previously had read him his *Miranda* rights, and he waived those rights. When the ADA asked him whether he was willing to answer questions, defendant responded, "Yes, I do not have any problem." That calm demeanor and willingness to talk after the prolonged break and re-administration of *Miranda* warnings show that the decision to provide information did not flow from the initial impropriety (*see People v Rodriguez*, 55 AD3d 351, 352 [1st Dept

2011], *lv denied* 12 NY3d 762 [2009] [fact that the defendant "had demonstrated an unqualified desire to speak to the detective" militated in favor of a finding of attenuation]; *cf. People v Paulman*, 5 NY3d at 131 [Court found significant that, "from the moment defendant encountered the police," he had "exhibited a willingness" to speak to them]).

Nor are we persuaded that there was no break in defendant's custodial circumstances because the police officers who conducted the improper interrogation where present and participated in the videotaped investigation. On the contrary, the court's determination that the police officer's involvement in the videotaped interrogation was "minimal" is supported by the record. In fact, Detective Crump, who had been the lead investigator, did not ask even a single question during the videotaped interview. For his part, Detective Stewart said nothing until after 45 minutes had elapsed, when he merely posed some discrete questions near the end of the session.[1] Under the circumstances, the police officers' presence and minimal involvement during the prosecutor's independent interrogation does not give rise to a single continuous interrogation (*cf. People v Fernandez*, 68 AD3d 469 [1st Dept 2009], *lv denied* 14

[1] The videotaped interrogation lasted approximately an hour.

NY3d 800 [2010] [failure to provide the defendant with *Miranda* warnings before his initial statements did not preclude admission of the defendant's subsequent statements, despite continued presence of one detective, where there was lengthy passage of time between statements, location and interrogators were changed, and detective was not involved in questioning]).

Likewise, while defendant points out that, during the videotaped interview, the ADA used the suppressed statements, the ADA mentioned the statements only in passing and otherwise did not refer to them. In response, defendant merely acknowledged that he wrote the statements and signed one of them. Only then - after defendant essentially completed giving the ADA his version of what transpired - did the prosecutor show defendant the statements. Under the circumstances, it cannot be said that defendant was confronted with improperly elicited statements in order to elicit the videotaped statements.

In sum, we find no error in the court's refusal to suppress defendant's videotaped statement to the ADA, notwithstanding the suppression of prior statements to the investigating officers more than seven hours earlier. There was a "definite, pronounced break in the interrogation" (*People v Chapple*, 38 NY2d at 115; *see also People v Torres*, 143 AD2d 582, 586 [1st Dept. 1989], *lv denied* 73 NY2d 897 [1989]), which was occasioned by a sufficient

lapse of time and the re-administration of *Miranda* warnings; and the interrogation was done almost exclusively by the prosecutor, rather than the investigating officers, so that the videotaped statement was not tainted by the shortcomings that led to suppression of the first statements. Nor is there a basis for concluding that the earlier statement in any way "locked-in" defendant with respect to the contents of the second statements.

Accordingly, the judgment of the Supreme Court, New York County (Ruth Pickholz, J. at suppression hearing; Maxwell Wiley, J. at plea and sentencing), rendered June 17, 2009, convicting defendant of manslaughter in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 32 years, should be affirmed.

All concur.

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

ENTERED: APRIL 4, 2013

CLERK