SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 21, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

9236N Benedetto Giambrone, et al., Index 307139/09
Plaintiffs-Respondents,

-against-

Kings Harbor Multicare Center, etc.,
Defendant-Appellant,

Westchester Square Hospital, et al.,
Defendants.

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Landman Corsi Ballaine & Ford P.C., New York (Gerald T. Ford of counsel), for appellant.

Law Office of William A. Gallina, PLLC, Bronx (Frank V. Kelly of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered October 7, 2011, which granted plaintiff's motion to amend the complaint against defendant Kings Harbor Multicare Center (Kings Harbor) to name his wife as an additional plaintiff and to assert a derivative cause of action on her behalf for loss of consortium and spousal services, unanimously affirmed, without costs.

The question presented is whether a derivative claim for loss of services relates back to a spouse's medical malpractice

complaint for purposes of the Statute of Limitations pursuant to CPLR 203(f). We hold that it does.

Plaintiff Benedetto Giambrone was a patient at defendant Westchester Square Hospital (Westchester Square) during which time he underwent surgery and is alleged to have developed a sacral wound. He was discharged to defendant Kings Harbor, where he underwent rehabilitation. In August 2009, plaintiff commenced a medical malpractice action against Kings Harbor alleging that they failed to properly treat his wound, which had progressed to a stage IV decubitus ulcer by the time of his discharge from Kings Harbor. Plaintiff's spouse, Girolama, was not named in the complaint and no claim was asserted on her behalf.

In December 2010, Mr. Giambrone commenced a separate medical malpractice action against Westchester Square (which action was later consolidated with the action against Kings Harbor), in which Mrs. Giambrone was a named plaintiff and a derivative claim was asserted on her behalf. Kings Harbor subsequently filed a third-party complaint against Westchester Square for contribution and indemnification. Approximately seven weeks after the statute of limitations had expired in the Kings Harbor action, Mr. Giambrone moved pursuant to CPLR 3025 (b) for leave to amend the complaint against Kings Harbor to assert a derivative cause of action on behalf of his wife, and the motion was granted.

The motion court properly exercised its discretion in granting leave to amend. The original complaint placed Kings Harbor on notice of the underlying transaction (*see* CPLR 203 [f]; *De'Leone v City of New York* (45 AD3d 254, 255 [1st Dept 2007]). We are in accord with the Third Department's view that "[i]n the absence of any prejudice and under these circumstances, Supreme Court should be permitted to exercise that same discretion which would allow the addition of a *plaintiff's* derivative cause of action" (*Anderson v Carney*, 161 AD2d 1002, 1003 [1990]). We disagree with the cases holding that a spouse's derivative claim cannot be added to a complaint through the relation back provision of CPLR 203 (f) (*see e.g. Dowdall v General Motors Corp.*, 34 AD3d 1221, 1222 [4th Dept 2006]; *Lucido v Vitolo*, 251 AD2d 383, 384 [2d Dept 1998]).

As the Court of Appeals held in *Matter of Greater N.Y. Health Care Facilities Assn. v DeBuono* (91 NY2d 716 [1998]), a case involving an analogous issue regarding whether the claims of proposed intervenors could be properly related back to the filing of a CPLR article 78 petition:

> "We conclude that a party may be permitted to intervene and relate its claim back if the proposed intervenor's claim and that of the original petitioner are based on the same transaction or occurrence. Also, the proposed intervenor and the original petitioner must be so closely related that the original

> petitioner's claim would have given the respondent notice of the proposed intervenor's specific claim so that the imposition of the additional claim would not prejudice the respondent. Thus, a stranger could not intervene in a pending proceeding to interpose an otherwise time-barred claim." (91 NY2d at 721)

While these criteria were not met by the proposed intervenors in *DeBuono*, they are met in this case. Mrs. Giambrone's claim is based on the same alleged malpractice that is the basis for her husband's claim. The plaintiffs are so closely related that Mr. Giambrone's claim would have given Kings Harbor notice of the proposed specific claim. And, notably, Kings Harbor was aware that Mr. Giambrone had a spouse, as she had brought a derivative claim in the related lawsuit against Westchester Square, had participated in the mediations with Kings Harbor, and Mr. Giambrone had testified at his deposition that he was married.

Courts holding that derivative claims cannot relate back to the original complaint have reasoned that the original pleading fails to give defendant notice of the *claim* (*see e.g. Lucido v Vitolo* at 384; *Dowdall v General Motors Corp.* at 1222). However, in our view, the salient inquiry is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives "notice of the transactions, occurrences

. . . to be proved pursuant to the amended pleading."

In denying the motion to amend on the basis that the original pleading did not give notice of the claim, these courts have disregarded the purpose of the relation back doctrine, which "enables a plaintiff to correct a pleading error - by adding either a new claim or a new party - after the statutory limitations period has expired" (*Buran v Coupal*, 87 NY2d 173, 177 [1995] [trial court acted within its discretion to permit relation back of original complaint against spouse to newly added defendant]; *compare Fazio Masonry, Inc. v Barry, Bette & Led Duke, Inc.*, 23 AD3d 748, 750 [3d Dept 2005] [relation back not permitted where new plaintiff's claims were independent of original claims, in distinction from a derivative action of a spouse, where "defendants in those cases knew, or reasonably could have known, that a derivative claim could arise from the original plaintiff['s] personal injury action[]"]).

Defendant's exposure to greater liability does not require denial of the motion to amend (*see e.g. De'Leone,* 45 AD3d 254 [amendment of complaint to include derivative claim for future medical expenses permitted]; *see also Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981] [regarding prejudice, "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking

some measure in support of his position"). Here, defendant, "from the outset of [its] involvement in the litigation, [had] sufficient knowledge to motivate the type of litigation preparation and planning needed to defend against the entirety of the particular plaintiff's situation" (Vincent C. Alexander, 2006 Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C203:11, 2013 Pocket Part at 69).

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

ENTERED: MARCH 21, 2013

CLERK

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

9273-
9274 Carlos Pacheco,
Plaintiff-Respondent,

-against-

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

P.O. Lopez, etc., et al.,
Defendants.

Index 16368/07

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for appellants.

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

Judgment, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered April 8, 2011, upon a jury verdict, awarding plaintiff the principal amount of $2,042,499, unanimously reversed, on the law, without costs, and the complaint dismissed. Appeal from order, same court and Justice, entered June 11, 2012, which denied defendants-appellants' motion to set aside the verdict, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. The Clerk is directed to enter judgment dismissing the complaint.

In this action, plaintiff sought damages for injuries he allegedly suffered when a police sergeant used a Taser "stun gun" to subdue him so that he could be transported by ambulance to a

hospital. Plaintiff claims, inter alia, that the use of the Taser constituted an assault and amounted to excessive force in violation of his rights under 42 USC § 1983.

The evidence adduced at trial disclosed that, in response to an emergency 911 call from plaintiff's girlfriend that he had suffered one or more seizures, two police officers, two emergency medical technicians, two paramedics, and several fire fighters arrived at plaintiff's apartment to aid him. After the EMTs examined plaintiff and informed him that he needed to be hospitalized, he became uncooperative. His girlfriend testified that this was the result of another seizure. The police officers testified and other evidence indicates that plaintiff refused to go to the hospital, became extremely violent and agitated, and attacked the personnel trying to help him. The officers further testified that, while kicking out at them, plaintiff broke a dresser in the room.

Thereafter, six or seven responders were needed to restrain plaintiff, handcuff him behind his back, and strap him across his lap and chest into an EMT transport chair. The officers testified that while strapped in the chair, plaintiff still kicked out at them, tried to stand, and bit one officer's arm and broke his skin. After the officers called for additional assistance, a police sergeant arrived who, after unsuccessfully

trying to calm plaintiff down with words, subdued him with a Taser. Thereafter, EMTs were able to transport plaintiff from his upstairs apartment into an ambulance on the street.

To prevail on an excessive force claim, a plaintiff must show that law enforcement personnel exceeded the standard of objective reasonableness under the Fourth Amendment (*Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007], *lv denied* 8 NY3d 814 [2007]; *see also Graham v Connor*, 490 US 386, 396-397 [1989]). In determining whether the use of force was reasonable, the trier of fact must allow for police officers' frequent need to make "split-second" judgments about how much force is necessary "in circumstances that are tense, uncertain, and rapidly evolving" (*Graham*, 490 US at 396-397). Other important considerations include whether the suspect actively resisted arrest and posed an immediate threat to the officers' safety (*Vizzari v Hernandez*, 1 AD3d 431, 432 [2d Dept 2003], citing *Graham*, 490 US at 396).

"Viewing the evidence in the light most favorable to plaintiff and according [him] the benefit of every reasonable inference . . . we find that it was insufficient as a matter of law to permit the jury to find that the officers used excessive force" (*Koeiman*, 36 AD3d at 453). Here, given plaintiff's repeated outbursts and the police officers' testimony that he was

emotionally disturbed, it was reasonable to taser him so that he could be hospitalized. Since the Patrol Guide of the New York City Police Department permits an officer to use a Taser to restrain an emotionally disturbed person who threatens injury to himself or others (Procedure No. 216-05 at 5), the officer's action comported with acceptable police practice. Plaintiff's expert witness, a retired police officer who testified to the contrary, did not furnish any basis for his conclusion that the officers departed from established protocol. Accordingly, we reverse the judgment and dismiss the complaint.

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

ENTERED: MARCH 21, 2013

CLERK

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

9337 Brian Cokeng, et al., Index 101756/09
Plaintiffs-Respondents,

-against-

Ogden Cap Properties, LLC, et al.,
Defendants-Appellants.

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

Edward T. Chase, Mount Vernon, for respondents.

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Order, Supreme Court, New York County (Jeffrey Oing, J.), entered April 24, 2012, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the complaint for lack of causation, or, alternatively, for an order scheduling a *Frye* hearing to examine the basis of the opinion of plaintiffs' expert epidemiologist/toxicologist, or, in the further alternative, for preclusion of that expert's opinion, and upon preclusion, summary judgment dismissing plaintiffs' complaint, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing of entitlement to judgment as a matter of law by proffering sufficient evidence to eliminate all material issues of fact (*see Lesocovich v 180 Madison Ave.* Corp., 81 NY2d 982, 985 [1993]).

Notably, defendants advanced no affidavit from a toxicology or epidemiology expert, nor did they otherwise eliminate all material issues of fact regarding general and specific causation. Accordingly, the motion court correctly denied summary judgment to defendants "regardless of the sufficiency of the opposing papers" (*Lesocovich*, 81 NY2d at 985).

We note that defendants' arguments regarding the report by plaintiffs' expert epidemiologist/toxicologist constitute issues of credibility and accuracy, the resolution of which are matters within the province of the jury (*see Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]).

The motion court also correctly denied defendants' motion seeking a *Frye* hearing on plaintiffs' expert epidemiologist/toxicologist (*see Frye v United States*, 293 F 1013 [DC Cir 1923]), as the expert's opinions are based on well-established and accepted methodologies (*see Nonnon v City of New York*, 88 AD3d 384, 394 [1st Dept 2011]).

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

ENTERED: MARCH 21, 2013

CLERK

Mazzarelli, J.P., Saxe, Degrasse, Manzanet-Daniels, Clark, JJ.

9492-
9493 In re Demetrius Samadjopoulos,
Petitioner-Appellant,

-against-

New York City Employee's
Retirement System, et al.,
Respondents-Respondents.

Index 400912/10

White & Case LLP, New York (Erika L. Shapiro of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Martin Schoenfeld, J.), entered January 26, 2011, denying the petition and dismissing the proceeding brought pursuant to CPLR article 78 to annul a determination of respondent Trustees of New York City Employees' Retirement System (NYCERS), dated December 11, 2009, which denied petitioner's application for World Trade Center (WTC) disability benefits, unanimously reversed, on the law, without costs, the petition granted to the extent of annulling the determination, and the matter remanded for further proceedings in accordance with this decision. Appeal from order, same court and Justice, entered January 26, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Administrative Code of the City of New York § 13-252 provides that a police pension fund member who is physically or mentally incapacitated for the performance of service as a proximate result of such service shall be retired on an accident disability retirement (ADR) pension. The WTC Law (Administrative Code § 13-252.1) amended this provision to address cases involving WTC injuries. The WTC Law established a presumption that "any condition or impairment of health . . . caused by a qualifying World Trade Center condition" as defined in the Retirement and Social Security Law (RSSL), "shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident . . . unless the contrary be proved by competent evidence" (§ 13-252.1 [1][a]). "Qualifying World Trade Center condition" is defined as, inter alia, "a qualifying condition or impairment of health" (RSSL § 2[36][a]), which in turn is defined as, inter alia, a qualifying physical condition, or a qualifying psychological condition, or both (§ 2[36][b]). "Qualifying physical condition" is defined to include, inter alia, "diseases of the upper respiratory tract," "diseases of the lower respiratory tract, including but not limited to . . . asthma [and] reactive airway dysfunction syndrome," and "diseases of the gastroesophageal tract, including . . . reflux disease" (§ 2[36][c]). "Qualifying

psychological condition[s]" include post-traumatic stress disorder, anxiety, and/or depression (§ 2[36][d]).

Petitioner demonstrated that he was incapacitated for the performance of service as a proximate result of his WTC line-of-duty toxic exposure injuries. The evidence showed that petitioner developed disabling asthma, respiratory airway dysfunction, and gastroesophageal reflux disease (GERD) in the wake of his WTC exposure, all of which are defined as WTC "qualifying physical condition[s]." He also suffers from post-traumatic stress disorder, anxiety, and/or depression -- "qualifying psychological condition[s]."

Once a petitioner establishes that he worked the requisite number of hours at the site, the "World Trade Center presumption" places the burden on the respondents to show that the petitioner's qualifying injury was not incurred in the line of duty (*see Matter of Maldonado v Kelly*, 86 AD3d 516, 519 [1st Dept 2011], *revd on other grounds sub nom. Matter of Bitchatchi v Board of Trustees of the N.Y. City Police Pension Fund, Art. II*, 20 NY3d 268 [2012]). If a determination is made, even postretirement, that the applicant is disabled by a qualifying WTC condition, it will be presumed, unless rebutted, that the disability was sustained due to a work-related accident, thus entitling the applicant to RSSL § 605(h) disability retirement

benefits.

Although the WTC presumption does not mandate enhanced ADR retirement benefits for first responders in all cases, it is nonetheless incumbent on respondents to come forward initially with affirmative credible evidence to disprove that the officer's disability was causally related to his work at the WTC site (*see Matter of McAuley v Kelly*, – AD3d –, 2013 NY Slip Op 00979, *2 [1st Dept 2013]). The Board may not deny benefits solely by relying on the lack of evidence connecting the disability to the exposure, or by "rely[ing] on petitioner's deficiencies to fill its own gap in proof" (*Matter of Bitchatchi*, 20 NY3d at 284 [2012]).

Respondents have utterly failed to rebut the presumption that petitioner's qualifying conditions were not caused by hazards encountered at the WTC site. Respondents do not even purport to offer an alternative cause for petitioner's debilitating conditions (*compare Matter of Dement v Kelly*, 97 AD3d 223, 230 [1st Dept 2012] [respondents did not sufficiently rebut presumption that petitioner's sleep apnea was caused by WTC exposure by supposed proof, inter alia, that apnea was not linked to GERD, from which petitioner did suffer] *and Bitchatchi*, 20 NY3d at 282 [respondents did not sufficiently rebut presumption that petitioner's cancer was attributable to WTC exposure by

supposed proof that her cancer was linked to a prior ulcerative colitis condition]). Indeed, the record contains no proof whatsoever that petitioner's disabling conditions were attributable to any other cause.

No fewer than four doctors from the WTC Medical Monitoring and Treatment Program (MMTP) found — and not one doctor disputed — that petitioner suffers from reactive airway disease and/or asthma as well as reflux, and another MMTP doctor, as well as the City's own doctor, found that petitioner also suffers from depression and anxiety. The fact that petitioner's spirometer incentive tests and chest X rays — taken in a physician's office and not a work environment which aggravates his symptoms — were normal does not negate the causal connection between his work at the WTC site and his injuries. MMTP physicians explained that normal results on these tests in an office environment are not only consistent with petitioner's diagnosis, but expected. Respondents cannot point to one physician who opined that a lack of symptoms in a physician's office or normal spirometry results undermines petitioner's diagnosis. While medical boards may resolve conflicting evidence, they may not simply ignore medical evidence, particularly here, where the Medical Board must rebut a statutory presumption.

Petitioner's respiratory and psychological conditions did

not exist prior to his work at the WTC site. The City does not — and cannot — dispute this. The causal connection between his physical and psychological conditions is buttressed by the reports of not only MMTP doctors but also by the City's own doctors.

Respondents are reduced to arguing that the WTC presumption does not apply because petitioner's four enumerated WTC conditions are not "disabling." We reject this cynical attempt to circumvent the clear intent of the statute. Petitioner is entitled to have his previously established disability reclassified to include his WTC-related conditions. In any event, respondents' assertion that petitioner is not "disabled" is itself irrational and arbitrary. Respondents admit that petitioner suffers from several qualifying conditions, yet state -- without any medical evidence to rebut the conclusion that the conditions are disabling -- that no disability exists.

Accordingly, because the record contains no affirmative credible evidence supporting the determination that petitioner's

qualifying conditions were not incurred in the line of duty, we reverse, and hold that petitioner is entitled to ADR benefits pursuant to the WTC presumption, which respondents have failed to rebut.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, JJ.

9572 The People of the State of New York, Dkt. 5300C/08
Respondent,

-against-

Ramon Lopez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Richard Lee Price, J.), rendered November 13, 2009, convicting defendant, after a nonjury trial, of attempted assault in the third degree, and sentencing him to 15 days' community service, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supported the inference that defendant intended to cause physical injury, which was the natural consequence of his acts, regardless of whether he simultaneously intended to avoid being arrested.

The court properly denied defendant's motion to suppress a statement. We likewise find no basis for disturbing the court's

credibility determinations. In any event, any error in admitting this statement was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]) because it had little or no bearing on the charge of which defendant was convicted.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9573 In re Ruth L.,
Petitioner-Respondent,

-against-

Clemese Theresa J.,
Respondent-Appellant.

_____

Israel P. Inyama, New York, for appellant.

Leslie S. Lowenstein, Woodmere, for respondent.

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

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Order, Family Court, Bronx County (Myrna Martinez-Perez, J.), entered on or about June 27, 2011, which, inter alia, granted custody of the subject child to petitioner paternal grandmother, unanimously affirmed, without costs.

We reject respondent mother's argument that the court did not have jurisdiction over this custody proceeding because New York is not the child's home state. The child lived in New York continuously with his mother, his father and his paternal grandmother from the age of about two weeks until he was almost six months old. Contrary to respondent's contention, his absence from New York, brought about by respondent's desire to prevent the father or petitioner from obtaining custody, was "a temporary absence which did not interrupt the six-month pre-petition

residency required by the UCCJEA [Uniform Child Custody Jurisdiction and Enforcement Act, Domestic Relations Law art 5-A]" (*see Matter of Felty v Felty*, 66 AD3d 64, 69 [2d Dept 2009]; *Matter of Krymko v Krymko*, 32 AD3d 941 [2d Dept 2006]; Domestic Relations Law § 75-a[7]).

The evidence establishes extraordinary circumstances that justify the award of custody to petitioner (*see Matter of Bennett v Jeffreys*, 40 NY2d 543 [1976]). This evidence includes respondent's extensive history of neglect and abuse of her nine previous children, which resulted in the death of one child who was left unattended in a bathtub and the termination of her parental rights as to all the others (*see e.g. Matter of Harold EE. v Roger EE.*, 17 AD3d 730, 731 n 1 [3d Dept 2005]; *see also Matter of Reed v Crim*, 202 AD2d 1018 [4th Dept 1994]). Respondent also has an extensive history of drug abuse, addiction, and criminal activity (*see Matter of Benzon v Sosa*, 244 AD2d 659 [3d Dept 1997]), as well as mental illness for which she has refused to engage in treatment or take prescribed medication (*see Matter of Vann v Herson*, 2 AD3d 910, 912-913 [3d Dept 2003]). Moreover, respondent's living situation continues to be unstable (*see Matter of North v Yeagley,* 96 AD3d 949 [2d Dept 2012]), and she has failed to plan for the child's return (*see Matter of Gary G. v Roslyn P.*, 248 AD2d 980 [4th Dept

1998]).

The court's determination that awarding custody to petitioner is in the child's best interests is supported by the evidence that petitioner has supported the child, given structure to his life, and provided a stable and loving home, where he is thriving (*see e.g. Matter of Brenda J. v Nicole M.*, 59 AD3d 299 [1st Dept 2009]). Indeed, the forensic evaluator concluded that removing the child from his grandmother's care would have disastrous consequences.

Respondent failed to preserve her objection to the court's consideration of the forensic evaluator's report (*see Matter of Hezekiah L. v Pamela A.L.*, 92 AD3d 506 [1st Dept 2012]).

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

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9574 Lenora Collazo, Index 300070/08
Plaintiff-Respondent,

-against-

Riverbay Co-op, et al.,
Defendants-Appellants.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellants.

Alexander J. Wulwick, New York, for respondent.

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Judgment, Supreme Court, Bronx County (Patricia A. Williams, J.), entered January 31, 2011, in plaintiff's favor, unanimously reversed, on the law, without costs, the judgment vacated, and the matter remanded for a new trial.

As plaintiff's son had not previously been identified as a notice witness, and defendants had no reason to anticipate that he would testify as to notice, the trial court erred in allowing him to testify that he had observed the alleged defective condition one month before his mother's accident (*see Tavarez v DeLange*, 190 AD2d 568 [1st Dept 1993]). The issuance of a missing witness charge as to a purported employee of defendants

whose existence was not proven was also error (*see e.g. Germe v City of New York*, 211 AD2d 480 [1st Dept 1995]). These errors were compounded by the preclusion of the testimony of two defense witnesses and the limitation of a third witness's testimony.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9575 In re Police Officer James Kim, Index 108768/11
Petitioner,

-against-

Police Commissioner Raymond Kelly,
Respondent.

_____

Richard E. Hershenson, New York, for petitioner.

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

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Determination of respondent Commissioner, dated March 29, 2011, which terminated petitioner's employment as a New York City police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Robert E. Torres, J.], February 8, 2012), dismissed, without costs.

Substantial evidence supports the finding that petitioner submitted a false mortgage application (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The evidence shows that the subject application falsely listed a company that petitioner did not work for as his sole source of income, and falsely listed a New Jersey address as his primary residence. There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of*

Berenhaus v Ward, 70 NY2d 436, 443-444 [1987]). Moreover, petitioner's contention that he was subjected to discriminatory treatment is both unpreserved, as it was not raised in the petition, and unavailing.

The penalty of termination does not shock our sense of fairness, since respondent Commissioner "is accountable to the public for the integrity of the Department" (*Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001] [internal quotation marks omitted]).

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9576 WDF, Inc., Index 602330/05
Plaintiff-Appellant,

-against-

City of New York, etc.,
Defendant-Respondent.

_____

Robert J. Saville, Mount Vernon, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered November 14, 2011, which granted defendant City of New York's motion to amend its answer, for partial summary judgment dismissing plaintiff's breach of contract claim and to declare that the notice of claim related to the contract had been withdrawn, and denied plaintiff's cross motion as moot, unanimously affirmed, without costs.

The court properly granted defendant's motion for leave to amend its answer to add an affirmative defense of waiver and release and a counterclaim seeking a declaration that plaintiff's notice of claim was deemed withdrawn. Plaintiff failed to demonstrate any "prejudice or surprise resulting directly from the delay" or to show that the proposed amendment "is palpably improper or insufficient as a matter of law" (*McGhee v Odell*, 96

AD3d 449, 450 [1st Dept 2012][internal quotations and citations omitted].

Plaintiff's arguments that defendant's amendment is not meritorious and that partial summary judgment was improper lack merit. Plaintiff signed a release and waiver which stated that it "agree[d] to withdraw *any of [its] previous claims* filed against the city demanding damages for delay, and waive[d] *any such claims* for delay damages which the [plaintiff] may have resulting from the work performed prior to the date of registration." "Because the release is clear and unambiguous, plaintiff may not endeavor to vary its terms or to create an ambiguity by resorting to extrinsic evidence" meant to explain the parties' intentions (*Serbin v Rodman Principal Invs., LLC*, 87 AD3d 870, 870 [1st Dept 2011], *citing W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 163 [1990]). "Nor is the release invalid for lack of consideration" (*id.*, *citing* General

Obligations Law § 15-303).

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

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9577 In re John DeRaffele, Index 111951/11
Petitioner-Appellant,

-against-

The State of New York Banking Department,
Respondent-Respondent.

_____

John DeRaffele, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for respondent.

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Judgment, Supreme Court, New York County (Paul G. Feinman, J.), entered July 20, 2012, denying the petition to annul respondent's determination, dated August 4, 2011, which denied petitioner's application for a mortgage loan origination (MLO) license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Banking Law § 599-e(1)(b)(ii) prohibits the issuance of a MLO license if the applicant has been convicted of a felony and, in the event the conviction was more than seven years before the application, "if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering." Here, petitioner pled guilty in 1989 to conspiracy to defraud the United States in federal district court. Although petitioner received a certificate of relief in 1996, the certificate stated

that it was not to be considered a pardon. Accordingly, the challenged determination was not arbitrary and capricious.

Petitioner's contention that, in determining his application, respondent should have considered the factors set forth in Correction Law § 753, which pertains to the application for a license or employment of a person previously convicted of a criminal offense, has been rejected by this Court (*see Matter of Rampolla v Banking Dept. of the State of N.Y.*, 93 AD3d 526 [1st Dept 2012]).

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9578 In re Thaddeus Jacob C., also known as Baby Boy M.,

A Dependent Child Under the Age of Eighteen Years, etc.,

Tanya K. M.,
Respondent-Appellant,

Leake & Watts Services, Inc.,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

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

Andrew J. Baer, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Anne-Marie Jolly, J.), entered on or about April 5, 2011, which, upon a fact-finding determination that respondent-appellant mother suffers from a mental illness, terminated her parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The uncontroverted medical evidence provided clear and convincing evidence that respondent is presently and for the foreseeable future unable, by reason of mental illness, to

provide proper and adequate care for the child (*see* Social Services Law § 384-b[4][c], [6][a]; *Matter of Joyce T.*, 65 NY2d 39, 478 [1985]). The court-appointed expert testified that respondent suffers from schizoaffective disorder, bipolar type, and personality disorder NOS (not otherwise specified) with borderline narcissistic and antisocial features, and that this prevents her from adequately caring for the child presently and for the foreseeable future (*see Matter of Isis S.C. [Doreen S.]*, 98 AD3d 905, 906 [1st Dept 2012]). Respondent's testimony confirmed that she lacked insight into the nature and extent of her mental illness.

A dispositional hearing was not necessary to find that termination of respondent's parental rights is in the best interests of the child (*see Matter of Leomia Louise C.*, 41 AD3d 249 [1st Dept 2007]).

The court properly denied posttermination visitation to respondent (*see Matter of Hailey ZZ. [Ricky ZZ.]*, 19 NY3d 422 [2012]).

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9579 The People of the State of New York, Respondent, Ind. 3959/10

-against-

Tyrone Davis, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 22, 2010, as amended January 11, 2011, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him to a term of 2⅓ to 7 years, unanimously affirmed.

Nothing in the court's identification charge warrants reversal. When defendant raised several objections to that charge, the court delivered a supplemental charge that addressed those concerns, and defendant had no further objections or requests to charge. Accordingly, defendant did not preserve his claim that the identification charge, as amended by the supplemental instructions, deprived him of a fair trial (*see People v Whalen*, 59 NY2d 273, 280 [1983]), and we decline to review it in the interest of justice. As an alternative holding,

we find the court's main and supplemental identification instructions, considered as a whole, sufficiently conveyed to the jury the applicable principles of law (*id.* at 279).

We have reviewed all other issues and find them to be without merit.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9580 In re Stephen M. Smith, etc., Index 307718/08
Respondent-Appellant,

-against-

New York County District Attorney's Office,
Petitioner-Respondent.

_____

Shapiro, Arato & Isserles, New York (Jeremy Licht of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Larry Stephen, J.), entered on or about October 10, 2012, which directed respondent-appellant to appear as a witness to testify in a criminal proceeding in an Indiana court, unanimously reversed, on the law, without costs, the petition denied and the special proceeding brought pursuant to CPL 640.10 dismissed.

The New York District Attorney's Office concedes that its failure to serve respondent as directed by its order to show cause, which required service of the papers supporting the order,

resulted in a lack of personal jurisdiction over respondent (*see* CPLR 403[d], 2214[d]). Accordingly, denial of the petition and dismissal of the proceeding is warranted (*see Matter of Ruine v Hines*, 57 AD3d 369 [1st Dept 2008]; *Matter of Feldman v Feldman*, 54 AD3d 372, 374 [2d Dept 2008]).

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9582 The People of the State of New York, Ind. 1527/10
Respondent,

-against-

Hector Morales,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Troy K. Webber, J.), rendered November 7, 2011, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 25 years, with 5 years' postrelease supervision, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the prison term to 20 years, and otherwise affirmed.

The record is insufficient to establish a valid waiver of defendant's right to appeal. We find the sentence excessive to the extent indicated.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9586- Ind. 1487/11
9586A The People of the State of New York, 2320/10
Respondent,

-against-

Anthony Graham,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 1, 2011, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 21, 2013

CLERK

Tom, J.P., Mazzarelli, Saxe, Moskowitz, Manzanet-Daniels, JJ.

9587N Svetlana Prokhorova, et al., Index 307718/08
Plaintiffs-Appellants,

-against-

Angeliki Kasimis, et al.,
Defendants,

The City of New York,
Defendant-Respondent.

_____

Law Office of Jeffrey S. Schwartz, LLC, Mineola (Jeffrey S. Schwartz of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 26, 2011, which, inter alia, granted defendant the City's motion to deem it in compliance with a prior order, unanimously affirmed, without costs.

Having certified that discovery was complete, plaintiffs are barred from challenging the motion court's determination that the

City fully complied with the March 24, 2011 order by producing two knowledgeable witnesses (*see Bookazine Co. v J & A Bindery*, 61 AD2d 919, 919 [1st Dept 1978]).

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9588 The People of the State of New York, Ind. 406/10
Respondent,

-against-

Akil Parks,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Alston & Bird LLP, New York (Carolyn O'Leary of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Wayne M. Ozzi, J.), rendered August 24, 2010, as amended September 2, 2010, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees, criminally using drug paraphernalia in the second degree, unlawfully dealing with a child in the first degree, criminal possession of marijuana in the fifth degree and unlawful possession of marijuana, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to an aggregate term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations,

including its evaluation of alleged inconsistencies in testimony. The police testimony leads to the inescapable conclusion that defendant threw a bag out of a window during the execution of a search warrant, and that this was the same bag that was recovered from a roof below the window and found to contain drugs.

The court properly delegated to a court officer the ministerial function of bringing the jury an amended verdict sheet containing a one-word correction in the name of a charged crime. The deliberating jury sent a note that simply called the court's attention to the fact that the verdict sheet incorrectly referred to criminal possession of marijuana in the fourth degree, rather than fifth degree. This was not even an inquiry, since the jury was not requesting any information. Even if it could be viewed as an inquiry, it was not a substantive inquiry requiring a response in open court under CPL 310.30. Instead, this note only necessitated the ministerial action of sending a corrected verdict sheet into the jury room, and there was no ambiguity in the note requiring the court to address the jury (*see People v Ziegler*, 78 AD3d 545, 546 [1st Dept 2010], *lv denied*, 16 NY3d 838 [2011]).

Furthermore, defense counsel raised no objection when the court discussed the note with the parties and apprised them of its intention to have a court officer deliver a corrected verdict

sheet. The court's action was not an improper delegation of a judicial responsibility, because the court officer's role was plainly ministerial (*see People v Bonaparte*, 78 NY2d 26, 30-31 [1991]). Accordingly, defendant's claim is not exempt from preservation requirements, and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9589 Nefertari Barnes, Index 302446/09
Plaintiff-Respondent,

-against-

United Parcel Service, et al.,
Defendants-Appellants.

_____

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

Michelle S. Russo, Port Washington, for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered June 5, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to establish entitlement to judgment as a matter of law in this action for personal injuries sustained in a collision between a minivan operated by plaintiff, and a delivery truck owned and operated by defendants. Although plaintiff's approach into the intersection was regulated by a stop sign and defendant driver's approach was not, the record presents a number of triable issues including which vehicle entered the intersection first, who had the right-of-way, and whether the

person with the right-of-way exercised due care to avoid the accident (*see Rivera v Berrios Trans Serv. Inc.*, 64 AD3d 416 [1st Dept 2009]; *Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]).

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9591 Eduvigis Furment, Index 305111/10
Plaintiff-Appellant,

-against-

Ziad Food Corp., et al.,
Defendants-Respondents.

_____

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

Sobel Law Group, LLC, Huntington (Cheryl Spinner Kravatz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered April 2, 2012, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendants failed to establish their entitlement to judgment as a matter of law in this action where plaintiff alleges that she fell over a produce box that was placed next to her in a supermarket aisle while she was bending over to retrieve a product. As the movants, defendants bore the burden of disproving an essential element of plaintiff's claims and cannot affirmatively establish the absence of negligence as a matter of law merely by pointing out the gaps they perceive in plaintiff's case (*see Dabbagh v Newmark Knight Frank Global Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]).

Furthermore, the record demonstrates that there are triable issues with respect to whether the box that plaintiff fell over was an open and obvious condition and whether it was inherently dangerous. Such issues are typically not disposable by summary adjudication (*see Burgos v 205 E.D. Food Corp.*, 61 AD3d 403 [1st Dept 2009]; *Centeno v Regine's Originals*, 5 AD3d 210 [1st Dept 2004]; *Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 75 [1st Dept 2004]), and here, the motion court improperly disregarded plaintiff's account of her accident (*see generally Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997] ["(i)t is not the court's function on a motion for summary judgment to assess credibility"]).

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9593-
9594 Index 600759/04

Banc of America Securities, LLC,
Plaintiff-Respondent,

-against-

Solow Building Company II, LLC,
Defendant-Appellant,

Bank of America Corporation,
Additional Defendant
on Counterclaim.

_____

Lowenstein Sandler LLP, New York (Jeffrey J. Wild of counsel), for appellant.

Davis Polk & Wardwell, New York (Robert F. Wise, Jr. of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 1, 2012, awarding plaintiff the total amount of $6,670,547.95, pursuant to an order, same court and Justice, entered March 7, 2012, which granted plaintiff's motion to confirm an arbitration award dated October 11, 2011, and denied defendant's cross motion to vacate the award, unanimously affirmed, with costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The arbitrator's construction of the term "remain," found in a schedule to the parties' settlement agreement, as meaning

simply to remain physically in place, and not necessarily unchanged, was not irrational (*see Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 346 [1985]). Nor was the arbitrator's finding that plaintiff did not cut any backbone cabling, as it was based on plausible credibility determinations (*see Kalyanaram v New York Inst. of Tech.*, 79 AD3d 418, 419-420 [1st Dept 2010], *lv denied* 17 NY3d 712 [2011]; *Matter of Haynes v New York City Dept. of Homeless Servs.*, 27 AD3d 330, 332 [1st Dept 2006]).

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9595 The People of the State of New York, Ind. 6526/10
Respondent,

-against-

Douglas Kevorkian,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about May 4 2011,

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

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

ENTERED: MARCH 21, 2013

CLERK

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

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9597 S. David Jagarnauth, Index 602057/09
Plaintiff-Appellant,

-against-

Massey Knakal Realty Services, Inc., et al.,
Defendants-Respondents.

_____

Adam Leitman Bailey, P.C., New York (Jeffrey R. Metz of counsel), for appellant.

Steven Landy & Associates PLLC, New York (David A. Wolf of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 3, 2012, which, in this action seeking to recover a real estate co-brokerage commission, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for summary judgment on his complaint alleging causes of action for breach of contract, unjust enrichment, conversion, and tortious interference with contract, unanimously affirmed, with costs.

We find that the court properly granted defendants' motion for summary judgment, dismissing plaintiff's complaint, since the plain language of the co-brokerage agreement does not support plaintiff's breach of contract claim. The agreement provided for an April 15, 2004, expiration date for plaintiff to receive a

co-brokerage commission on the sale of the property. It also provided that "in the event that a contract of sale has been executed by Owner and Prospective Buyer on or before said date, this agreement shall continue in full force and effect until the closing of the sale." While plaintiff assisted with the negotiation of the first contract of sale that was executed on October 18, 2003, that contract of sale was properly cancelled by the seller on May 18, 2004. Plaintiff, who was not at all involved in the second contract of sale, executed more than two years later, was not entitled to a co-brokerage commission based on that contract of sale (*see Helmsley-Spear, Inc. v 150 Broadway N.Y. Assoc.*, 251 AD2d 185, 186 [1st Dept 1998]).

The evidence was sufficient to demonstrate that plaintiff was not the "procuring cause" of the sale of the property so as to earn a real estate brokerage commission (*see Greene v Hellman*, 51 NY2d 197, 205-207 [1980]; *see Good Life Realty, Inc. v Massey Knakal Realty of Manhattan, LLC*, 93 AD3d 490, 491 [1st Dept 2012]). The fact that plaintiff introduced the buyer and the sellers was insufficient to establish his entitlement to commissions resulting from the sale (*see Green* at 206-207). There was no "direct and proximate link" to the purchase (*see id.; Cushman & Wakefield, Inc. v 214 E. 49th St. Corp.*, 218 AD2d 464, 467 [1st Dept 1996], *lv denied* 88 NY2d 816 [1996]), since

plaintiff's own testimony supports the conclusion that he had no communications with the buyer about the property from 2004 until after the closing and that he did not discuss the transaction with the buyer, sellers or defendants from 2004 to 2007 (*see generally Brandenberg v Waters Place Assoc., L.P.*, 17 AD3d 615 [2d Dept 2005]).

Plaintiff is not entitled to recover a co-brokerage commission under a theory of unjust enrichment since his efforts, which occurred two years prior to the consummation of the sale of the property, were unsuccessful (*see Orenstein v Brum*, 27 AD3d 352, 353 [1st Dept 2006]). In any event, plaintiff's claim is barred by the existence of the co-brokerage agreement governing this subject matter (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388-389 [1987]).

A cause of action for conversion "cannot be predicated on a mere breach of contract" (*East End Labs., Inc. v Sawaya*, 79 AD3d 1095, 1096 [2d Dept 2010]). In any event, plaintiff failed to establish that he has a legal right to possession of the co-brokerage commission (*see Weisman, Celler, Spett & Modlin v Fein*, 225 AD2d 508 [1st Dept 1996]).

The court properly dismissed plaintiff's claim for tortious interference with contract, since he failed to prove the existence of a valid contract with a third party, and that there

was breach of contract by the third-party buyer to support his claim (*see Benjamin Goldstein Prods. v Fish*, 198 AD2d 137, 138 [1st Dept 1993]).

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9598 Pure Power Boot Camp, Inc., Index 112294/11
Plaintiff-Appellant,

Pure Power Boot Camp Franchising Corporation, et al.,
Plaintiffs,

-against-

Fross Zelnick Lehrman & Zissu, P.C.,
Defendant-Respondent.

_____

Sherwood A. Salvan, New York, for appellant.

Eaton & Van Winkle LLP, New York (Brendan R. Marx of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about September 4, 2012, which, to the extent appealed from, granted defendant's motion to dismiss plaintiff Pure Power Boot Camp, Inc.'s claims, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish that plaintiff's legal malpractice action is barred by an agreement, purportedly entered into in connection with the settlement of a legal fee dispute, to release the firm from all claims. The parties agreed to settle their legal fee dispute for $5,000, and $5,000 was paid to defendant. At issue is the scope of the settlement and whether the settlement was intended to include a general release of all

claims against defendant. While the absence of an executed general release is not necessarily dispositive, defendant failed to establish that the parties agreed to execute the release and intended to be bound by it (*see Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009]). Defendant also failed to establish that it was not negligent in preparing, filing and amending a trade dress application, since the mere fact that the application was accepted by the U.S. Patent and Trademark Office is not evidence of a lack of negligence.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9599 The People of the State of New York, Respondent, Ind. 2746/10

-against-

Robin Seabrook, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about November 24, 2010, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9600 The People of the State of New York, Ind. 374/78
Respondent,

-against-

Kevin Goldbeck,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about December 5, 2008, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Assuming, without deciding, that the state and federal standards for effective assistance at a criminal trial apply to a sex offender adjudication (*see People v Reid*, 59 AD3d 158 [1st Dept 2009], *lv denied* 12 NY3d 708 [2009]), we conclude that defendant received effective assistance at the classification hearing. It is clear from the record that further efforts by counsel to litigate defendant's risk level would have been unavailing. Counsel's alleged deficiencies did not affect the outcome or deprive defendant of a fair hearing.

First, there is no reasonable possibility that counsel could have persuaded the court to reduce defendant's point score below the threshold for a level three adjudication. Even if counsel had successfully challenged the assignment of points for contact under clothing, there still would have been more than enough points to support that risk level. In addition, the court properly applied a presumptive override as an alternative basis for a level three adjudication, and counsel was not ineffective for failing to oppose that determination.

Defendant claims that his counsel should have made further arguments in support of his request for a discretionary downward departure. However, we find that there were no persuasive arguments to be made in that regard. The mitigating factors cited by defendant on appeal were known to the hearing court, and were outweighed by the seriousness of defendant's record, including the underlying sex crime. Defendant places great emphasis on the fact that defendant did not commit any additional sex crimes during the approximately 30 years between the underlying crime and the SORA hearing. However, defendant spent almost all of that time in prison on the underlying conviction and a subsequent felony conviction. Although defendant did not commit new sex crimes in prison or during a period of parole, this does not show that he has such a low risk of reoffense that

he warrants a downward departure. Counsel's failure to make these arguments was not ineffective under the circumstances of defendant's case, and we likewise decline to grant a downward departure in the exercise of our independent discretion.

We have considered and rejected defendant's remaining claims.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9601 The People of the State of New York, Respondent, Ind. 2812/06

-against-

Kenneth Glassman-Blanco, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Cassandra M. Mullen, J.), rendered January 14, 2010, convicting defendant, after a jury trial, of criminal possession of a weapon in the fourth degree, and sentencing him to time served, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant possessed a dangerous knife with the intent to use it unlawfully against the victim, at least in an effort to place the victim in fear of imminent harm.

Defendant argues that the element of unlawful intent was undermined by his acquittals of attempted murder, assault and attempted assault. Although in performing weight of evidence review, we may consider the jury's verdict on other counts (*see*

People v Rayam, 94 NY2d 557, 563 n [2000]), "[w]here a jury verdict is not repugnant, it is imprudent to speculate concerning the factual determinations that underlay the verdict because what might appear to be an irrational verdict may actually constitute a jury's permissible exercise of mercy or leniency" (*People v Horne*, 97 NY2d 404, 413 [2002]; *see also People v Hemmings*, 2 NY3d 1, 5 n [2004]). In any event, the jury could have concluded that the events described by the victim occurred, but that they only supported a weapon possession conviction.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Román, Feinman, Clark, JJ.

9602-
9603 Index 116419/10

Rupesh Patel,
Plaintiff-Respondent,

-against-

American University of Antigua, et al.,
Defendants-Appellants,

American Union of Antigua,
Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

Forde & Associates, Eastchester (James L. Forde of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered September 27, 2012, which granted defendants American University of Antigua and GCLR, LLC's motion to reargue their motion to dismiss the complaint and, upon reargument, adhered to the prior order, same court and Justice, entered on or about January 17, 2012, denying their motion to dismiss on the ground of forum non conveniens and to dismiss as against GCLR pursuant to CPLR 3211(a)(1), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly. Appeal from the order entered January 17, 2012, unanimously dismissed, without costs, as superseded by the appeal from the September 27, 2012 order.

In this action for personal injuries allegedly suffered by plaintiff when he slipped and fell on defendant American University of Antigua's (AUA) campus, that portion of defendants' motion seeking dismissal of the complaint as against defendant GCLR, LLC should have been granted pursuant to CPLR 3211(a)(1) since the documentary evidence establishes that a cause of action for negligence cannot be maintained against GCLR. The services agreement between GCLR and AUA shows that GCLR does not own, manage or otherwise control AUA's premises. Rather, it merely performs various administrative services, including accounting, preparing and distributing brochures, and maintaining student records. Plaintiff did not oppose this portion of the motion, and accordingly, his present arguments are not preserved for appellate review (*see Lally v New York City Health & Hosps. Corp.*, 277 AD2d 9 [1st Dept 2000], *lv dismissed* 96 NY2d 896 [2001]).

Defendants' motion to dismiss on the ground of forum non conveniens should also have been granted. The accident occurred in Antigua where AUA is located, pertinent witnesses and documentary evidence are located in Antigua, and, as plaintiff concedes, Antiguan law is applicable (*see e.g. Peters v Peters*,

101 AD3d 403 [1st Dept 2012]); *United States Aviation Underwriters v United States Fire Ins. Co.*, 134 AD2d 187, 190 [1st Dept 1987]). There is no connection to New York since the complaint is dismissed against GCLR, the only party that is a New York resident.

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

ENTERED: MARCH 21, 2013

CLERK

Sweeny, J.P., Acosta, Feinman, Clark, JJ.

9604- Index 8850/05
9605N Eugene Stolowski, et al.,
Plaintiffs-Appellants,

-against-

234 East 178th Street LLC,
Defendant-Respondent,

The City of New York,
Defendant.

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Eugene Stolowski, et al.,
Plaintiffs-Respondents,

-against-

234 East 178th Street LLC,
Defendant-Appellant,

The City of New York,
Defendant.

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Sullivan Papain Block McGrath & Cannavo P.C., New York (Stephen C. Glasser of counsel), for Eugene Stolowski, Brigid Stolowski, Eileen Bellew, Jeffrey G. Cool, Sr., Jill Cool, Joseph G. Di Bernardo and Brendan K. Cawley, appellants/respondents.

Meyer, Suozzi, English & Klein, P.C., Garden City (Kieran X. Bastible of counsel), for Jeanette Meyran, appellant/respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (John Sandercock of counsel), for 234 East 178th Street LLC, appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for 234 East 178th Street LLC, respondent.

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.),

entered June 12, 2012, which denied defendant 234 East 178th

Street LLC's motion to strike plaintiffs' note of issue or permit post-note of issue discovery, unanimously modified, on the law and the facts, the motion granted to the extent of permitting discovery on the newly asserted wrongful death claim of plaintiff DiBernardo, and otherwise affirmed, without costs. Order, same court and Justice, entered March 2, 2011, which denied plaintiffs' motions for partial summary judgment, unanimously affirmed, without costs.

Although defendant timely moved to strike the note of issue, it had previously stipulated to waive any known discovery not raised at a compliance conference held one month prior to the making of the motion. Since defendant knew that it needed discovery concerning updated medical and special damages, but failed to seek it, it lost its entitlement to same (*see Sereda v Sounds of Cuba, Inc.*, 95 AD3d 651 [1st Dept 2012]). However, defendant remains entitled to all material and necessary discovery concerning the wrongful death claim of Di Bernardo, a claim not asserted until after the compliance conference (*see Francescon v Gucci Am., Inc.*, 71 AD3d 528 [1st Dept 2010]).

Plaintiffs' motion for partial summary judgment on liability pursuant to General Municipal Law § 205-a was properly denied. To the extent the trial court and this Court used the word "illegal" in the decisions emanating from the criminal case

arising from this fire (*People v Rios*, 87 AD3d 916 [1st Dept 2011]), such description of the subject apartment alterations amounted to dictum which has no binding collateral estoppel effect (*see Continental Cas. Co. v Employers Ins. Co. of Wausau*, 60 AD3d 128, 142 [1st Dept 2008], *lv denied* 13 NY3d 710 [2009]). In the criminal trial, the issue of statutory violations was not before the jury.

Collateral estoppel aside, plaintiffs failed to set forth a prima facie entitlement to summary judgment, as they submitted no admissible nonhearsay evidence that defendant was on notice of the condition alleged to have violated the statutes pleaded (*cf. Lusenskas v Axelrod*, 183 AD2d 244, 248-249 [1st Dept 1992], *appeal dismissed* 81 NY2d 300 [1993]). In any event, defendant's experts raised issues of fact as to whether any statutes were violated, creating triable issues of fact barring summary

resolution (*see Pirraglia v CCC Realty NY Corp.*, 35 AD3d 234, 235 [1st Dept 2006]; *see also Friedman v BHL Realty Corp.*, 83 AD3d 510 [1st Dept 2011]).

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

ENTERED: MARCH 21, 2013

CLERK

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

8691-
8692 Index 111102/07

Board of Managers of the 25 Charles Street Condominium, et al.,
Plaintiffs-Respondents,

-against-

Celia Seligson,
Defendant-Appellant.

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Michael T. Sucher, Brooklyn, for appellant.

Ganfer & Shore, LLP, New York (Ira B. Matetsky of counsel), for respondents.

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Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered June 19, 2012, and bringing up for review an order, same court and Justice, entered January 6, 2012, modified, on the law and the facts, to vacate the award to plaintiffs of the amount of interest for which defendant was responsible on the past-due common expenses, remand the issue for determination by the Special Referee in accordance herewith, and otherwise affirmed, without costs. Appeal from order, dismissed, as subsumed in the appeal from the judgment.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
David B. Saxe
Dianne T. Renwick
Helen E. Freedman, JJ.

8691-8692
Index 111102/07

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Board of Managers of the 25 Charles Street Condominium, et al.,
Plaintiffs-Respondents,

-against-

Celia Seligson,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of Supreme Court, New York County (Milton A. Tingling, J.), entered June 19, 2012, awarding plaintiffs a sum of money, and bringing up for review an order, same court and Justice, entered January 6, 2012, which confirmed the Special Referee's report on damages.

Michael T. Sucher and Andrew M. Shabasson, Brooklyn, for appellant.

Ganfer & Shore, LLP, New York (Ira B. Matetsky, Matthew N. Tobias and Anne D. Taback of counsel), for respondents.

RENWICK, J.

This action involves a dispute between the owners of the two units of the 25 Charles Street Condominium, which is actually a "cond-op." A "cond-op" is a hybrid of a cooperative (coop) and a condominium (condo). One unit, the entire residential portion of the building (consisting of coop apartments), is legally both a residential cooperative and a condominium. The second unit, the commercial space, is the other condominium. The commercial space is owned by the defendant in this action, Celia Seligson.

The 25 Charles Street condominium was organized in 1986. Pursuant to the condominium's declarations and bylaws, the commercial and residential units were respectively allocated 10% and 90% of the common interest in the common elements. The bylaws further provided that the board of managers of the condo shall consist of three persons, two designated by the residential unit owner (coop) and one designated by the commercial unit owner.

On April 9, 2007, the two representatives from the coop held a condominium board meeting, despite the absence of the representative from the commercial unit, which was required for a quorum. At this meeting, the "board" adopted a budget for 2007 and a resolution concerning payment of arrears of common charges by the commercial unit. The board thereafter billed the

commercial unit for amounts allegedly due. The commercial unit owner refused to pay them, asserting that the assessment against her was without authority and included amounts that should have been borne solely by the coop.

Subsequently, the coop and the "board" commenced this action seeking, inter alia, a declaration that the action they took at the April 9, 2007 meeting was valid. In her answer, defendant denied all substantive allegations and asserted affirmative defenses, alleging that the board was not authorized to act without defendant's presence. After all parties were deposed, plaintiffs moved for summary judgment, asserting that defendant had refused to participate in the board and pay her share of expenses and capital contributions, totaling $282,237.06, having made no payments to the condominium since the inception of her ownership of the commercial unit. Defendant cross-moved for summary judgment, challenging the formation of the "Board," without designating a representative of, or participation by, the commercial unit. Defendant asserted that the board could only be elected at a unit owners meeting, which had not occurred; that all prior expenses had been incurred without authority; and, that plaintiffs' attempt to collect expenditures made over 14 years earlier were time-barred. Rather than addressing the merits of the motion and cross motion, the motion court directed the

parties to schedule a board meeting.

On December 1, 2009, the meeting was held and was attended by defendant, two residential unit owners on behalf of the coop, as well as the parties' attorneys. Before the meeting, plaintiffs provided defendant with an agenda, a proposed budget for 2010, and a breakdown of the "Commercial Unit Past Due Charges." At the meeting, defendant objected to the validity of the meeting as being one of the "board," asserting that the board must first be "elected" at a unit owners meeting. Defendant opposed all actions taken and was overruled by a vote of two to one on each matter, including the $282,256.58 charge for past-due expenses.

After the December 2009 board meeting, plaintiffs supplemented their motion for summary judgment. They asserted that the board meeting had been held pursuant to the October 2009 order, and that defendant attended the meeting, creating a quorum. Thus, plaintiffs sought an order declaring that the board's resolutions were proper and directing defendant to pay monies. Defendant responded that the common expenses assessed against her were for services belonging to the coop and did not benefit the commercial unit.

The Court granted plaintiffs partial summary judgment to the extent of declaring "the resolutions adopted by the Board of

Managers [at the December 2009 meeting] to be proper and valid except those dealing with charges to the commercial unit which will be the subject of the hearing." The court referred the matter to a referee "to hear and report on whether the commercial unit owes monies, and if so, how much and from what period and for what is said monies owed." Defendant moved to reargue and renew the motion and cross motion, maintaining that the December 2009 meeting of the "board" was not held pursuant to the bylaws, as there had been no election of board members at a unit owners meeting. The court granted reargument, but adhered to its original decision.

Defendant appealed before this Court, where she resumed her argument that the meeting she and representatives of the coop attended on December 1, 2009, pursuant to the motion court's direction, "was not a proper meeting of the board." This Court rejected defendant's contention, reasoning that the designation of members to the board by the two units was sufficient as an election, even in the absence of a unit owners meeting, and finding that the bylaws do not require that the board first be elected at a meeting of unit owners in order to be properly constituted. Accordingly, this Court held that Supreme Court had "correctly determined that the board meeting was properly held, and accordingly, the actions of the board are protected by a rule

analogous to the business judgment rule" (*see Board of Mgrs. of the 25 Charles St. Condominium v Seligson*, 85 AD3d 515, 516 [1st Dept 2011]). This Court further held that the "nature of the actions taken by the board in operating the property, such as hiring a managing agent and preparing an annual budget, were within the board's broad authority under the bylaws," but "inasmuch as defendant's challenges to the individual expenditures created questions of fact as to the legitimacy of the individual actions, the court appropriately referred the matter to a referee to hear and report on the issue of whether defendant owed plaintiffs any money, and if so, the amounts owed" (85 AD3d at 517). Accordingly, the matter was remanded to the Referee to hear and report on the allocation of common expenses to defendant's unit.

At the end of a five-day evidentiary hearing, the Referee concluded that plaintiffs had established by a fair preponderance of the credible evidence that defendant owed $299,911.53, representing unpaid and defaulted common expenses, including capital improvements, plus interest, charged from 1994 through 2009. In reaching its conclusions, the Referee relied upon the documentary evidence presented underlying the condominium's common charges, including years of receipts, invoices, and financial statements. The categories of expenses claimed by

plaintiffs included repairs and maintenance, labor, utilities, insurance, taxes, professional services, and general and administrative services. The Referee also relied upon testimony of the condominium's managing agent, who calculated the total amount of common expenses for each year, which was then multiplied by the commercial unit's 10% share to calculate the amount for which defendant was responsible. The manager also calculated the amount of interest for which defendant was responsible on the past-due common expenses, utilizing the interest rate and method of calculation expressly provided for in the bylaws. Lastly, plaintiffs also presented evidence that defendant was responsible for 10% of the costs for a capital project in which the building's roof, facades and exterior walls were inspected and repaired.

Plaintiffs then moved before Supreme Court for an order confirming the Referee's report and granting a money judgment against defendant. Defendant opposed the motion to confirm, and cross-moved to reject it, arguing that the monies expended by plaintiffs from 1994-2009 were residential unit expenses and not condominium expenses, were never budgeted as such, and thus cannot be recouped under the governing documents. Defendant further asserted that the monies expended from 1994-2009 for capital expenses were also unbudgeted residential unit expenses,

and that no interest is recoverable because no default in payment of common charges could have existed prior to the creation of a board or prior to any demand in advance of payment. The court granted plaintiffs' motion to confirm the Referee's report on damages. When defendant did not pay the judgment within 30 days of service of the order, a money judgment was entered against her for $342,592.36, which included the $299,911.53 set forth in the report, plus costs and statutory interest through the date of entry of the judgment. Defendant pursued this appeal.

In this second appeal, defendant argues that the court erred in confirming the Referee's report holding her responsible for unassessed common charges for the years 1994-2009. Defendant contends that the board was not authorized to retroactively charge her for monies unilaterally expended by plaintiffs without prior notice to defendant and without approval of a properly constituted board. Specifically, defendant maintains that the board's action of billing her for purported 1994-2009 common charges was not authorized by the declaration or bylaws. While the governing documents empower the board to prepare a budget and allocate and assess common charges in accordance with that budget, since no board was constituted or budget enacted from 1994 through 2009, defendant contends that plaintiffs have no basis to recover any purported common charges from that time

period.

This argument, however, was never raised before the motion court, which referred the matter to a referee to determine, in effect, whether the individual expenditures were properly allocated to the commercial unit, as benefitting such unit. Instead, as indicated, defendant initially attacked the validity of the December 2009 board meeting, which adopted the resolution in question with regard to arrears. Alternatively, defendant argued that the assessed common charges to the commercial unit were improper because the expenditures inured solely to the benefit of the coop. Defendant's attempt to bring this new argument -- that no board was constituted or budget enacted from 1994 through 2009 -- is barred by the law of the case given that, in the prior appeal in this case, we took a contrary position when we affirmed Supreme Court's determination "that the [December 2009] board meeting was properly held, and accordingly, the actions of the board are protected by a rule analogous to the business judgment rule," and referred to the Special Referee the issue of whether the individual expenditures were properly allocated to the commercial unit.

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court, as well as on the appellate court . . . [and]

operates to foreclose re-examination of the question absent a showing of subsequent evidence or change of law" *(J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 809 [2d Dept. 2007] [internal quotation marks, citations and alterations omitted]; *see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). Accordingly, based upon our prior determination of the validity of the December 2009 Board meeting, defendant is now limited to challenging the individual expenditures as improperly allocated to the commercial unit rather than the coop. At the hearing, however, defendant presented no evidence refuting the documentary and testimonial evidence allocating $299,911.53 of expenditures to the commercial unit from 1994 through 2009. In any event, we find that the Referee's findings are supported by the record, except in one limited respect, with regard to the issue of interest chargeable for late payment of common charges.

Although the bylaws authorized the assessment of interest chargeable for late payment of common charges, plaintiffs, in our view, waived the assessment of such late fees during the time period it took no steps to collect them. The bylaws provide that the board "shall take prompt action to collect any Common Charges or Unit Expenses due from the Unit Owners which remain unpaid for more than thirty (30) days from the date for payment thereof." Nevertheless, it was not until April 2007 that plaintiffs took

any steps to collect the late payment that began to accrue shortly after defendant purchased the commercial unit in December 1993. Thus, according to the bylaws, no interest accrued before the board took any action to collect them.

Accordingly, the judgment of Supreme Court, New York County (Milton A. Tingling, J.), entered June 19, 2012, awarding plaintiffs a sum of money, and bringing up for review an order, same court and Justice, entered January 6, 2012, which confirmed the Special Referee's report on damages should be modified, on the law and the facts, to vacate the award to plaintiffs of the amount of interest for which defendant was responsible on the past-due common expenses, remand the issue for determination by the Special Referee in accordance herewith, and otherwise affirmed, without costs. Appeal from the order should be dismissed as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: MARCH 21, 2013

CLERK