SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**DECEMBER 17, 2009**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Acosta, Román, JJ.

1478 Nelson Santiago, et al.,
Plaintiffs-Respondents,

Index 115904/06
590483/07

-against-

Fred-Doug 117, L.L.C., et al.,
Defendants-Appellants.

[And a Third-Party Action]

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Malapero & Prisco, LLP, New York (Frank J. Lombardo of counsel), for appellants.

Proner & Proner, New York (Tobi R. Salottolo of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered on or about March 31, 2009, which, to the extent appealed from as limited by the brief, granted plaintiffs' motion for summary judgment on the issue of liability under Labor Law § 240(1) and denied defendants' motion for summary judgment dismissing the Labor Law § 240(1) cause of action, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Labor Law § 240(1) imposes a duty to protect workers engaged in "the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure." While

"repair" of a broken or malfunctioning item is among the statute's enumerated activities, "routine maintenance" to prevent malfunction is not covered activity (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *see Craft v Clark Trading Corp.*, 257 AD2d 886, 887 [1999]). Plaintiff testified that he went to the Rite Aid pharmacy in response to a service call that the air conditioning was broken. The Rite Aid manager confirmed that he had called Concept, plaintiff's employer, to have the air conditioning fixed because the front of the store was excessively hot. However, the Concept service manager testified that he had dispatched plaintiff to the Rite Aid that day to complete maintenance work begun three days earlier. A Concept work order and invoice also indicate that plaintiff was doing maintenance work, changing filters and belts, and cleaning coils on three HVAC units to prevent future problems. These discordant versions of the facts preclude a determination, as a matter of law, as to whether plaintiff was doing covered repair work or non-actionable routine maintenance on the date of his accident.

Assuming a fact-finder determines that plaintiff was involved in covered repair work, the evidence raises the further issue of whether plaintiff's own actions were the sole proximate

cause of his injuries (*see Blake v Neighborhood Hous. Servs. Of N.Y. City*, 1 NY3d 280, 290 [2003]; *Lovall v Graves Bros., Inc.*, 63 AD3d 1528, 1530 [2009]; *Lopez v Bovis Lend Lease LMB, Inc.*, 26 AD3d 192 [2006]; *Meade v Rock McGraw, Inc.*, 307 AD2d 156 [2003]). Plaintiff testified that he was standing on an open eight-foot A-frame ladder placed sideways and secured about a foot from an open door to the Rite Aid manager's office, and that the store manager bumped the ladder as he squeezed past plaintiff to exit the office. Plaintiff stated that he fell off the ladder when it was bumped a second time, and after falling, he saw that the manager had re-entered his office. In contrast, the store manager testified that he saw plaintiff lean a closed ladder against the wall, unsecured, that he warned plaintiff that this was not safe, and that plaintiff replied that he knew what he was doing. He also testified that while the ladder blocked the doorway to his office, there was enough space for him to get through. This testimony raises the factual issue of whether plaintiff misused an otherwise adequate ladder by leaning it, unsecured, against the wall, after which the ladder slipped as he was moving on top of it.

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1813 The People of the State of New York, Ind. 3152/06
Respondent,

-against-

Alford Horsford, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Marc A. Sherman of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John Carter, J.), rendered October 15, 2008, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third and fourth degrees, and sentencing him, as a second felony drug offender, to an aggregate term of 4 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification, including its resolution of alleged inconsistencies in testimony. The identification was particularly reliable because the

undercover officer followed defendant after the sale and led the field team to him.

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

ENTERED: DECEMBER 17, 2009

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

1814 Verizon New York, Inc., Index 22596/05
Plaintiff-Appellant,

-against-

STD Fibre Works, LTD,
Defendant-Respondent.

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Solomon and Solomon, P.C., Albany (Douglas M. Fisher of counsel), for appellant.

Epstein & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for respondent.

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Order, Supreme Count, Bronx County (Sallie Manzanet-Daniels, J.), entered on or about April 8, 2009, which, upon renewal, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant installed underground cables in the subject area beginning in April 2003 and ending in June 2003. In connection with this work, it applied for and received permission to work in the manholes in the area. Some eight months later, following a cable outage, plaintiff entered one of the manholes and discovered damage to one of its cable boxes. According to plaintiff, defendant was the responsible party.

Summary judgment was properly granted as plaintiff failed to offer any evidence beyond mere speculation that defendant's employees damaged the subject cable box. Testimony from plaintiff's employee established that companies other than

defendant, as well as the New York City Fire Department, had keys to the manholes and therefore access to them without plaintiff's supervision, that employees from another company had entered the manhole on two occasions in April 2003, and that despite the fact that an inspector from plaintiff or its subsidiary was present when the work was performed by defendant, no inspector noticed any damage to the cable box prior to the outage in February 2004 (*see e.g. Bernstein v City of New York*, 69 NY2d 1020, 1021-1022 [1987] [where an accident may be caused by several possibilities, and where one or more cannot be traced back to the defendant, the plaintiff may not recover without sufficient proof that the defendant was liable]).

We have considered plaintiff's remaining contentions, including that Supreme Court abused its discretion in granting defendant's motion to renew, and find them unavailing.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

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

1815 In re Jessenia Shanelle R., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.,

Wanda Y. A., etc.,
Respondent-Appellant,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

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Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

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Appeal from orders of disposition, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about March 16, 2009, which, upon respondent-appellant's default, terminated her parental rights to the subject children, and committed custody and guardianship of the children to petitioner agency and the Commissioner of Social Services for purposes of adoption, unanimously dismissed, without costs.

No appeal lies from the orders of disposition, as they were entered upon appellant's default in appearing at the fact-finding and dispositional hearings (CPLR 5511; *Matter of Jessica Lee D.*, 44 AD3d 327 [2007]).

The application of appellant's assigned appellate counsel for leave to withdraw as counsel is granted, as there are no

nonfrivolous issues that could be raised on appeal (*Matter of Martha P.*, 46 AD3d 830 [2007]). Appellate counsel represents that he spoke to appellant's Family Court attorney and encouraged him to contact appellant to see if she wished to move to vacate her default, and that the Family Court attorney informed appellate counsel that he had lost all contact with appellant. It also appears that appellate counsel wrote to appellant advising her of his opinion that there are no viable appellate issues and of her right to file a pro se supplemental brief, but appellant has not taken advantage of that opportunity.

M-5135 ***In re Jessenia Shanelle R., and Others***

Motion seeking poor person relief and assignment of counsel denied.

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

ENTERED: DECEMBER 17, 2009

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

1816 Federico Fontanez, Index 17905/06
Plaintiff-Respondent,

-against-

Marc Samuel Lazarus, et al.,
Defendants,

David Borenstein, M.D.,
Defendant-Appellant.

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Schiavetti, Corgan, DiEdwards and Nicholson, LLP, New York (Angela M. Ribaudo of counsel), for appellant.

The Arce Law Office, PLLC, Bronx (Michael Arce of counsel), for respondent.

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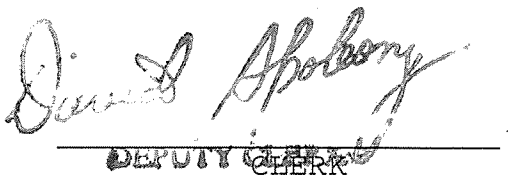
Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 14, 2008, which, in an action for personal injuries, upon reargument, denied, as untimely, defendant-appellant's motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

In a stipulation so-ordered by the court, any motions by defendants for summary judgment were to be "served and filed" by November 21, 2007, and that while appellant served its motion on November 21, it did not file it until November 30. Accordingly,

appellant was required, but failed, to show good cause for the late filing (*Corchado v City of New York*, 64 AD3d 429 [2009]).

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

ENTERED: DECEMBER 17, 2009



DEPUTY CLERK

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

1817 In re April Dequito, Index 113480/07
Petitioner-Appellant,

-against-

The New School for General Studies,
Respondent-Respondent.

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Woods & Lonergan, LLP, New York (James Francis Woods of counsel), for appellant.

Ward Norris Heller & Reidy LLP, Rochester (Heidi S. Martinez of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered on or about July 1, 2008, which denied the Article 78 petition to set aside respondent's determination to expel petitioner on the grounds of plagiarism, unanimously affirmed, without costs.

Contrary to petitioner's contention, the policy of expelling a student for plagiarizing at any stage of her Master's thesis is not arbitrary, capricious or irrational. There is no indication that respondent's determination was made in bad faith as the result of discrimination based on petitioner's national origin. Since there is no issue of fact with respect to that issue, a hearing was not required (*Matter of Feigman v Klepak*, 62 AD2d 816, 819 [1978]; *cf.* CPLR 7804[h]). Given that petitioner was repeatedly advised to remove the plagiarized portions of her thesis from her various drafts, we do not find the penalty of

expulsion to be shocking to one's sense of fairness.

The record indicates that respondent substantially complied with its procedures for suspending and expelling a student on the grounds of plagiarism (*see Matter of Trahms v Trustees of Columbia Univ. in City of N.Y.*, 245 AD2d 124, 125 [1997]). Petitioner received adequate notice of the ad hoc committee's hearing, as well as a meaningful opportunity to be heard at the appeals committee meeting. There is no indication in the record that respondent's policies prohibited the professor who reported the plagiarism from serving on the ad hoc committee, or the Associate Dean of Academic Services from serving on both the ad hoc and appeals committees.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

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

1818 Hsing Hsung Chuang, et al., Plaintiffs-Appellants, Index 100318/07

-against-

Whitehouse Condominium, et al., Defendants-Respondents.

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Meltzer, Lippe, Goldstein & Breitstone, LLP, Mineola (Michael H. Masri of counsel), for appellants.

Finder Novick Kerrigan LLP, New York (Marianna L. Picciocchi of counsel), for respondents.

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Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered April 21, 2008, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The affidavit of a member of the board of managers and the accompanying spread sheet showing the unit owners' attendance at the meeting and their votes on the construction work at issue established prima facie that the work was approved in accordance with the condominium's by-laws (*see* Real Property Law § 339-u). In opposition, plaintiffs failed to submit evidence to raise an issue of fact.

To the extent plaintiffs argue that discovery is needed, they failed to demonstrate either that the required evidence is within defendants' exclusive knowledge or that they "at least made some attempt to discover facts at variance with

[defendants'] proof" (*see Voluto Ventures, LLC v Jenkens & Gilchrist Parker Chapin LLP*, 44 AD3d 557, 557 [2007]).

We have reviewed plaintiffs' remaining arguments and find them without merit.

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1819 The People of the State of New York, Ind. 5122/06
Respondent,

-against-

Hector Garcia,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Vincent Rivellese of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J. at violation of plea agreement hearing; Ronald A. Zweibel, J. at plea and sentence), rendered May 15, 2008, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 5 years, unanimously affirmed.

Regardless of whether defendant's waiver of his right to appeal forecloses review of the sufficiency of the evidence that he violated the terms of his plea agreement by failing to complete a drug treatment program, the court properly found that defendant had violated the rules of the program. A counselor at the treatment facility testified that defendant was found in possession of a syringe cap and a glassine envelope containing what appeared to be heroin. This was sufficient for the court to find that defendant had violated the program's rules and had been

properly dismissed from it, despite the fact that the contraband items had been discarded without being tested. We find no reason to disturb the hearing court's credibility determination regarding the counselor's testimony.

Defendant's valid waiver of his right to appeal forecloses review of his excessive sentence argument. As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 17, 2009

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

1820 Adele Cignarella, et al., Index 7772/06
Plaintiffs-Respondents,

-against-

Anjoe-A.J. Market, Inc., doing business as MET Foodmarkets, et al.,
Defendants-Appellants.

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Wilson, Elser, Moskowitz, Edelman & Dicker LLP, White Plains (Michael L. Boulhosa of counsel), for appellants.

Joseph A. Marra, Yonkers (Vincent P. Fiore of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 14, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff allegedly sustained personal injuries in July 2005 when she tripped and fell at a local supermarket. She alleged that her foot got caught in a plastic or nylon looped tie wrap, used by defendants to secure newspapers, which was laying on the concrete sidewalk inside the shopping cart security barrier, immediately adjacent to the customer entrance. Plaintiff fell to the ground, fractured her left shoulder, and tore her rotator cuff.

Based on deposition testimony that this debris was clearly visible at the time plaintiff fell, defendants have not established entitlement to summary judgment as a matter of law.

Even if routine maintenance "procedures" were being followed on the date of the accident, simply walking around the supermarket looking for hazardous conditions, without more, would not adequately establish precisely when the area of the accident was last inspected or cleaned (*see Porco v Marshalls Dept. Stores*, 30 AD3d 284 [2006]; *Deluna-Cole v Tonali, Inc.*, 303 AD2d 186 [2003]).

Even assuming that defendants cleaned or inspected the area on a regular basis prior to the accident, plaintiffs established, through the testimony of their nonparty witness, a triable issue of fact as to whether an ongoing and recurring dangerous condition existed in the area that was routinely left unaddressed by defendants. Under such circumstances, defendants' testimony that if the sidewalk was dirty, the assistant store manager would send someone to clean it, "did no more than confirm the existence of a question of fact as to the ongoing condition" of the entranceway (*O'Connor-Miele v Barhite & Holzinger*, 234 AD2d 106, 107 [1996]).

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1821 The People of the State of New York, Ind. 1226/08
Respondent,

-against-

Curtis Bedford,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Ambrecht, J.), rendered on or about March 17, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

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

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

1822 Urban Archaeology Ltd, Index 600827/09
Plaintiff-Appellant,

-against-

207 E. 57th Street LLC, etc.,
Defendant-Respondent.

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Alpert Butler & Weiss, P.C., New York (Clark E. Alpert of counsel), for appellant.

Epstein, Becker & Green, P.C., New York (Adrian Zuckerman of counsel), for respondent.

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Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered September 14, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, with costs.

The force majeure clause of the parties' lease agreement contemplates either party's inability to perform its obligations under the lease due to "any cause whatsoever" beyond the party's control - other than financial hardship. This clause conclusively establishes a defense to plaintiff's claim that it is excused from performing under the lease by reason of the effect that the downturn in the economy has had on it (*see Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902-903 [1987]).

We reject plaintiff's argument based on what it describes as the otherwise broad language of the clause.

Nor does the doctrine of impossibility avail plaintiff, since impossibility occasioned by financial hardship does not

excuse performance of a contract (*see 407 E. 61st Garage v Savoy Fifth Ave. Corp.*, 23 NY2d 275, 281-282 [1968]). Moreover, an economic downturn could have been foreseen or guarded against in the lease (*see Kel Kim Corp.*, 70 NY2d at 902).

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

ENTERED: DECEMBER 17, 2009

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

1823 330 West 86th Street, LLC, Index 600073/08
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant-Respondent-Appellant,

328 Owners Corp., et al.,
Defendants-Respondents.

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Edward B. Safran, New York, for appellant-respondent.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent-appellant.

Marcus Rosenberg & Diamond LLP, New York (David Rosenberg of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered July 1, 2008, which denied plaintiff's motion for summary judgment declaring a deed restriction extinguished on the ground that its purpose has been accomplished, and defendant City's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's predecessor in interest purchased the subject building from the City pursuant to the Urban Development Action Area Act (UDAAA) (codified in General Municipal Law art 16) (*see 328 Owners Corp. v 330 W. 86 Oaks Corp.*, 8 NY3d 372 [2007]). The UDAAA was enacted for the purpose of "correct[ing]" "such substandard, insanitary, blighted, deteriorated or deteriorating conditions, factors, and characteristics" as cause areas to

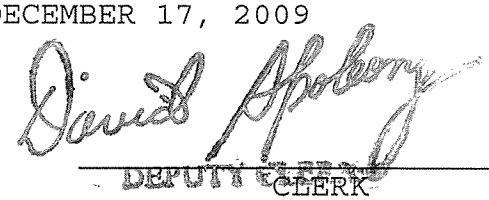
become "slum or blighted areas" by, inter alia, "rehabilitation, restoration or conservation of such areas" (General Municipal Law § 691). The deed by which the building was transferred recites that "the project to be undertaken by [plaintiff's predecessor] consists solely of the rehabilitation or conservation of existing private or multiple dwellings or the construction of one to four unit dwellings without any change in land use permitted by existing zoning" (*see* General Municipal Law § 695[6][d]). The Court of Appeals having held that this restriction could be enforced against plaintiff as successor grantee (*see 328 Owners Corp., supra*), plaintiff commenced this action for a judgment declaring that the restriction is unenforceable on the ground that it "is of no actual and substantial benefit to the persons seeking its enforcement . . . because the purpose of the restriction has already been accomplished . . ." (Real Property Actions and Proceedings Law § 1951; *see Chambers v Old Stone Hill Rd. Assoc.*, 1 NY3d 424, 434 [2004]). Plaintiff, which allegedly seeks to demolish the building and replace it with a high-rise "sliver" apartment building (*see 328 Owners Corp.*, 8 NY3d at 279), argues that the purpose of the restriction was rehabilitation of the building and that the building has been rehabilitated. The City contends that plaintiff too narrowly interprets the term "rehabilitation," i.e., as a repair project, and that "rehabilitation" must be read in conjunction with

"conservation," which would preclude demolition of the building.

We agree with the motion court that, even in the absence of a definition of "rehabilitation" in the UDAAA, plaintiff cannot be found as a matter of law to have fully rehabilitated the building. The record raises issues of fact whether all outstanding building code violations have been removed and whether certain work was performed without the necessary permits, contrary to the requirements of the deed that all work be performed in accordance with local law, and contains no evidence, such as invoices or contracts, to substantiate plaintiff's claim that the necessary rehabilitative work was completed. Nor has the City established as a matter of law that the terms "rehabilitation" and "conservation," which are set forth in the deed in the disjunctive, are meant to be read in conjunction with each other, or that the City's general goal of improving the availability and affordability of quality housing in New York City can be inferred from the deed. Resolution of such ambiguities must await discovery as to the intent of the parties to the deed.

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

ENTERED: DECEMBER 17, 2009



DEPUTY CLERK

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

1824 In re East River Realty Company, LLC, Index 117040/07
Petitioner-Respondent,

-against-

New York State Department of
Environmental Conservation,
Respondent-Appellant.

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Andrew M. Cuomo, Attorney General, New York (Todd D. Ommen of counsel), for appellant.

Mayer Brown LLP, Washington, DC (Richard Ben-Veniste of counsel), for respondent.

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Judgment (denominated an order), Supreme Court, New York County (Lewis Bart Stone, J.), entered October 30, 2008, setting aside respondent's determination dated October 9, 2007, which excluded three properties belonging to petitioner from the Brownfield Cleanup Program (Environmental Conservation Law, art 27, tit 14) (BCP), reinstating respondent's earlier acceptance of the three properties into the BCP, and ordering respondent to execute and deliver to petitioner a cleanup agreement as to the three properties, unanimously affirmed, without costs.

The BCP was enacted "to encourage persons to voluntarily remediate brownfield sites for reuse and redevelopment" (Environmental Conservation Law § 1403). "Brownfield site" is defined as "any real property, the redevelopment or reuse of which may be complicated by the presence or potential presence of a contaminant" (section 1405[2]). A would-be participant in the

program must submit a request that includes information "sufficient to allow the department to determine eligibility and the current, intended and reasonably anticipated future land use of the site" (section 1407[1]). We reject respondent's argument that a property may be deemed ineligible for the program on the ground that it would have been remediated in any event (*see Matter of Destiny USA Dev., LLC v New York State Dept. of Envtl. Conservation*, 63 AD3d 1568, 1570 [2009] [rejecting respondent's reliance on extra-statutory "factors (that) effectively limit inclusion in the BCP to parcels of real property that, but for BCP participation, would remain undeveloped"]; *Matter of HLP Props. LLC v New York State Dept. of Envtl. Conservation*, 21 Misc 3d 658, 669 [2008] [rejecting respondent's use of "its own administratively-created and far more limiting guidelines to determine petitioners' ineligibility"]).

Given the extensive record before it, the court had sufficient evidence on which to base its determination that petitioner was eligible for inclusion in the BCP and therefore properly declined to remand the matter to respondent for

additional consideration (*see Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 10 NY3d 846 [2008]; *Destiny USA Dev.*, 63 AD3d at 1573).

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1825 The People of the State of New York, Ind. 4108/06
Respondent,

-against-

Jeffrey Cordisco,
Defendant-Appellant.

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Patrick J. Brackley, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 27, 2009, convicting defendant, after a jury trial, of leaving the scene of an incident without reporting, as a felony, and sentencing him to a term of 1 year, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

Defendant's challenge to the sufficiency of the evidence establishing the element of "knowing or having cause to know that personal injury has been caused to another person" (Vehicle and Traffic Law § 600[2][a]) is unpreserved and we decline to review it in the interest of justice. While the court made a postverdict ruling on a somewhat related issue, it did not "expressly decide[]" (CPL 470.05[2]) the particular issue presented on appeal (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]; *compare People v Prado*, 4 NY3d 725 [2004] [court's

factual findings in nonjury trial expressly decided issue]; *see also People v Colon*, 46 AD3d 260, 263 [2007]). As an alternative holding, we find that the evidence was legally sufficient. We also find that the verdict was not against the weight of the evidence. Viewing the sufficiency (*see People v Ford*, 11 NY3d 875, 878 [2008]) and the weight (*see People v Danielson*, 9 NY3d 342, 349 [2007]) of the evidence in light of the elements of the crime as charged to the jury, we conclude that the evidence supports an inference that defendant knew or had cause to know that someone had been injured in the accident.

Since defendant only objected to the court's response to the final note, and in doing so took a different position from the one he raises on appeal (*see People v Whalen*, 59 NY2d 273, 280 [1983]; *People v Williams*, 297 AD2d 565 [2002], *lv denied* 99 NY2d 566 [2002]), his contentions regarding the court's responses to a series of jury notes are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the court responded meaningfully to the jury's inquiries (*see People v Almodovar*, 62 NY2d 126, 131 [1984]).

The court properly declined to submit leaving the scene of an incident under Vehicle and Traffic Law § 600(1) as a lesser included offense of that crime under Vehicle and Traffic Law § 600(2)(a). Since a motor vehicle accident can, in the abstract, cause personal injury without causing property damage, the

property damage offense does not qualify as a lesser included offense under the impossibility test (*see People v Glover*, 57 NY2d 61, 63 [1982]). As the Court of Appeals has recently reiterated, if a proposed lesser included offense does not meet the impossibility test, it does not matter whether it fits the particular facts of the case (*People v Davis*, __ NY3d __, 2009 NY Slip Op 08676, *3 [Nov 24, 2009]).

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK
CLERK

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

1826 Marling Sone, Index 103992/06
Plaintiff-Appellant,

-against-

Cheryl Qamar,
Defendant-Respondent.

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James M. Sheridan, Jr., Garden City, for appellant.

Cullen and Dykman LLP, Brooklyn (Ian T. Williamson of counsel), for respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered November 28, 2008, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant satisfied her initial burden of demonstrating, prima facie, that plaintiff did not sustain a serious injury as defined by Insurance Law 5102(d). Defendant submitted the affirmed report of a neurologist who found no neurological deficits and noted only a 20 degree limitation on flexion in plaintiff's lumbosacral spine.

Plaintiff failed to meet her consequent burden to provide evidence which raised a triable issue of fact concerning whether she sustained such a serious injury, instead relying on the finding of defendant's doctor. However, the limitation noted by defendant's doctor is not significant within the meaning of

Insurance Law 5102(d) (*see Style v Joseph*, 32 AD3d 212, 214 [2006]). Moreover, defendant's doctor opined that it was not causally related to the accident and plaintiff provided nothing which raised a triable issue of fact concerning this element of proof. Accordingly, the court properly granted summary judgment.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK
CLERK

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

1827 Manuel J. Parrish, etc., Index 603786/04
Plaintiff-Appellant,

-against-

Unidisc Music, Inc., et al.,
Defendants-Respondents.

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Gabin B. Rubin, New York, for appellant.

Cinque & Cinque, P.C., New York (James P. Cinque of counsel), for respondents.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered September 26, 2008, which, in an action for artist's royalties stemming from the alleged breach of a recording agreement, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff entered into a recording agreement with defendants' predecessor in 1982 pursuant to which he would receive royalties based on the sale of his recordings. In October 1983, the parties agreed to terminate the recording agreement thereby freeing plaintiff to record music for other companies. The termination agreement also provided that plaintiff was no longer entitled to further royalties; plaintiff's signature appears on the termination agreement. Thereafter, in 1998, plaintiff's counsel contacted defendants inquiring into plaintiff's entitlement to royalties, and defendants' counsel replied that as per the termination

agreement, plaintiff was no longer entitled to receive such royalties. In 2004, plaintiff commenced this action alleging, inter alia, breach of contract and seeking a declaration that his signature on the termination agreement was a forgery.

"A cause of action based on fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was discovered or with reasonable diligence could have been discovered, whichever is later" (*DeLuca v DeLuca*, 48 AD3d 341, 341 [2008]; *see* CPLR 213[8]; 203[g]). Here, the record shows that plaintiff was put on notice of the alleged fraud in 1998, when he learned that based on the termination agreement signed by him, defendants claimed a right to his work, but plaintiff failed to further investigate their claim at that time, and did not file suit within two years of when the alleged fraud should have been discovered (*see Prestandrea v Stein*, 262 AD2d 621, 622 [1999]). Since this action was untimely commenced, we decline to reach the issue of whether the fraud was sufficiently pleaded (*see DeLuca*, 48 AD3d at 341).

Plaintiff's remaining claims for breach of contract, unjust enrichment and rescission are barred by the documentary evidence, i.e., the unambiguous terms of the termination agreement, and the applicable statute of limitations (*see* CPLR 213[2]).

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

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1828 AJW Partners LLC, et al., Index 602987/08
Plaintiffs-Respondents,

-against-

Itronics Inc., et al.,
Defendants-Appellants.

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Fox Rothschild LLP, New York (Ernest E. Badway of counsel), for appellants.

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Thomas J. Fleming of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 30, 2009, which granted plaintiffs' motion to dismiss seven of eight counterclaims and denied defendants' cross motion to dismiss the complaint, unanimously affirmed, with costs.

The parties entered into a complex financing arrangement, as set out in a securities purchase agreement pursuant to which defendants issued callable secured convertible notes valued at the loan amount of $3.25 million. When, several years later, defendants refused to honor plaintiffs' exercise of stock conversion rights, plaintiffs brought this action for breach of contract. In response, defendants interposed the subject counterclaims, alleging that plaintiffs violated the parties' agreement by short selling the stock of defendant Itronics Inc. and by engaging in market manipulation in order to maximize

gains. Both parties moved to dismiss the others' claims.

The counterclaim alleging that the agreement allowed for a usurious rate of interest was properly dismissed, as the usury laws do not apply here. In general, corporations may not interpose a usury defense, except for criminal usury as defined in Penal Law § 190.40 (General Obligations Law § 5-521). General Obligations Law § 5-501(6)(b), however, provides that penal usury laws do not apply where, as here, loans in excess of $2.5 million are issued in one or more installments pursuant to a written agreement. The counterclaim alleging fraud was properly dismissed, as it is based on a mere general allegation that plaintiffs entered into the agreement with no intent to perform (*see Laura Corio, M.D., PLLC v R. Lewin Interior Design, Inc.*, 49 AD3d 411, 412 [2008]). The counterclaims alleging negligent misrepresentation and breach of fiduciary duty were properly dismissed, as there can be no fiduciary obligation in a contractual arm's length relationship between a debtor and note-holding creditor (*see River Glen Assoc. v Merrill Lynch Credit Corp.*, 295 AD2d 274, 275 [2005]; *SNS Bank v Citibank*, 7 AD3d 352, 354 [2004]). Here, the parties' agreement stated that they acted solely in arm's length capacities and that plaintiffs were not fiduciaries of defendants. The counterclaims alleging conversion and breach of the implied covenant of good faith and fair dealing were properly dismissed, as they are based on a claim that

plaintiffs had violated the parties' agreement by short selling Itronics Inc.'s stock, and are thus duplicative of the remaining counterclaim alleging breach of contract on that same ground (*see Levi v Utica First Ins. Co.*, 12 AD3d 256, 257-258 [2004]; *Yeterian v Heather Mills N.V. Inc.*, 183 AD2d 493, 494 [1992]). The counterclaim alleging breach of contract due to a purported violation of a prohibition against plaintiffs' acquiring beneficial ownership of more than 4.99% of Itronics Inc.'s common stock was properly dismissed, because, as made clear by defendants' filings with the Securities & Exchange Commission, the prohibition prevented plaintiffs from holding more than 4.99% of the corporation's stock at any one time, but permitted plaintiffs to convert and sell shares in excess of that percentage over the life of the loan so long its actual holdings remained below the conversion cap.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

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

1829 Andrew M. Cuomo, Attorney General of the State of New York, et al., Plaintiffs-Respondents, Index 400071/08

-against-

Darshan Uppal, etc., et al., Defendants.

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Capital Business Credit LLC, Nonparty-Appellant.

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Hahn & Hessen LLP, New York (John P. Amato of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Steven C. Wu of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered April 3, 2009, which denied the motion of nonparty Capital Business Credit LLC to release at least $210,654.98 from funds held in escrow, unanimously affirmed, without costs.

Contrary to plaintiffs' claim, Capital does not have to await the conclusion of this forfeiture action to request the release of funds; paragraph 7 of the parties' stipulation reserved Capital's right to make motions.

Also contrary to plaintiffs' contention, Capital is not limited to the remedy of receiving proceeds from a forfeiture sale; unlike the situation in *Property Clerk of N.Y. City Police Dept. v Molomo* (81 NY2d 936 [1993]) and *City of New York v Salamon* (161 AD2d 470 [1990]), the property in which Capital has

a perfected security interest is not the instrumentality of a crime. Indeed, Capital has shown that at least $195,056.41 of the escrowed funds ($223,107 minus $28,050.59) are not subject to forfeiture (*see* CPLR 1311[1]) because they are neither proceeds of a crime (*see* CPLR 1310[2]) nor substituted proceeds (*see* CPLR 1310[3]); rather, they came from the $300,000 that Capital wired into the bank account of non-criminal defendant Shivalik Enterprises, Inc. on January 10, 2008.

Nevertheless, it was not an improvident exercise of the court's discretion to deny Capital's motion. There was conflicting evidence as to whether Shivalik was out of business, i.e., whether Capital's loan to Shivalik could be repaid from some source other than the escrowed funds. Furthermore, Capital has not shown any compelling circumstance requiring the immediate release of $210,654.98 (*cf.* CPLR 1311[4][d]); it does not claim, for example, that it will go out of business if it does not receive that sum right away. The escrowed funds are in an interest-bearing account; therefore, if Capital eventually receives those funds, it will be compensated for the delay.

Since Capital has adequate legal remedies, it is not necessary to impose a constructive trust on the escrowed funds (*see e.g. Bertoni v Catucci*, 117 AD2d 892, 895 [1986]).

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

ENTERED: DECEMBER 17, 2009

CLERK

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

1830 The People of the State of New York, Ind. 3839/04
Respondent,

-against-

Anthony Rudder,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

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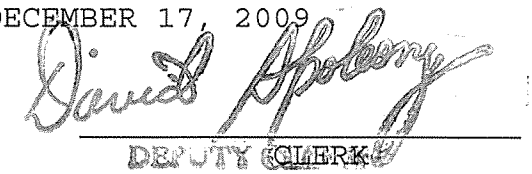
Judgment of resentence, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered March 27, 2008, revoking a prior sentence of probation and resentencing defendant to a term of 1½ years, unanimously modified, on the law, to the extent of vacating the sentence and remanding to Supreme Court for resentencing, and otherwise affirmed.

As the People concede, defendant should have been sentenced in accordance with the statute in effect at the time of the underlying crime of criminal sale of a controlled substance in the fourth degree, which provided for an indeterminate sentence.

We have considered and rejected defendant's request for a remedy other than a resentencing proceeding.

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

ENTERED: DECEMBER 17, 2009



DEPUTY CLERK

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

1831N Cynthia Kitchen, Index 16717/04
Plaintiff-Appellant,

-against-

Mamadou L. Diakhate,
Defendant-Respondent,

Elicer Diaz, et al.,
Defendants.

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Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

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

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Appeal from order, Supreme Court, Bronx County (Howard R. Silver, J.), entered February 9, 2009, to the extent it denied plaintiff's motion to reargue an in limine order precluding certain evidence, unanimously dismissed, without costs, as taken from a non-appealable paper.

Denial of a motion to reargue is not appealable as of right (*Freeman v Prince Leasing Corp.*, 49 AD3d 455 [2008]). This motion clearly sought reargument, not vacatur, as it was alternatively denominated (*see People v American Motor Club*, 241 AD2d 409 [1997]).

Were we to consider the appeal on the merits, we would affirm the preclusion of evidence concerning plaintiff's knee

injury, as the undue 2½-year delay in correcting her deposition testimony until the eve of trial was prejudicial to defendants.

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

ENTERED: DECEMBER 17, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Catterson, DeGrasse, JJ.

95 L&L Painting Co., Inc., et al., Index 117508/06
Petitioners-Appellants,

-against-

The Contract Dispute Resolution
Board of the City of New York, et al.,
Respondents-Respondents.

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Georgoulis & Associates PLLC, New York (Michael McDermott of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Alan G. Krams of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 22, 2008, which denied the petition to annul a determination of respondent Contract Dispute Resolution Board (CDRB) rejecting petitioners' claim for compensation for additional work under a contract with respondent Department of Transportation (DOT), affirmed, without costs.

Following competitive bidding, DOT awarded petitioner L&L a public works contract for removal of lead-based paint from the Queensboro Bridge. The contract requires L&L to construct a protective scaffolding platform above the bridge's roadways. The instant dispute stems from the parties' conflicting interpretations of a contract drawing on a document identified as "Sheet 26R," which consists of two drawings and a column of explanatory notes. The drawing of the main bridge typical cross section depicts the north and south "outer," "inner" and "upper"

roadways of the bridge. Note 5 reads: "Minimum vertical clearance of 14 feet shall be maintained above all roadways." The only references to note 5 in the cross section drawing consist of two lines showing clearance on the south inner and upper roadways. However, the outer roadway is approximately 18 inches higher than the inner roadway. Nevertheless, the cross section drawing depicts the protective platform as a straight horizontal plane notwithstanding the difference in elevation. Based on the elevation differential, L&L's platform subcontractor, petitioner Odyssey, submitted to DOT a proposed shop drawing placing the protective platform at 10 feet 6 inches, instead of 14 feet, above the outer roadway surface. DOT's engineering consultant rejected the shop drawing and directed Odyssey to amend it to conform to the 14-foot vertical clearance requirements set forth under Note 5. This amendment required L&L to incur what it claims to be additional costs stemming from the necessary relocation of existing power cables, among other things.

Based upon the foregoing, L&L filed requests for the payment of its purported additional costs with DOT and the Comptroller of the City of New York. Upon the denial of its requests, L&L petitioned CDRB for a review, pointing out as follows:

> [T]he elevation of the inner roadway and the outer roadway are significantly different. If the elevation of the platform is maintained and the elevation of the roadway is different, it is impossible to maintain the same clearance. This is an ambiguity in the contract documents.

At oral argument, L&L urged CDRB to construe the ambiguity against DOT, the drafter of the contract. With one dissent, the CDRB panel denied L&L's petition on the ground that even though the drawing on Sheet 26R was ambiguous, L&L failed in its responsibility to request clarification of the ambiguity prior to bidding. In this regard, paragraph 7(A) of the pre-bid information package required bidders to examine the contract documents and make written requests for "an interpretation or correction of every patent ambiguity, inconsistency or error therein which should have been discovered by a reasonably prudent bidder."

The instant Article 78 proceeding is brought on the ground that CDRB's determination was arbitrary and capricious. Petitioners allege that CDRB's decision disregarded the contract documents by requiring petitioners to discover and seek clarification of a latent ambiguity. Supreme Court dismissed the petition, finding the ambiguity on Sheet 26R to be patent. We affirm for the following reasons.

Note 5, which textually requires the 14-foot vertical clearance above *all* roadways, is referenced in the drawing only with respect to the south inner and upper roadways. The issue

that divides the parties could have been obviated if the clearance requirement had been limited to "these roadways," "this roadway" or even "roadway," instead of "all roadways." Accordingly, there is a rational basis for CDRB's determination that the drawing on Sheet 26R is ambiguous. Because the record contains no expert opinion on the subject, we find no basis for our dissenting colleague's conclusion that "there appears to be no engineering ambiguity in the plan attendant to the contract." The dissent also posits that an engineer, the intended reader of the contract, would reasonably conclude that the minimum 14-foot clearance is not required on the outer roadway. As noted above, DOT's engineering consultant rejected this contention in a letter from a professional engineer, stating that note 5 is general and applies to all roadways. As the record contains no evidence of a contrary engineering opinion, we cannot presume that any other engineer would have reached a different conclusion.

According to Black's Law Dictionary, a patent ambiguity is one that appears on the face of a document and arises from the language itself. A latent ambiguity does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed (*see*

*id.*). The ambiguity here is patent because its source is note 5's textual reference to "all roadways," in contrast to the apparent indication on the drawing that note 5 applies only to the south inner and upper roadways.

All concur except Nardelli and Catterson, JJ. who dissent in a memorandum by Catterson, J. as follows:

CATTERSON, J. (dissenting)

The disputed notations of the contract scale plan drawing in question are unambiguous in the eyes of its intended reader, an engineer. Furthermore, the use of a scale rule when viewing those scale plan drawings establishes that they are unambiguous and that petitioners correctly interpreted them. Hence, I believe the agency's decision was arbitrary and capricious, and should be annulled.

This action arises out of an article 78 petition in which petitioners seek to annul a determination by New York City's Contract Dispute Resolution Board (hereinafter referred to as "CDRB") that the contract at issue was ambiguous, that under the terms of the contract the ambiguity was required to be resolved prior to bidding, and thus petitioners were not entitled to compensation for extra work. Subsequently, the Supreme Court confirmed the determination holding that CDRB's decision had a rational basis.

The contract at issue is for the removal of lead paint from the Queensboro (59$^{th}$ Street) Bridge. As part of the paint removal project, the respondent Department of Transportation (hereinafter referred to as "DOT") required that the petitioner L&L install a protective shielding platform above the roadways to protect vehicles and pedestrians on the bridge from falling debris, and to protect workers at the elevated level.

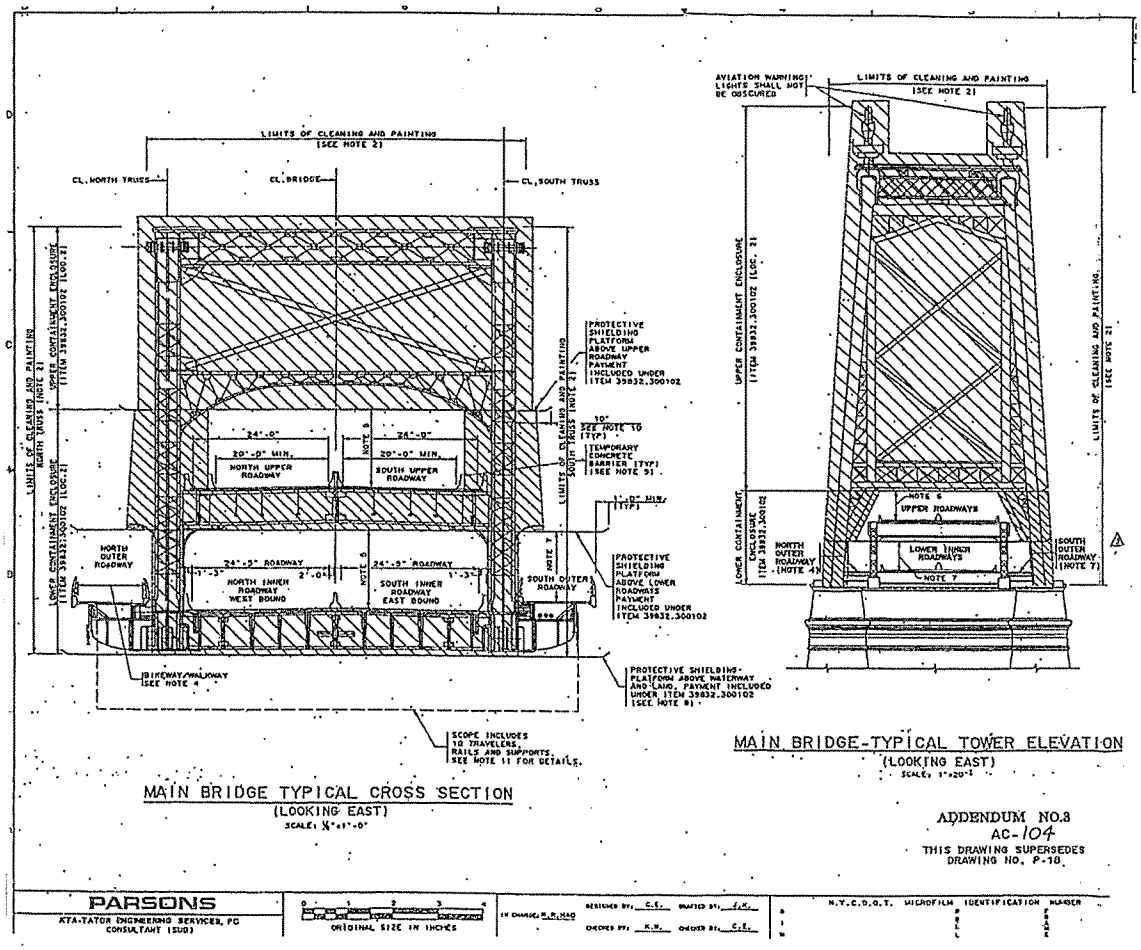
The record reflects that the bridge has ten lanes divided

among three major sections: the upper roadways, the lower inner roadway, and the lower outer roadway. At issue in this case are the notations for the lower level where the two outer roadways run on the north and south side of the bridge (the north side having limited access solely to pedestrians and bicycles while the south side is limited to passenger cars), and where the inner roadway consists of four lanes. It is undisputed that the outer roadways sit at a higher elevation, at approximately 1 foot 5 inches higher than the inner roadway.

On September 18, 2003, L&L was awarded the contract by DOT, and on March 3, 2004, subcontracted petitioner Odyssey to install the platform, designed by DOT's Project Engineer, Parsons Transportation Group. Prior to its bid in February 2004, Odyssey took measurements of the bridge to confirm the specifications of Parsons's design drawing No. P-18R, Sheet 26R, which is a plan drawn to scale showing a "typical cross section" of the bridge and a "typical tower elevation" (hereinafter referred to as "the plan"). Odyssey discovered in its measurements that the maximum clearance for the outer roadways was 12 feet 8 inches due to the higher elevation combined with the placing of the bridge towers, utility lines, and light fixtures. After Odyssey took field measurements and adjusted their designs to account for the outer roadway's actual maximum clearance, Parsons approved the design.

In the plan, the platform is marked as a horizontal line that runs above the north outer roadway and continues over the

four lanes of the inner roadway and across the top of the south outer roadway. The platform, as drawn, is flat and level all the way across the two outer roadways and inner roadway. Notably, the platform as drawn does not compensate for the height differential between the north outer roadway and the inner roadway or between the south outer roadway and the inner roadway. Therefore, the plan as drawn indicates that the height clearance of the platform over the inner roadways is greater than the height clearance of the platform over the two outer roadways, the difference being the change in elevation between inner and outer roadways. It is uncontroverted that the plan is drawn to scale.



It is also notable that only the four lanes of the inner roadway are designated on the plan by a reference to Note 5 on a vertical line drawn between the roadway and the platform. On the right-hand side of the plan are the listings of the notations associated with the engineer's design. Specifically, Note 5 states, "Minimum vertical clearance of 14 feet shall be maintained above all roadways." Correspondingly, only the south outer roadway is designated by a reference to Note 7, which states, "All protective shielding platforms and containments shall be installed in accordance with approved shop drawings to the satisfaction of the contractor's engineer." The north outer roadway is designated by a reference to Note 4, which states that "During construction, the entire width of bikeway/walkway on the north outer roadway shall not be reduced or obstructed at any time."

The record reflects that Odyssey deduced these notations meant all roadways designated with Note 5 (i.e. inner roadways) would have a minimum vertical clearance of 14 feet under the platform. Likewise, Odyssey interpreted Note 7 to mean the platform was to be installed above the south outer roadway in accordance with shop drawings showing there would be less than a 14-foot clearance along the outer roadways.

However, following approval by Parsons and the award of the contract to L&L, DOT directed L&L to redo the design with at

least 14 feet of clearance between the platform and the outer roadways. L&L requested more funding for the additional work required to construct the platform 14 feet above the outer roadways, due to the hindrances of the light posts and the necessary relocation of electrical cables. DOT refused to pay for the additional work, at which point the dispute came before CDRB.

On July 27, 2006, CDRB held, by a vote of 2-1, that DOT's plans created confusion between the notations and the actual plan, resulting in an ambiguity according to the contract. CDRB thus held that L&L should have sought clarification on the ambiguity in the pre-bidding meeting. Thus, CDRB held the contractor was not entitled to additional compensation. Furthermore, CDRB found that Parsons had the ability to approve certain parts of the project but ultimately left approval up to the City. However, the sole dissent, coming from the only engineer on the panel, concluded that "from a construction/engineering point of view, [the conclusion] reached by L&L [for the platform's placement] was reasonable."

On January 22, 2008, the court below denied the petition to set aside CDRB's determination on the grounds that the decision was not arbitrary or capricious. The court found it rational for CDRB to find ambiguity between Note 5 and the plan because Note 5 said "all roadways" but did not make clear whether it was all

lanes of the inner roadway or all the lanes including the outer roadways. Finally, the court noted that where a clause for pre-bid clarification of ambiguities exists in a contract, contractors are subject to the City's interpretation if they fail to adhere to it.

The court erred in finding a rational basis for CDRB's decision. It ignored the opinion of the sole engineer on the board, and so the context of both the designs and the notations was not properly considered from the appropriate viewpoint of the intended readers, i.e., engineers rather than lawyers.

It would be apparent to an engineer that Note 5 cannot be read independently of the plan, which clearly and specifically places Note 5 on the inner roadway and not on the outer roadways. DOT argues, and the court agreed that the discrepancy between the language in Note 5 with regard to the outer roadways and the plan is a rational basis for a finding of ambiguity. However, the only means by which the intended reader can initially apply Note 5 to outer roadways is to purposely read Note 5 standing alone and outside the context of the plan.

Likewise, it is also apparent that the plan is drawn to scale. In other words, the intended reader, the engineer, could measure the designated height of the platform for the inner roadway as it compares to the designated height of the platform for the outer roadway. In doing so, the intended reader would

reasonably conclude that the 14 feet is not required for the outer roadway due to that roadway's elevation differential and the unadjusted level line on the drawing representing the platform.

The plan cannot be properly viewed in the same way as an accountant's worksheet or lawyer's brief, but rather must be read as an engineer and others in the field of construction would read it. Indeed, the only engineer on the CDRB panel read it to mean something entirely different from the interpretation of the others on the panel.

Since, in my opinion, this is an engineer's problem and there appears to be no engineering ambiguity in the plan attendant to the contract, the clause for pre-bid clarification on ambiguities does not apply. Moreover, it is apparent that a 14-foot requirement applied to the outer roadways would substantially increase the work required of L&L and Odyssey. There is no evidence in the contract of DOT's intent to require such extra work as relocating electrical cables. Moreover, DOT could not have reasonably expected L&L and Odyssey to complete more than the estimated $1 million worth of extra work without compensation.

Furthermore, DOT's argument for the 14-foot requirement over the outer roadway as a safety measure is not persuasive, but rather arbitrary and unreasonable. For example, the posted

height clearance for travel on the south outer roadway is only 8 feet 5 inches, and there are a number of fixtures on the bridge that are already situated below the 14-foot requirement, such as light posts, utility lines, and a portion of the bridge's towers.

Consequently, there was no rational basis for the board's finding of ambiguity in the drawing and notations, and so the determination should be annulled.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Nardelli, Catterson, JJ.

433 In re Mutual of America Life Insurance Company, Petitioner-Appellant, Index 211452/02

-against-

The Tax Commission, et al., Respondents-Respondents.

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Stroock & Stroock & Lavan LLP, New York (Joseph L. Forstadt and Stanley Parness of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Rita D. Dumain of counsel), for respondents.

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Order and judgment, Supreme Court, New York County (Leland G. DeGrasse, J.), entered on or about February 19, 2008 which, insofar as appealed from, reduced the assessed valuation of petitioner's property for the tax year 1996-1997 to $62,409,542 and confirmed the assessed valuations for the tax years 1997-1998 through 2001-2002, unanimously modified, on the law, to the extent that the trial court's findings of assessed value of the subject building for the years at issue is subject to correction, on remand, by the substitution of actual rent where available and the deduction of escalation income, and otherwise affirmed, without costs.

In these consolidated tax certiorari special proceedings, for tax years 1996-97 through 2003-04, the petitioner, Mutual of America Life Insurance Company (hereinafter referred to as "Mutual"), owner of a building at 320 Park Avenue, Manhattan,

challenges the assessed valuation of the property by The Tax Commission and The Commissioner of Finance of The City of New York (hereinafter referred to as the "City"). On appeal, Mutual asserts, inter alia, that the trial court overvalued the property by disallowing an annual capital expenditure deduction for leasing costs on owner-occupied space. Because there is no legal authority directly on point, and neither party cites to any section of the tax code to support its arguments, this is a case of first impression on the issue of whether such leasing costs can be taken as a below-the-line deduction[1] in the valuation of an investment property for tax purposes. We agree with the trial court that they may not be so deducted except where owner-occupied space becomes a de facto vacancy and the deductions are subject to proof.

The undisputed facts of this case are as follows: Mutual acquired the 34-story commercial office building at Park Avenue and 51st Street in 1992. Mutual refitted the building for use as its company headquarters in 1994-1995. The building offered approximately 675,000 square feet of rentable office space, as well as retail space on the ground floor and storage space in the below-grade levels. Of the rentable office space, Mutual

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[1]Generally, one-time, non-recurring expenses that are not ongoing annual expenses may be taken as a capital expenditure, and thus as a below-the-line deduction that reduces the market value of a property for tax purposes.

occupied about 40 percent, that is 263,652 square feet (hereinafter referred to as "owner-occupied" space). The balance of rentable space was available to outside tenants. In the first tax year at issue, 1996-1997, about half of this space (30 percent) remained vacant. By the second tax year at issue, 1997-1998, approximately only 5 percent of the office space was still vacant. For the next three years the office space available to outside tenants was fully rented.

In 1996, Mutual sought an administrative correction of the building's assessed value on which the property tax was based. Mutual failed to get a correction, paid the property tax and timely commenced a special proceeding against the City to challenge the assessment pursuant to RPTL 702, 706(2) and New York City Charter §§ 163(f), 166. Mutual thereafter brought similar proceedings for the next seven tax years. Unable to reach a settlement, the eight cases were jointly tried in September 2006. At trial, each party submitted an expert's written report containing eight appraisals. Based on its expert's conclusions, Mutual withdrew its challenge to the last two tax years and thus the trial was limited to the first six tax years 1996-1997 through 2001-2002.

Both Mutual's appraiser (Jerome Haimes) and the City's appraiser (Terrence Tener) used the income capitalization approach to valuation, and both testified as experts at trial.

Both experts valued the building as of the taxable status date of each year (January 5) pursuant to New York City Charter § 1507. Each applied a 45 percent equalization rate, appropriate for tax class four buildings in New York City, to produce a "fractional assessment" as required by state law pursuant to RPTL 305, 720(3), 1802(1).

The record reflects that the accepted income capitalization approach used by both experts results in an assessment of the building as an investment, with the building's income stream representing the return on investment. In this case, both parties used the same method for determining income stream (hereinafter referred to as "net operating income") as follows: by adding the actual annual gross rental income from all leased space (based on the rates and terms as reflected in lease contracts) to a hypothetical amount of gross rental income from any unleased space (based on the market rent at the time and estimated lease terms). The resultant annual gross potential income for each year was then reduced by deducting a vacancy and collection loss (calculated as an estimate based on market conditions and expressed as a percentage of the annual gross potential income). Also deducted were the annual operating expenses such as cost of utilities, maintenance, insurance, security and ongoing leasing costs. The latter costs were understood by both experts to be those annual costs budgeted for

in anticipation of a future, steady turnover of tenants. Mutual characterized these - and the City did not disagree - as expenses which are "anticipated and amortized anticipating the large outlay to be made when a current tenant's lease ends and a replacement tenant must be found."

Further, both expert appraisers applied the same complex formula in calculating ongoing leasing costs to the *total* square footage of rentable space in the building, that is, to both leased and unleased space. The formula involves factoring in a lease renewal probability of 70 percent to reflect that not every tenant would vacate at the end of a lease; the length of an average lease (Mutual's expert used 13 years; the City's appraiser used 10 years); tenant concessions expressed as a dollar per square foot amount as well as leasing commissions expressed as a percentage of the annual gross income.

Tenant concessions sometimes characterized as "work letter items" were agreed to be improvements and renovations made to prepare the space for a particular tenant as a result of a lease or tenant/landlord agreement. The concessions also included lost rent between leases and free rent offered as inducement. Leasing commissions were simply broker and co-broker commissions associated with renewals and new leases.

As a result, both expert appraisers arrived within the same range of expenses associated with ongoing leasing costs, and thus

at similar values for the net operating income of the building.[2] Both appraisers then utilized an estimated annual rate of return in order to arrive at the capitalized value of the building. For 1996-1997, Mutual's appraiser used a rate of 14.7 percent while the City's expert used a rate of 12.64 percent to reach capitalized values of $156,268,033 and $178,293,118 respectively. Finally, the assessed value could be estimated pursuant to RPTL 305, 720(3) by applying an agreed-upon equalization rate, in this case 45 percent, to the capitalized value which is also generally considered to be the market value of the property.

Both expert appraisers agreed, however, that occasionally an intermediate step is required before establishing the market value of a property when a one-time, non-recurring expense needs to be deducted as a below-the-line capital expenditure from the capitalized value. Testimony at trial established that this can be the cost of construction in rendering vacant raw space habitable by erecting drywall, installing duct work and ceilings and floors. In situations where the space is already habitable, it is the cost of tenant improvements and leasing commissions associated with an initial occupancy (hereinafter referred to as "lease-up" costs) of habitable, retrofitted space. Both appraisers in this case agreed that annual recurring on-going

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[2] For example, for the 1996-1997 tax year, Mutual's appraiser estimated the net operating income at $22,971,411. while the City's appraiser estimated it at $22,536,259.

leasing costs do not account for the same expense as initial one-time leasing costs; that because initial costs are applied to space which does not involve a renewal but an entirely new tenant, a full and comprehensive leasing package is usually required; and, that a full leasing package on an initial occupancy would cost two to three times the expected annual rent for the space. Ongoing leasing costs were viewed as being lower than costs associated with preparing space for an initial occupancy because renewal tenants require significantly lower, or even no, work letter items such as painting or carpet replacement.

In this case, the City conceded that lease-up costs should be deducted from the capitalized value of the property for 1996-1997 for the 30 percent of rentable space that was vacant in the building in that tax year. The City's appraiser allowed for almost $23 million as a lease-up cost, and so arrived at a market value of $155,309,341 for the building for 1996-1997.

Mutual's appraiser however, applied lease-up costs to owner-occupied space as well as to the vacant space, noting that attribution of hypothetical rent should be accompanied by a deduction of appurtenant corresponding costs which would not be covered by the ongoing operational expenses. Thus, at this point the valuations of the expert appraisers diverged dramatically since Mutual further argued that the lease-up costs for the

owner-occupied space should be deducted for each of the disputed years. For tax year 1996-1997, Mutual's appraiser deducted $59,698,490 as a capital expenditure item to allow for leasing costs associated with both the 30 percent vacancy and the 40 percent of owner-occupied space and so arrived at a market value of $96,569,543.

The trial court engaged in a thorough comparison and analysis of both expert appraisals for each of the tax years in dispute. For clearly stated reasons, the court selected either Mutual's or the City's value for each step of the appraisal - except that, sua sponte, it used market, not actual, rent to calculate the gross income from leased space as well as unleased space. Thus, the court reached its own results for the capitalized value of the building in successive years.

The court further determined that the capitalized value was also the market value of the subject building for all the tax years in dispute except for the first tax year of 1996-1997. This determination took into account the concession of the City's appraiser that consideration must be given for lease-up costs on the 30 percent vacant portion of the building. The court adopted the City's estimate and deducted a rounded-up amount of $23 million from the capitalized value during the first tax year at issue.

Finally, the court noted that the "considerable" disparities

between the market values found by the court and those opined by Mutual's expert are due to the incorrect opinion of Mutual that the "costs of preparing owner-occupied space for a market tenant in each disputed year should be deducted from the capitalized value of the net operating income." The court rejected that opinion, and thus reduced the assessed valuation only for the 1996-1997 tax year. For the reasons set forth below, we agree with the trial court, and modify only to the extent of finding that it erred in applying market rent to leased space when actual rents were available for the calculation of gross income.

It is a cardinal principle, enshrined in the State Constitution, that in property valuations for tax purposes "[a]ssessments shall in no case exceed full value." NY Constitution, art. XVI, § 2; (*see Matter of Commerce Holding Corp. v Board of Assessors of Town of Babylon*, 88 NY2d 724, 729 [1996]). Further, the Court of Appeals has held that the "concept of full value is typically equated with market value" or "what a seller under no compulsion to sell and a buyer under no compulsion to buy" would agree is the most probable price a property would bring on a specific date (88 NY2d at 729). Thus, the Court of Appeals observed that "the assessment of property value for tax purposes must take into account any factor affecting a property's marketability" (*id.*, citing RPTL 302[1] ["(t)he taxable status of real property . . . shall be determined

annually according to its condition"]). Moreover, each annual assessment is separate and distinct from each other (*Matter of Northville Indus. Corp. v Board of Assessors of Town of Riverhead*, 143 AD2d 135, 138 [1988].

On this basis, Mutual argues that valuing real property according to its condition on each taxable status date means that an appraiser must hypothesize a sale of the property on that date each year. Indeed, Mutual argues that "[w]here six annual valuations are in dispute, as here, appraisers must imagine six separate sales . . . [even though] each sale is a fiction."

Further, relying on *Commerce Holding Corp.*, Mutual argues that for any factor that depresses the value of the property, the cost to cure must be deducted. Moreover, if the improvement has not been made, it must also be deducted the following year. Mutual asserts this does not mean that the amount is spent "again and again" - just that it must be accounted for hypothetically each year.

In this case, Mutual contends the owner-occupied space comprising 40 percent of the building's rentable space is a negative factor affecting the property's marketability. Upon closing, it argues, a "willing" buyer would be facing a 40 percent vacancy, and hence would be confronted with initial lease-up costs for 40 percent of the building which, like those associated with the 30 percent vacancy in 1996-1997, must be

deducted as a capital expenditure.

Mutual further relies on *Matter of CCB Assoc. v Penale*, (266 AD2d 805 [1999], *lv dismissed in part and denied in part*, 95 NY2d 788 [2008]) to argue that since market rent is attributed to the 263,652 square feet of owner-occupied space not earning rent, the cost necessary to obtain that rent must be accounted for because such potential costs reduce the market value of a property. In this case, Mutual argues that the trial court failed to recognize the hypothetical nature of the costs in the context of a hypothetical sale for valuation.

Mutual's argument is based on a flawed analysis of the sparse applicable case law. First, its reliance on *Commerce Holding Corp.* is misplaced. In that case, subsurface contamination indisputably affected marketability of the realty, and the Court held that the full cost *to complete* the cleanup had to be deducted, from each valuation. In other words, the "total remaining cost" was to be deducted not just the amount expended in a particular year. However, in *Commerce Holding Corp.*, the building suffered from de facto contamination, and the costs associated with the cleanup were subject to proof. As the cleanup progressed, the total of the remaining costs was a real, not a hypothetical, amount just as the 30 percent vacancy of the subject building in 1996 was a de facto vacancy not a hypothetical.

Even if we were to accept, as Mutual posits that, "the construct of hypothesized sales ordinarily presents no unusual dilemma" in valuations, the 40 percent vacancy facing a new hypothetical buyer in each successive year is an unacceptable construct. That proposition would entail assuming that each new buyer becomes an owner-occupier of the same 40 percent of office space since, according to Mutual a hypothetical buyer in year two is also confronted with a 40 percent vacancy rate as is hypothetical buyer in year 3 and so on for each of the years at issue. It cannot even be assumed that a hypothetical buyer would be confronted with a 40 percent vacancy upon closing. It could be equally well hypothesized that an owner-occupier while selling the property would still remain as a tenant of some portion if not all of the current space. Similarly, the hypothetical new buyer could occupy some of the space and would be looking to lease only a portion of current 40 percent of owner-occupied space. Indeed, it is obvious that a vacancy to which lease-up costs are properly attributed as a below-the-line deduction cannot be hypothetical. The proposition that a new owner would be faced with a vacancy of 40 percent of the space for each disputed year simply cannot be assumed where such a hypothetical does not require actual accrual of costs. It merely results in a tax windfall for the petitioner.

Indeed, if there is one holding to be extrapolated from the

sparse case law cited by Mutual, it is that lease-up costs qualify as a capital expenditure only when the vacancy actually exists (*Matter of CCB Assoc.*, 266 AD2d at 807 [2004]). In *CCB Associates*, the petitioners presented evidence that the building's major tenant had vacated the premises the year prior to their petition, leaving a 58 percent vacancy rate. More significantly, the case suggests that the vacancy must be of sufficient size to destabilize occupancy.

*CCB Associates* supports what we assume is the City's view, that unless the area of vacant space is sufficiently sizeable the leasing costs associated with re-tenanting it must fall within the normal, ongoing operating expenses. At trial, the City conceded that the costs associated with tenanting 30 percent of the rentable office space that remained vacant in 1996 should be viewed as below-the-line capital expenditure. The City, relying on the Appraisal Institute's *Appraisal of Real Estate* (Twelfth Edition, Chicago 2001), agreed that "[a]n investment grade building is not completed till it has stabilized at market occupancy." In this regard, because in 1996, the building was only 70.5 percent tenanted, the City agreed it was not at a stabilized occupancy, which it did not achieve until the following year.

However, there is no authority, in tax code, statute or case law, nor are we inclined to set a precedent, for classifying

space which is, in effect, occupied (albeit by the owner, not a paying tenant) as vacant based on the fiction that it will be leased to a paying tenant at the start of each new tax year. As the City asserts, relying on *Matter of Ernst v Board of Assessors of City of Lockport*, (58 Misc 2d 504 [1968], *affd* 33 AD2d 655 [1969]), while owner-occupied space is calculated as if leased at market rent to produce a hypothetical revenue stream, the fact that it does not do so is entirely by Mutual's own choice, and Mutual "cannot expect [its] fellow taxpayers to compensate [it] for the difference."

The trial court also correctly determined that lease-up costs could not be taken as a capital expenditure for the next two tax years in dispute even though some of the 30 percent of vacant space remained untenanted. It is true that the Court of Appeals has held that the total remaining costs of curing any negative factor must be applied each year irrespective of whether they are actually spent (*see Matter of Commerce Holding*, 88 NY2d at 731). It is also undisputed that, in this case, less than 5 percent of the building's rentable space was untenanted as of the beginning of the second tax year in dispute. However, in this case, both appraisers factored in a 5 percent vacancy and collection loss as part of the ongoing operating expense. Hence, both parties essentially agreed that occupancy was stabilized at 95 percent, and thus Mutual cannot claim the remaining vacancy as

a below-the-line capital expenditure.

Finally, we agree with Mutual that the trial court erred in using market rent rather than actual rents for leased space in its calculations. "As a rule, actual income is the best indicator of value." (*Matter of Conifer Baldwinsville Assoc. v Town of Van Buren*, 115 AD2d 325, 725 [1985], *affd* 68 NY2d 783 [1986]); *see also Matter of City of New York (First Elephant Estates y la Hermosa Church)*, 17 AD2d 317, 320 [1962]) ([g]enerally, with respect to income-earning property . . . the net income is . . . the surest index of value). In essence, market rent is the rent at which a space, under current and ordinary conditions, would command on an open market. As a result, actual rent for tenant occupied space will always be a more accurate barometer of the subject property value than market rent. In this case, both appraisers, in applying the income capitalization approach, used actual rents, not market rents, for space that was actually leased (tenant occupied space), and applied market rent only to owner-occupied space and vacant space. Consequently, we find that the trial court should have used actual rents, where they are available.

Likewise, as Mutual asserts, and the City concedes, the trial court erred in adding escalation to the market rents. Escalations are increases in a tenant's rent, typically stipulated to in a commercial lease, that compensate the owner

for general inflation or specific expense increases. It follows that escalation should only be applied to actual rent and not market rent. Since the trial court only applied market rent in its calculations of operating income, we conclude that it erred in its application of escalation and thus erroneously arrived at net operating income totals for each of the tax years greater than the totals submitted by either of the parties' experts.

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Friedman, Nardelli, Buckley, Richter, JJ.

1419 Parker Realty Group, Inc., Index 105149/06
Plaintiff-Respondent,

-against-

A. Michelle Petigny, etc.,
Defendant-Appellant,

970 Management LLC, et al.,
Defendants.

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Howard L. Sherman, Ossining, for appellant.

Kip Lenoir, New York, for respondent.

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Judgment, Supreme Court, New York County (Walter B. Tolub, J.), entered December 11, 2008, after a nonjury trial, awarding plaintiff the sum of $83,350.75, consisting of individual awards of $5,880, $500 and $60,000, plus interest on each, and costs and disbursements, modified, on the law, to vacate the individual awards of $5,880 and $60,000 and the interest on each, thereby reducing the total award to $500 plus interest, costs and disbursements, and otherwise affirmed, without costs. The Clerk is directed to enter an amended judgment accordingly.

Pursuant to an exclusive broker's agreement between plaintiff real estate broker and defendant A. Michelle Petigny, plaintiff arranged for the sale of property owned by Petigny at 970 Eastern Parkway in Brooklyn to ADDA Management, LLC. The broker's agreement provided that the commission was due and payable at the closing and transfer of title and that "[i]n the

event[] title does not pass due to the Owner's willful default, commission shall still be deemed earned by [plaintiff]." After ADDA failed to close, Petigny entered into a contract with defendant 970 Management, LLC. Under the plain language of the brokerage agreement, since the fact that title did not pass to ADDA was not due to Petigny's willful default, plaintiff was not entitled to its $5,880 commission on the ADDA transaction (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Contrary to plaintiff's argument, the parties did not orally modify the agreement to provide for the payment of commission in the event of a buyer's default, since at least one of the material provisions of the contemplated modification remained in dispute (*see Willmott v Giarraputo*, 5 NY2d 250, 253 [1959]). Plaintiff's June 17, 2005 email to Petigny states, "[A]lthough we have discussed and agreed upon my company receiving a fee for the prior work with [the ADDA] deal, I have yet to hear back from you regarding an agreed payment amount." Nor is plaintiff entitled to recover under the theory of quantum meruit, since the valid and enforceable written broker's agreement "cover[s] the dispute in issue," i.e., plaintiff's entitlement to payment (*see Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 227-228 [1993]). However, it is undisputed that plaintiff, by its president, Kim Parker, appeared in court, at Petigny's request and with the promise of $500 for the appearance, to testify in

connection with Petigny's suit against ADDA.

With respect to plaintiff's $60,000 commission on the sale of the property to 970 Management LLC, plaintiff failed to establish that the parties orally modified their exclusive broker's agreement to extend its term. Kim Parker testified that after she talked to Petigny and received an email saying that Petigny's property manager was aware that Parker would continue to serve as the broker for the property, she continued to show the property and therefore remained "employed" by Petigny (*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628 [1987]). However, Parker also testified that Petigny never signed the written agreement memorializing the new terms and that Petigny had negotiated a separate agreement with another broker. Thus, Petigny's representations cannot be construed as unambiguously creating in plaintiff the exclusive right to sell the property (*see Far Realty Assoc. Inc. v RKO Del. Corp.*, 34 AD3d 261 [2006]).

All concur except Nardelli and Buckley, JJ. who dissent in part in a memorandum by Nardelli, J. as follows:

NARDELLI, J. (dissenting in part)

I disagree with the majority's determination to vacate the award of $5,880 by the trial court in conjunction with the ADDA transaction, and would affirm that portion of the judgment.

It is axiomatic that after a bench trial, "the decision of the fact-finding court should not be disturbed on appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence . . ." (*Claridge Gardens v Menotti*, 160 AD2d 544, 544-545 [1990]; *see also 542 East 14th Street v Lee*, 66 AD3d 18 [2009]). The trial court's award of $5,880 was rationally based, in that it constituted 6% of the amount of $98,000 being held in escrow with regard to the first transaction, in which the buyer, ADDA Management Inc., defaulted. Defendant Petigny was awarded that amount in a separate proceeding. It is undisputed that ADDA was introduced to Petigny by plaintiff, and that the $98,000 which Petigny was awarded emanated from that transaction.

Contrary to the majority's conclusion, it is evident that the brokerage agreement, which provided for the payment of a full commission on the purchase price only in the event that title transferred, did not cover the situation presented here, where title did not transfer, but the seller nevertheless received a significant benefit, i.e., $98,000, because the broker introduced ADDA to the seller. As this Court has stated, "where the

contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum meruit . . ." (*Joseph Sternberg, Inc. v Walber 36th St. Assoc.*, 187 AD2d 225, 228 [1993]).

Implicit in the judgment awarded to plaintiff is that the court found that plaintiff performed services in good faith, defendant accepted those services, and plaintiff is entitled to compensation for the reasonable value of those services (*see e.g. Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 266-267 [1995]). In other words, if plaintiff did not introduce ADDA to defendant, defendant would not be enriched by the $98,000 ADDA tendered when the contract was executed. Such a finding by the trial court is hardly irrational, and the trial court's determination to deem plaintiff entitled to 6% of that amount should not be disturbed.

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

ENTERED: DECEMBER 17, 2009

David Friedman

DEPUTY CLERK

Friedman, J.P., McGuire, Renwick, Richter, Manzanet-Daniels, JJ.

1551 The People of the State of New York, Ind. 3284/07
Respondent,

-against-

Robert Wright,
Defendant-Appellant.

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

Robert S. Morgenthau, District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered March 31, 2008, convicting defendant, after a nonjury trial, of criminal possession of a controlled substance in the fifth and seventh degrees and criminal trespass in the third degree, and sentencing him as a second felony offender, to an aggregate term of 1½ years, unanimously affirmed.

At the conclusion of a suppression hearing, the court reserved decision and the parties proceeded immediately to a nonjury trial. Defendant testified in his own behalf and admitted possessing the 33 bags of cocaine recovered from his person but maintained that the cocaine was for his personal use. The court acquitted defendant of the top count charging him with possession of the cocaine with intent to sell (Penal Law § 220.16[1]). Prior to testifying, defendant neither requested that the court rule on the suppression motion, protested the

absence of a ruling nor asserted that he could not make a knowing decision whether to testify without a ruling. Under these circumstances, we need not determine whether the court erred in denying the motion to suppress the post-arrest statement defendant made in response to a question from the arresting officer on the ground that the officer failed to give *Miranda* warnings. Nor do we need to determine whether this claim of error has been preserved for review. In any event, there is no reasonable possibility the alleged error might have contributed to the conviction (*People v Ayala*, 75 NY2d 422, 433 [1990]). For the same reason, we need not determine whether defendant preserved for review his claim that the subsequent, unsolicited statement he made while en route to the police station should have been suppressed or reach the merits of that claim.

Defendant assumes that if his first statement should have been suppressed on account of the failure to give *Miranda* warnings, the 33 bags of cocaine should have been suppressed as a fruit of that violation (*but see United States v Patane*, 542 US 630 [2004] [plurality opinion]; *id.* at 644 [Kennedy, J., joined by O'Connor, J., concurring in judgment]). Even assuming that this claim of error was not waived by defendant's decision to testify before the court ruled on the motion to suppress, we need not resolve it on the merits. During argument on the motion to suppress, the sole ground defendant advanced for suppression was

that the arrest was made without probable cause. As defendant never argued that the 33 bags of cocaine should be suppressed on account of the *Miranda* violation, this claim is not preserved for review (*People v Martin*, 50 NY2d 1029, 1030-1031 [1980]) and we decline to review it in the interest of justice. Finally, defendant urges that trial counsel was ineffective if he failed to preserve the suppression claims. Even putting aside that this claim of ineffective assistance of counsel was raised for the first time in defendant's reply brief, it can be raised only in a CPL 440.10 motion as it cannot be reviewed on this record.

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Sweeny, Moskowitz, Acosta, Abdus-Salaam, JJ.

1591 Sammie McClellan, Index 302489/07
Plaintiff-Appellant,

-against-

Majestic Tenants Corp., et al.,
Defendants-Respondents.

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Law Office of Michael G. O'Neill, New York (Theresa B. Wade of counsel), for appellant.

Epstein Becker & Green, P.C., New York (Michael A. Levine of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered July 8, 2008, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly dismissed the complaint on the grounds that plaintiff's discrimination claims under the New York State Human Rights Law and the New York City Human Rights Law were subject to mandatory arbitration under the relevant collective bargaining agreement (*see Sum v Tishman Speyer Props., Inc.*, 37 AD3d 284 [2007], *appeal withdrawn* 12 NY3d 911 [2009]; *Garcia v Bellmarc Prop. Mgt.*, 295 AD2d 233, 234 [2002]). The collective bargaining agreement contained a "clear and unmistakable" waiver of an employee's right to a judicial forum for claims of employment discrimination (*see Wright v Universal Mar. Serv. Corp.*, 525 US 70, 80 [1998]; *Sum*, 37 AD3d at 284;

*Conde v Yeshiva Univ.*, 16 AD3d 185 [2005]; *Garcia*, 295 AD2d at 234 [2002]).

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

ENTERED: DECEMBER 17, 2009

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

1690 Verizon New York, Inc.,
Plaintiff,

-against-

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

Bovis Lend Lease LMB, Inc.,
Defendant,

Integrated Structures Corp.,
Defendant/Third-Party
Plaintiff-Appellant,

-against-

SLCE Architects, et al.,
Third-Party Defendants-Respondents,

One Call Center, et al.,
Third Party Defendants.

[And Other Actions]

Index 116144/03
591036/05
590929/06
407207/07

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Edward H. Lehner, J.), entered on or about July 28, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated September 15, 2009,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: DECEMBER 17, 2009

CLERK
DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1792 The People of the State of New York, Ind. 19253C/05
Respondent,

-against-

Guillermo Bermudez,
Defendant-Appellant.

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Stanley Neustadter, New York (Christopher Fenlon of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Denis J. Boyle, J.), rendered June 2, 2007, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to term of 3 to 6 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 determinations concerning identification and credibility. In addition to a reliable identification by the victim, defendant was connected to the crime through cell phone records. Although the phone service subscriber was a person other than defendant, there was a sufficient circumstantial linkage between defendant and the phone, and we reject defendant's related claim that the phone records should have been excluded as irrelevant (*see People v Mirenda*, 23 NY2d 439, 452-454 [1969]).

Defendant's challenge to the court's response to a jury note is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The court provided a meaningful response that could not have caused defendant any prejudice.

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1794 In re Shenay W.,

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

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Tamara A. Steckler, The Legal Aid Society, New York and Davis Polk & Wardwell, New York (Gur Bligh of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for Presentment Agency.

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about September 8, 2008, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that appellant committed acts, which, if committed by an adult, would constitute the crimes of assault in the second and third degrees, attempted assault in the second and third degrees and menacing in the second and third degrees, unanimously modified, on the law, to the extent of vacating the findings as to assault in the third degree, attempted assault in the second and third degrees, and menacing in the second and third degrees, and dismissing those counts of the petition, and otherwise affirmed, without costs.

The court's finding as to second-degree assault under Penal Law § 120.05(10)(a) 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]). The evidence warrants the inference that when appellant threw a book containing cassettes at her teacher, which struck the teacher in the head and caused physical injury, appellant intended the natural consequence of her act, which was to cause such injury (*see generally People v Getch*, 50 NY2d 456, 465 [1980]). However, the menacing charges were not established, in that there was no evidence of any threatening behavior before, after, or otherwise separate from the sudden attack. In addition, the dangerous instrument element of second-degree menacing (Penal Law § 120.14[1]) was not established, because the book of cassettes was not a dangerous instrument under the circumstances (as the court expressly found when it dismissed all other counts containing a dangerous instrument element). The remaining counts should have been dismissed as lesser included offenses of second-degree assault.

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

ENTERED: DECEMBER 17, 2009

David Slobony

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1797-
1798 IRB-Brasil Resseguros S.A., Index 604013/06
Plaintiff-Respondent-Appellant,

-against-

Eldorado Trading Corporation Ltd., et al.,
Defendants-Appellants-Respondents.

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Sheppard Mullin Richter & Hampton LLP, New York (Mark A. Berube of counsel), for appellants-respondents.

Skadden, Arps, Slate, Meagher & Flom LLP, New York (Lea Haber Kuck of counsel), for respondent-appellant.

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Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered June 9, 2009, awarding plaintiff the principal sum of $31,519,242.33, and bringing up for review an order, same court (Herman Cahn, J.), dated February 11, 2009, which, upon renewal, granted plaintiff's motion for summary judgment, unanimously affirmed, with costs. Appeal from order, same court (Herman Cahn, J.), entered October 1, 2008, which initially denied the summary judgment motion, unanimously dismissed, without costs, as academic.

Plaintiff's original motion for summary judgment was denied because of the court's concern that the Euroclear statement and other documents suggested that BB Securities, rather than plaintiff, may have been the true holder under the terms of the note. Plaintiff moved to renew, submitting an affidavit by BB's managing director, clearly averring that it held the note solely

as custodian for plaintiff, as well as an assignment agreement between BB and plaintiff, establishing the latter's exclusive entitlement to sue under the note. Under these circumstances, the court providently exercised its discretion in granting renewal in the interest of justice (*see Garner v Latimer*, 306 AD2d 209 [2003]). The additional affidavit by an officer familiar with the corporate records, accompanying a true copy of the assignment agreement, was admissible (*see DeLeon v Port Auth. of N.Y. & N.J.*, 306 AD2d 146 [2003]), and established plaintiff's entitlement to summary judgment.

In view of our finding that summary judgment was correctly granted upon renewal, we dismiss plaintiff's appeal of the denial of its original motion for summary judgment as academic. However, had we not done so, we would hold that plaintiff met its prima facie burden on the initial motion for summary judgment by submitting evidence of defendant Eldorado Trading's promise to pay under the note, the guarantee by defendants Eldorado S.A. and Verpar, and nonpayment (*see Eastbank v Phoenix Garden Rest.*, 216 AD2d 152 [1995], *lv denied* 86 NY2d 711 [1995]). Plaintiff also submitted evidence demonstrating it had purchased the note, which was held by BB Securities on its behalf in a secure account at Euroclear. Contrary to defendants' contention, the affidavit of a corporate officer with personal knowledge, together with authenticated business records, is admissible in support of a

motion for summary judgment (*see First Interstate Credit Alliance v Sokol*, 179 AD2d 583, 584 [1992]). In addition, a certified statement of account issued by Euroclear was admissible under the terms of the note, which provided that such record would be "conclusive evidence" as to the identity of any holder, and because it had sufficient indicia of trustworthiness (*see Elkaim v Elkaim*, 176 AD2d 116, 117 [1991], *appeal and lv dismissed* 78 NY2d 1072 [1991]).

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1799 The People of the State of New York, Ind. 1367/07
Respondent,

-against-

Mohamed Zokari,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Emily C. Lee of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered October 12, 2007, convicting defendant, after a jury trial, of burglary in the third degree and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of 2¼ to 4½ years, unanimously affirmed.

The court properly declined to submit criminal trespass in the third degree as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, that he entered a store without criminal intent and only subsequently formed an intent to steal (*see People v Warfield*, 6 AD3d 218 [2004], *lv denied* 3 NY3d 650 [2004]; *People v Mauricio*, 215 AD2d 326 [1995], *lv denied* 86 NY2d 738 [1995]). Although there may be a dispute about how soon after entering a Duane Reade defendant began to steal 103 packets of gum, the security guard's testimony that defendant began stealing the gum

shortly after entering was not disputed. Also undisputed was the prosecution's evidence that defendant recently had been excluded, by way of a trespass notice issued to him at the same store, from all Duane Reade stores and that, five months before that notice, he received such a notice at another Duane Reade store. To convict defendant of trespass rather than burglary, the jury would have had to find that although defendant had been so excluded recently and repeatedly, he nonetheless selected the Duane Reade store as a place to engage in shopping, browsing or some other unclear but innocent activity, that he happened to be carrying a black plastic garbage bag for some innocent reason, and that it may not have been until shortly after he entered that he suddenly formed the larcenous intent that led him to fill the bag with gum. A reasonable view of the evidence is not one at war with common sense; there was no evidence that reasonably might suggest that defendant did not enter the store with the intent to commit a crime.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1800 Frank Bettis, Index 112234/07
Plaintiff-Appellant,

-against-

Raymond Kelly, as Police Commissioner
of the New York City Police Department, et al.,
Defendants-Respondents.

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Frank Bettis, appellant pro se.

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

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 7, 2008, which, in this action alleging wrongful termination, granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Given plaintiff's admission that he was aware of defendants' alleged fraud in January 2002, this action, commenced in 2007, alleging claims that defendants violated his rights to equal protection and due process and that defendants violated section 75 of the Civil Service Law and section 14-115 of the Administrative Code of the City of New York, was properly dismissed as barred by the statute of limitations (*see* CPLR 213[8]). The action is also barred under the doctrine of res judicata because the instant action and the one plaintiff brought in federal court (*see Bettis v Kelly*, 2004 WL 1774252, 2004 US Dist LEXIS 15463 [SD NY 2004], *affd* 137 Fed Appx 381 [2d Cir

2005], *cert denied* 547 US 1004 [2006]; *see also Bettis v Safir*, 2000 WL 1336055, 2000 US Dist LEXIS 13285 [SD NY 2000]), are based on the same transaction, namely plaintiff's termination from the New York City Police Department in 1994, and his prior action was dismissed on the merits (*see e.g. Heritage Realty Advisors, LLC v Mohegan Hill Dev., LLC*, 58 AD3d 435, 436 [2009], *lv denied* 12 NY3d 830 [2009]).

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

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1801 Chrishema Clarke, an Infant Under the Age of Fourteen Years, by her Mother and Natural Guardian, Terri Thompson-Gomillion, etc., et al., Plaintiffs-Respondents,

Index 109350/06

-against-

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

The New York City Housing Authority, Defendant-Appellant.

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Cullen and Dykman, LLP, Brooklyn (Joseph Miller of counsel), for appellant.

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

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Order, Supreme Court, New York County (Edward H. Lehner, J.), entered February 24, 2009, which denied defendant New York City Housing Authority's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Factual issues whether the infant plaintiff's assailant was an intruder who entered the building through a negligently maintained door or possessed a key to the building or was an invited guest of building residents preclude summary judgment

(*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]; *Miller v State of New York*, 62 NY2d 506, 508-509 [1994]).

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

ENTERED: DECEMBER 17, 2009

David Spoleony

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1802 The People of the State of New York, Ind. 4897/06
Respondent,

-against-

Harold Hayes,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Amy I. Donner of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Philip J. Morrow of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered February 20, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 3 to 6 years, unanimously affirmed.

Regardless of whether defendant made a valid waiver of his right to appeal, we reject his suppression claim on the merits (*see People v Francois*, 61 AD3d 524 [2009]).

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

ENTERED: DECEMBER 17, 2009

David Apolony

DEPUTY CLERK

Tom, P.J., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1803 Arbor Leasing, LLC, Index 603151/06
Plaintiff-Respondent,

-against-

BTMU Capital Corporation, etc.,
Defendant-Appellant.

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Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Paul D. Sarkozi of counsel), for appellant.

Ganfer & Shore, LLP, New York (Mark A. Berman of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered July 14, 2009, which, insofar as appealed from, in this breach of contract action, granted plaintiff's motion for summary judgment on the issue of liability, unanimously reversed, on the law, with costs, and the motion denied.

The contract provided, inter alia, that it could be terminated, without notice or explanation, should plaintiff engage in acts that were "materially harmful, or potentially materially harmful, to the business interests or reputation of [defendant] or any of its [a]ffiliates." Whether or not defendant knew of or could prove such a basis at the time it terminated the contract is irrelevant (*see Big Apple Car v City of New York*, 204 AD2d 109, 111 [1994]; *Kerns, Inc. v Wella Corp.*, 114 F3d 566, 569-570 [6th Cir 1997]). The relevant inquiry is an objective one: whether, at the time of termination, plaintiff was

objectively in default. It is clear that the acts and knowledge of plaintiff's sole member/manager, who had complete control over the company, may be imputed to plaintiff for purposes of determining whether it was in default (*see Keen v Keen*, 113 AD2d 964, 966 [1985], *lv dismissed* 67 NY2d 602 [1986]). This is also true under Illinois law, where plaintiff is organized (*see Direct Mktg. Concepts, Inc. v Trudeau*, 266 F Supp 2d 794, 797 [ND Ill 2003]).

During the early stages of discovery, defendant put in evidence showing that plaintiff, with knowledge that its principal had committed money laundering, to which he subsequently pleaded guilty, nevertheless placed the principal in full control of the finances and accounts of the parties' venture. Furthermore, a forensic audit commissioned by defendant raised numerous questions as to the legality and fidelity of plaintiff's handling of defendant's funds. Under these circumstances, the motion should have been denied to allow defendant to complete discovery (*see* CPLR 3212[f]).

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1804 The People of the State of New York, Ind. 9043/98
Respondent,

-against-

Gerald Marcellin,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Richard Nahas of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Jeffrey M. Atlas, J.), rendered on or about May 29, 2001,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

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

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1807-
1807A-
1808B The People of the State of New York, Ind. 3181/06
Respondent, 3081/07
2797/07

-against-

Tony Morten, etc.,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Stephen L. Barrett, J.), rendered September 3, 2008, convicting defendant, upon his pleas of guilty, of robbery in the first degree, criminal possession of a weapon in the third degree, and bail jumping in the second degree, and sentencing him to concurrent terms of 12 years for the robbery conviction and 7 years for the weapon conviction, consecutive to a term of 1½ to 3 years for the bail jumping conviction, unanimously modified, on the law, to the extent of remanding for resentencing, and otherwise affirmed.

The record establishes that the court and counsel were under the misapprehension that the court was required to impose a sentence for the bail jumping conviction that was consecutive to the sentences for both the weapon possession and robbery convictions. However, Penal Law § 70.25(2-c) provides that

consecutive sentences are mandated (absent a mitigation finding) only when the bail jumping charge relates to the crime for which the defendant jumped bail, and when the terms for both crimes are indeterminate. Here, the bail jumping sentence was not required to be consecutive on the robbery sentence for two reasons: first, defendant jumped bail only on the weapon charge, not the robbery charge, and second, the sentence for the robbery was not indeterminate, but was a determinate 12-year sentence. Since the court may not have apprehended the extent of its discretion, defendant is entitled to resentencing (*see People v Farrar*, 52 NY2d 302, 307 [1981]).

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

ENTERED: DECEMBER 17, 2009

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1809 Christakis Shiamili, Individually and on Behalf of Ardor Realty Corp., Plaintiff-Respondent, Index 600460/08

-against-

The Real Estate Group of New York, Inc., et al., Defendants-Appellants.

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Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Andrew I. Mandelbaum of counsel), for appellants.

The Shapiro Firm, LLP, New York (Robert J. Shapiro of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 2, 2009, which denied defendants' motion to dismiss the complaint as barred by the Federal Communications Decency Act of 1996 (CDA), unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

This is an action for defamation and unfair competition by disparagement based on comments posted on an internet Web site. It is alleged that defendants "administer and choose" the content for the Web site at issue here, available to and accessed by members of the public interested in New York City real estate, and that they further published numerous false and defamatory statements on the site damaging to plaintiff personally and to his reputation as a businessman, as well as to Ardor.

The CDA provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" (47 USC § 230[c][1]), and "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section" (§ 230[e][3]). Congress thereby granted internet services immunity from liability for publishing false or defamatory material so long as the information was provided by another party. Therefore, "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions - such as deciding whether to publish, withdraw, postpone or alter content - are barred" (*Zeran v American Online*, 129 F3d 327, 330 [4th Cir 1997], *cert denied* 524 US 937 [1997]; *see also Chicago Lawyers' Comm. for Civ. Rights under Law v Craigslist*, 519 F3d 666 [7th Cir 2008]; *Green v America Online (AOL)*, 318 F3d 465, 470-471 [3d Cir 2003], *cert denied* 540 US 877 [2003]). The CDA thus treats internet publishers differently than it does corresponding authors in print, television and radio (*see Batzel v Smith*, 333 F3d 1018, 1026-1027 [9th Cir 2003], *cert denied* 541 US 1085 [2004]).

However, the immunity provided by the CDA applies only where the information that forms the basis of the state law claim has been provided "by *another information content* provider" (47 USC § 230[c][1], emphasis added). "Internet content provider" is

defined in the statute as "any person or entity that is responsible, *in whole or part, for the creation or development of information* provided through the Internet or any other interactive computer service" (§ 230[f][3], emphasis added). Accordingly, an interactive computer service provider remains liable for its own speech (*Universal Communication Sys. v Lycos*, 478 F3d 413, 419-420 [1st Cir 2007]), or for its material contribution to the content of a third party's statement (*see Fair Hous. Council of San Fernando Val. v Roommates.com*, 521 F3d 1157 [9th Cir 2008]). However, the "'development of information' . . . means something more substantial than simply editing portions of an e-mail and selecting material for publication" (*Batzel*, 333 F3d at 1031).

Plaintiff's claim is barred by the CDA. The complaint makes no allegation that defendants authored any defamatory statements. It merely alleges that defendants "choose and administer content" that appears on the Web site. This is precisely the kind of function that the CDA immunizes (*see e.g. Fair Hous. Council*, 521 F3d at 1173-1174; *Batzel*, 333 F3d at 1031). Even accepting as true all of plaintiff's allegations and giving it the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the complaint does not raise an inference that defendants were "information content providers" within the meaning of the CDA. Plaintiff argues that defendants engaged in

a calculated effort to encourage, keep and promote "bad" content on the Web site. However, message board postings do not cease to be data "provided by another information content provider" merely because "the construct and operation" of the Web site might have some influence on the content of the postings (*see Universal*, 478 F3d at 422; *see also Chicago Lawyers' Comm.*, 519 F3d at 671-672; *Carafano v Metrosplash.com*, 339 F3d 1119, 1124-1125 [9th Cir 2003]).

Where, as here, there is no allegation that defendants authored the defamatory statements, it is not appropriate to permit discovery to determine if a cause of action exists (*see Walsh v Liberty Mut. Ins. Co.*, 289 AD2d 842, 844 [2001]; *see also Universal*, 478 F3d at 425-42; *cf. Fair Hous. Council*, 521 F3d at 1174).

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK

Tom, J.P., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1810 Richard Alvarez,
Plaintiff,

Index 23808/06
86212/07
83798/08

-against-

Colgate Scaffolding & Equipment Corp.,
Defendant-Appellant,

170 East 77th Realty Group LLC, et al.,
Defendants-Respondents.

[And Other Actions]

---

French & Casey, LLP, New York (Susan A. Romero of counsel), for appellant.

Barry, McTiernan & Moore, New York (Laurel A. Wedinger of counsel), for respondents.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered October 14, 2008, which denied defendant Colgate's motion for summary judgment, unanimously affirmed, without costs.

Issues of fact as to the whether the sidewalk bridge's cross-brace from which plaintiff fell was properly installed precluded summary dismissal (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 554-555 [1992]). Colgate's principal testified that the bridge was installed properly, that when Colgate oversees an installation the cross-braces are always tightened securely, that construction workers often loosen the bolts and remove the cross-braces to make the transport of materials onto the sidewalk easier, and that no one made any complaints to Colgate about improper installation. This, coupled with plaintiff's testimony

that he had observed workers and children sitting and climbing on the cross-braces on numerous occasions prior to his accident, suggesting that the bolt was secure upon installation and that any loosening was caused by third parties at a time when Colgate no longer had responsibility for the bridge, was sufficient to establish prima facie that Colgate neither created nor had actual or constructive notice of the loose bolt on the cross-brace (*see Garcia v Good Home Realty, Inc.*, 2009 NY App Div LEXIS 7782, 2009 WL 3644276).

However, Colgate's principal conceded that he had not been present on the day of installation. His inability to state with certainty whether the Colgate foreman who usually monitors and inspects sidewalk bridge installations was present on that day to observe whether the bolt was securely tightened, and Colgate's failure to produce any evidence from the actual installer that the installation was performed correctly, further raise questions of fact as to the condition of the cross-brace on the date of installation (*see Velez v 955 Tenants Stockholders, Inc.*, 66 AD3d 1005 [2009]).

Moreover, Colgate's sole proximate cause defense is unavailing. Assuming the bolt was not properly secured at the time of the bridge's installation, the intervening act by plaintiff of sitting on the cross-brace was not so extraordinary or unforeseeable so as to constitute a superseding cause that

absolves Colgate of liability (*see generally Kush v City of Buffalo*, 59 NY2d 26, 32-33 [1983]; *cf. Howard v Poseidon Pools*, 72 NY2d 972 [1988]). A jury could easily find, based on plaintiff's testimony that he frequently observed construction workers and the neighborhood children sitting and climbing on the cross-braces, that such activity was a natural and foreseeable consequence of installing the sidewalk bridge. While such activity on plaintiff's part might be relevant to a determination of his comparative negligence, it would not break the chain of causation stemming from Colgate's possibly improper installation of the bridge (*see Butler v Seitelman*, 90 NY2d 987 [1997]).

Finally, plaintiff's sitting on the cross-brace did not assume any risk that would negate a duty otherwise owed by Colgate (*cf. Turcotte v Fell*, 68 NY2d 432, 437-439 [1986]; *Roberts v Boys & Girls Republic, Inc.*, 51 AD3d 246 [2008], *affd* 10 NY3d 889 [2008]). The risk plaintiff assumed was of losing his balance and falling from a securely fastened cross-brace, not falling from a cross-brace that was not securely bolted to the frame. As plaintiff testified that he had no knowledge or awareness that the cross-brace in question was loose at the time he sat on it, he cannot be charged with having assumed an open

and obvious risk (*cf. Mendoza v Village of Greenport*, 52 AD3d 788, 789 [2008]; *Yisrael v City of New York*, 38 AD3d 647, 648 [2007]).

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

ENTERED: DECEMBER 17, 2009

David Apolony
DEPUTY CLERK

Tom, P.J., Andrias, Saxe, McGuire, Manzanet-Daniels, JJ.

1812N The Board of Managers of the Waterford Association, Inc., etc., Plaintiff-Respondent, Index 114054/04

-against-

Negar Samii, et al., Defendants-Appellants.

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Cox Padmore Skolnik & Shakarchy LLP, New York (Sanford Hausler of counsel), for appellants.

Kagan Lubic Lepper Lewis Gold & Colbert LLP, New York (Jesse P. Schwartz of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered September 18, 2009, which, in an action by plaintiff condominium involving its right of access to defendant's unit, denied defendant's motion to amend her answer to include a demand for punitive damages under her counterclaim for diminution of her unit's value, unanimously affirmed, without costs.

Although the counterclaims as to which defendant sought to amend her answer to include a demand for punitive damages were dismissed by a subsequent order of the court, defendant maintains that she intends to appeal from that order as well. Under the circumstances, and in the interest of efficiency and judicial economy, we find it would be inappropriate to dismiss the instant appeal as moot.

Defendant's own evidence in support of the motion shows that plaintiff did make some efforts to address the problem leaks in a

manner that would have avoided the need for access to controlling valves in defendant's unit, albeit not to the extent that defendant would have liked (*see Vitra, Inc. v Soho House, LLC*, 50 AD3d 529 [2008]), and otherwise falls short of showing the "high degree of moral turpitude," "wanton dishonesty" and utter malice necessary to an award of punitive damages (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]; *Gellman v Seawane Golf & Country Club, Inc.*, 24 AD3d 415, 418-419 [2005]).

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

ENTERED: DECEMBER 17, 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
John T. Buckley
James M. Catterson
Rolando T. Acosta
Helen E. Freedman, JJ.

1378-
1378A
Index 601804/08

x

Masood Nabi,
Plaintiff-Appellant,

-against-

Derek S. Sells, et al.,
Defendants-Respondents.

x

Plaintiff appeals from an order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered February 13, 2009, which, insofar as appealed from, granted defendant attorneys' motion to dismiss plaintiff former client's first cause of action for a declaration that defendant attorneys forfeited any right to a legal fee by reason of noncompliance with 22 NYCRR 1215.1, and from an order, same court and Justice, entered June 9, 2009, which, insofar as appealed from, denied plaintiff's motion to dismiss defendants' first counterclaim seeking to recover legal fees on the basis of a written retainer agreement.

The Abramson Law Group, PLLC, New York (Robert Frederic Martin of counsel), for appellant.

Rosato & Lucciola, New York (Joseph S. Rosato and Gerard A. Lucciola of counsel), for respondents.

BUCKLEY, J.

In this action for declaratory and other relief, defendant attorneys seek to enforce the terms of a contingency fee retainer agreement.

It was error to dismiss the first cause of action merely because plaintiff is not entitled to the declaration he seeks (*see Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]); the proper course is to declare in favor of defendants (*see Holliswood Care Ctr. v Whalen*, 58 NY2d 1001, 1004 [1983]; *Mongelli v Sharp*, 140 AD2d 273 [1988]). The aspects of the contingency fee retainer agreement prepared by defendants and signed by plaintiff that allegedly render it noncompliant with 22 NYCRR 1215.1 do not bar defendants from recovering in quantum meruit (*see Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 60-64 [2007]; *see also Egnotovich v Katten Muchin Zavis & Roseman LLP*, 55 AD3d 462, 464 [2008]; *Nicoll & Davis LLP v Ainetchi*, 52 AD3d 412 [2008]).

We need not decide whether any of the alleged defects in the retainer agreement, alone or in combination, bar recovery in contract. Provided that defendant attorneys were not discharged for cause, in which case they would not be entitled to any fee

(*see Matter of Montgomery*, 272 NY 323, 326 [1936]), their recovery would be limited to the fair and reasonable value of their services, computed on the basis of quantum meruit (*see Matter of Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655, 658 [1993]; *Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457-458 [1989]; *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186, 188-189 [2002]; *Smith v Boscov's Dept. Store*, 192 AD2d 949, 950 [1993]). The rationale for the rule is that, due to the special relationship of the utmost trust and confidence between a client and an attorney, the client has the right to discharge the attorney at any time, for any reason, or for no reason, regardless of any particularized retainer agreement, and the client should not be compelled to pay damages for exercising the absolute right to cancel the contract (*see Martin v Camp*, 219 NY 170, 173-176 [1916]; *see also Demov, Morris, Levin & Shein v Glantz*, 53 NY2d 553, 556-557 [1981]; *Matter of Montgomery*, 272 NY at 327; *Matter of Krooks*, 257 NY 329, 331-332 [1931]). Against the client's unqualified right to terminate the attorney-client relationship is balanced the notion that a client should not be unjustly enriched at the attorney's expense or take undue advantage of the attorney, and therefore the attorney is entitled to recover the reasonable value of

services rendered (*see Matter of Cooperman*, 83 NY2d 465, 473-474 [1994]; *Demov, Morris, Levin & Shein*, 53 NY2d at 558; *Matter of Krooks*, 257 NY at 332-333). After the termination of the relationship, the client and attorney of course remain free to reach a new agreement that, in lieu of a fixed dollar amount for the quantum meruit value of services rendered, the discharged attorney shall receive as compensation a contingent percentage of the recovery, determined either at the time of substitution or the conclusion of the case (*see Matter of Cohen*, 81 NY2d at 658; *Lai Ling Cheng*, 73 NY2d at 458; *Reubenbaum v B. & H. Express*, 6 AD2d 47, 48-49 [1958]). However, such an arrangement of payment cannot be compelled by the attorney; it can only be reached with the consent of the client.

By contrast, where the dispute is between successive lawyers, rather than between the client and the attorney, a different set of rules applies (*see Matter of Cohen*, 81 NY2d at 658; *Lai Ling Cheng*, 73 NY2d at 458; *Reubenbaum*, 6 AD2d at 49). In that situation, the outgoing attorney may elect, even over the objections of the incoming attorney, either quantum meruit compensation in a fixed dollar amount at the time of discharge, or a contingent percentage fee, determined either at the time of

substitution or the conclusion of the case (*see Matter of Cohen*, 81 NY2d at 658; *Lai Ling Cheng*, 73 NY2d at 458-459; *Levy v Laing*, 43 AD3d 713, 715 [2007]; *Pearl v Metropolitan Transp. Auth.*, 156 AD2d 281, 282-283 [1989]; *Reubenbaum*, 6 AD2d at 49). Even then, however, in the absence of an agreement between the outgoing and incoming attorneys, the contingent percentage fee is measured by quantum meruit, based on the discharged attorney's proportionate share of the work performed on the whole case, in addition to the amount of recovery (*see Lai Ling Cheng*, 73 NY2d at 458-459; *see also Matter of Cohen*, 81 NY2d at 658; *Reubenbaum*, 6 AD2d at 49). Indeed, the additional option of contingent percentage compensation that a discharged attorney has against incoming attorneys, not available as against the former client, sounds in quantum meruit: the incoming attorneys should not be unjustly enriched at the expense of the outgoing attorney.

The dispute at hand is between only the client and the discharged attorney. Therefore, if it is established that defendants were discharged without cause, their recovery is limited to quantum meruit in a fixed dollar amount, which may be more or less than that provided in the rescinded contract that had existed between them and plaintiff, and which may be

presently payable or secured by lien (*see Matter of Montgomery*, 272 NY at 326-328; *Paulsen v Halpin*, 74 AD2d 990, 991 [1980]; *Reubenbaum*, 6 AD2d at 48). Although the annulled contingency fee agreement no longer governs the parties' relationship, it may "be taken into consideration as a guide for ascertaining quantum meruit" (*Matter of Tillman*, 259 NY 133, 135 [1932]), in addition to such pertinent factors as "'the nature of the litigation, the difficulty of the case, the time spent, the amount of money involved, the results achieved and amounts customarily charged for similar services in the same locality'" (*Schneider, Kleinick, Weitz, Damashek & Shoot*, 302 AD2d at 188-189 [quoting *Smith*, 192 AD2d at 951]).

Accordingly, the order of the Supreme Court, New York County (O. Peter Sherwood, J.), entered February 13, 2009, which, insofar as appealed from, granted defendant attorneys' motion to dismiss plaintiff former client's first cause of action for a declaration that defendant attorneys forfeited any right to a legal fee by reason of noncompliance with 22 NYCRR 1215.1, should be modified, on the law, to declare that defendants did not forfeit their right to a legal fee by reason of the alleged noncompliance with 22 NYCRR 1215.1, and otherwise affirmed, without costs; the order of the same court and Justice, entered June 9, 2009, which, insofar as appealed from, denied plaintiff's

motion to dismiss defendants' first counterclaim seeking to recover legal fees on the basis of a written retainer agreement, should be modified, on the law, to limit any recovery of legal fees to quantum meruit, and otherwise affirmed, without costs.

All concur.

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

ENTERED: DECEMBER 17, 2009

DEPUTY CLERK