SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 26, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Andrias, Richter, JJ.

3622-
3622A Carlton Tucker, et al.,
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

Index 101463/04

_____

Kelner & Kelner, New York (Gail S. Kelner of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

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Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered October 27, 2009, dismissing the complaint, and bringing up for review an order, same court and Justice, entered June 24, 2009, which granted defendant's motion for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this appeal, we consider whether the New York City Pothole Law (Administrative Code of City of NY § 7-201[c][2])

requires plaintiff to show that the City received prior written notice of the purported tree well defect that allegedly caused him to be thrown from his bike, notwithstanding the Court of Appeals' determination in *Vucetovic v Epsom Downs, Inc.* (10 NY3d 517 [2008]) that tree wells are not part of the sidewalk within the meaning of section 7-210 of the Administrative Code. Given the distinct purposes of Administrative Code §§ 7-201(c)(2) and 7-210, and the different language employed therein, we find that *Vucetovic* is not determinative of the issue and that the Pothole Law is applicable.

Section 7-210 of the Administrative Code, which was enacted "in an effort to transfer tort liability from the City to adjoining property owners as a cost-saving measure" (*Vucetovic*, 10 NY3d at 521), thereby creating new liability, provides, in pertinent part:

> "a. It shall be the duty of the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, to maintain such sidewalk in a reasonably safe condition.
>
> "b. Notwithstanding any other provision of law, the owner of real property abutting any sidewalk, including, but not limited to, the intersection quadrant for corner property, shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe

> condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags and the negligent failure to remove snow, ice, dirt or other material from the sidewalk.
>
> "c. Notwithstanding any other provision of law, the city shall not be liable for any injury to property or personal injury, including death, proximately caused by the failure to maintain sidewalks . . . in a reasonably safe condition."

In *Vucetovic*, the Court of Appeals, "guided by the principle that 'legislative enactments in derogation of common law, and especially those creating liability where none previously existed,' must be strictly construed," held that "section 7-210 does not impose civil liability on property owners for injuries that occur in city-owned tree wells" (10 NY3d at 521 [citation omitted]). "Acknowledging that th[e] case present[ed] a close question" (*id.*), the Court explained:

> "Here, sections 19-152 and 16-123, the provisions whose language section 7-210 tracks, contemplate the installation, maintenance, repair and clearing of sidewalks or sidewalk flags. Significantly, tree wells are not mentioned in sections 19-152, 16-123 or 7-210. And while section 7-210 employs the phrase 'shall include, but not be limited to,' this clause *applies to the types of maintenance work to be performed, not the specific features of what constitutes a sidewalk*. Given the statutory silence and the absence of any discussion of tree wells in the legislative history, it seems evident that the City Council did not consider the issue of tree well liability when it drafted section 7-210. If the City Council desired to shift liability for accidents involving tree wells

> exclusively to abutting landowners in derogation of the common law, it needed to use specific and clear language to accomplish this goal" (*id.* [emphasis added]).

Section 7-201(c)(2) was enacted to address "the vexing problem of municipal street and sidewalk liability" *(Barry v Niagara Frontier Tr. Sys.*, 35 NY2d 629, 633 [1974]). Recognizing "the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways" *(Poirier v City of Schenectady*, 85 NY2d 310, 314 [1995]), the section ensures that the City receives written notice of defects in the public way so that it may repair a problem before there is liability. In contrast to section 7-210, which is limited to sidewalks, section 7-201(c)(2) provides:

> "No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any . . . sidewalk . . . or any part or portion of any [sidewalk] *including any encumbrances thereon or attachments thereto*, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice" (emphasis added).

This broad language, encompassing a sidewalk and "any encumbrances thereon or attachments thereto," is addressed to the features of a sidewalk, and not to the type of maintenance work

to be performed, and requires a plaintiff to show that the City received prior written notice of the alleged tree well defect, a soil level below the sidewalk area, in violation of 34 RCNY 2-09(f)(4)(xx)(B) (*see Fuhrmann v City of Binghamton*, 31 AD3d 1036, 1036 [2006]; *O'Reilly v City of New York*, 2010 NY Slip Op 32240[U] [Sup Ct, NY County 2010]; *Beatty v City of New York*, 2010 NY Slip Op 30608[U] [Sup Ct, New York County 2010]; *Shulman v House of the Redeemer*, 2010 NY Slip Op 32038[U] [Sup Ct, New York County 2010]).

We reject the argument that a tree well is not an "encumbrance" on or an "attachment" to the sidewalk, but an area adjacent to and separate and distinct from the sidewalk. While the terms "encumbrances thereon or attachments thereto" are not defined in the statute, the American Heritage Dictionary of the English Language 589 (4th ed. 2006) defines an encumbrance as "a burden or impediment." It defines an impediment as "something that impedes, a hindrance or obstruction." (*id.* at 879). As the photographs in the record before us demonstrate, the tree well is inserted into the sidewalk, which surrounds it on three sides, and is clearly an impediment to pedestrians who traverse the sidewalk.

This interpretation is consistent with precedent. In

Meltzer v City of New York (156 AD2d 124 [1989]), the plaintiff tripped on a projecting gas valve housing on a Manhattan street. The motion court dismissed the complaint as against the City on the ground of lack of prior written notice. This Court affirmed, finding that the "minor street defect" was an "encumbrance" or "attachment" covered by the Pothole Law (*id.* at 124). There is no significant difference between the gas valve housing in *Meltzer* and the tree well at issue here -- both constitute an "encumbrance" on or "attachment" to the sidewalk.

In *Oboler v City of New York* (8 NY3d 888 [2007]), the plaintiff fell after stepping on a depressed manhole cover in the street. There was a 1 to 1½-inch height differential between the edge of the asphalt and the manhole cover. In affirming the dismissal of the action, the Court of Appeals stated that "[t]he City had no prior written notice of the hazard allegedly presented by the depressed manhole cover, as required under the Pothole Law" (8 NY3d at 889). Here, the alleged defect is a six inch differential between the soil in the tree well and the surrounding sidewalk, which is sufficiently similar to a depressed manhole cover so as to require notice under the Pothole Law (*see also DeSilva v City of New York*, 15 AD3d 252 [2005] [summary judgment granted to the City because there was no prior

notice of manhole cover resting on subway grating); *Cuffey v City of New York*, 255 AD2d 203 [1998] [action against City dismissed because there was no prior notice of alleged curb and/or sewer cap defect]; *Curci v City of New York*, 209 AD2d 574 [1994] [action against City dismissed because there was no prior notice of several-inch depression in grassy area between the curbline and the sidewalk]).

Plaintiff's argument that excluding tree wells from Administrative Code § 7-210 while including them in § 7-201(c)(2) would lead to an illogical outcome ignores the difference in the language employed in the two sections. *Vucetovic v Epson Downs, Inc.* (10 NY3d 517 [2008], *supra*) does not address whether prior written notice is required to maintain an action against the City for failing to maintain a tree well, and section 7-210(d) expressly provides that "[n]othing in this section shall in any way affect the provisions of this chapter or of any other law or rule governing the manner in which an action or proceeding against the city is commenced, including any provisions requiring prior notice to the city of defective conditions." Indeed, in *Ortiz v City of New York* (67 AD3d 21, 29 [2009], *revd on other grounds* 14 NY3d 779 [2010]), this Court applied the Pothole Law to ramps installed by the City even though they are not sidewalk

flags or part of the sidewalk under *Vucetovic*.

Similarly, the Second Department recently held that a tree well was within the ambit of the Town of Oyster Bay's written notice requirement (*see Holmes v Town of Oyster Bay*, __ AD3d __, 919 NYS2d 207 [2011]). In *Holmes*, the plaintiff allegedly sustained injuries when she tripped on a tree stump in a tree well located in a utility strip that ran parallel to a sidewalk. Citing *Vucetovic*, the court found that the abutting landowner was entitled to summary judgment because Code of Town of Oyster Bay § 205-2, which imposes a duty on landowners to maintain the sidewalk abutting their properties in good and safe repair and free from obstructions, did not extend to the tree well. The court found that the Town was also entitled to summary judgment:

> "Where, as here, a municipality has enacted a prior written notice law (*see* Code of Town of Oyster Bay § 160-1), it cannot be held liable absent proof of the requisite notice or an exception to that requirement . . . Contrary to the plaintiff's contention, the area in which she fell was within the purview of the Town's prior written notice law, and the plaintiff does not assert that an exception to the prior written notice requirement is applicable here" (919 NYS2d at 208 [citations omitted]).

Given the applicability of the Pothole Law, the lack of prior written notice of the alleged defect, and the absence of any evidence that the City created the alleged defect through an

affirmative act of negligence or made a special use of the subject tree well, the City may not be held liable even if it had actual or constructive notice of the alleged defect (*see Amabile v City of Buffalo*, 93 NY2d 471, 474, 475-476 [1999]), and notwithstanding that, as it happens, it owns the abutting property (*see* Administrative Code 2-210[d]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Sweeny, Acosta, Freedman, Abdus-Salaam, JJ.

4120 Theresa Devito, Index 18057/06
Plaintiff-Appellant,

-against-

Dennis Feliciano, et al.,
Defendants-Respondents.

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

Gottlieb Siegel & Schwartz, LLP, Bronx (Shane M. Biffar of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered on or about March 26, 2010, after a jury trial in an action alleging serious injuries sustained in an automobile accident, dismissing the complaint, unanimously affirmed, without costs.

The jury's finding that the automobile accident was not a substantial factor in bringing about plaintiff's injuries was based upon a fair interpretation of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). "[I]t is the jury's function to determine the credibility of witnesses and the weight to be accorded the testimony of experts" (*Harding v Noble Taxi Corp.*, 182 AD2d 365, 370 [1992]). Here, the record demonstrates credibility and reliability issues with respect to

the testimony of plaintiff's witnesses. Indeed, the testimony at trial contains inconsistencies relating to the circumstances of the accident, plaintiff's medical history and her subsequent treatment.

The trial court did not err in excluding certain medical records of plaintiff, as they were not properly certified and never given to defendants for inspection prior to trial (*see* CPLR 3122-a). Nor did the trial court err in declining to provide a missing witness charge since plaintiff did not satisfy the elements that are a prerequisite for receiving the charge (*see Getlin v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 117 AD2d 707, 708-709 [1986]; NY PJI 1:75, Comment, Caveat 2).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5161 The People of the State of New York, Ind. 1417/02
Respondent,

-against-

John Garcia,
Defendant-Appellant.

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

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

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Order, Supreme Court, Bronx County (John P. Collins, J.), entered December 9, 2009, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

Defendant was released on parole shortly after he filed his resentencing motion. Accordingly, the court correctly determined that defendant had lost his eligibility for resentencing, and denied the motion on that basis (*see* CPL 440.46[1]; *see also People v Orta*, 73 AD3d 452 [2010], *lv denied* 15 NY3d 755 [2010]). "The purpose of the [Drug Law Reform Act] resentencing provisions is to relieve prison inmates of onerous sentences of incarceration" (*People v Pratts*, 74 AD3d 536, 536 [2010], *lv granted* 15 NY2d 895 [2010]). Only persons in custody are permitted to apply for resentencing. A reduction in an inmate's

prison term may have the incidental effect of also reducing his or her supervisory term by replacing parole with a shorter term of postrelease supervision (*see* Penal Law § 70.70[3][b]). Nevertheless, it is clear from the legislative scheme that resentencing under the Drug Law Reform Act of 2009 and its predecessors was not intended to provide a remedy for a defendant who no longer has a prison term for the court to reduce, and who only seeks a reduction in the supervisory portion of a sentence. Instead, the Legislature provided that parolees could earn relief from supervision by way of Executive Law § 259-j(3-a).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5162 Brenda Melendez, Index 308427/08
Plaintiff-Respondent,

-against-

The Reichwald-Hiranandani
Living Trust Dated September
15, 1998, etc., et al.,
Defendants-Appellants.

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Meiselman, Denlea, Packman, Carton & Eberz P.C., White Plains (Peter N. Freiberg of counsel), for appellants.

Michelle S. Russo, Port Washington, for respondent.

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered June 11, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to submit sufficient evidence, such as a deed, to demonstrate the absence of any material issue of fact as to the ownership of the building. Indeed, the property management agreement and the testimony of the president of Friedman Management Corp. appear to contradict defendants' claim that the Living Trust is the sole owner. Defendants also failed to submit sufficient evidence, such as the testimony of an individual with personal knowledge of ice and snow removal

operations on the day of plaintiff's accident, to demonstrate that they neither created nor had notice of the allegedly hazardous condition on the building steps.

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5163 Bienvenida Perez, et al., Index 7191/04
Plaintiffs-Respondents,

-against-

John A. Corr, et al.,
Defendants-Appellants.

_____

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for appellants.

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for respondents.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered May 12, 2010, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint as to plaintiff Gloria Dunn's claim under the 90/180 day category, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Defendants demonstrated the absence of factual issues with respect to plaintiff's 90/180-day claim, by submitting plaintiff's deposition testimony, wherein she testified that she was confined to her home for approximately one month, and that she missed about one month of work (*see McCree v Sam Trans Corp.*, 82 AD3d 601 [2011]). That plaintiff returned to work for an

additional two months, on a reduced work schedule, fails to raise a triable issue of fact as to whether she sustained a 90/180-day injury (*see Linton v Nawaz*, 62 AD3d 434, 443 [2009], *affd on other grounds* 14 NY3d 821 [2010]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5164 Precision Performance, Inc., Index 13198/02
Plaintiff-Appellant,

-against-

Manuel Perez also known
as Manuel Perez Morales,
Defendant.
- - - - -
Texas Southern LLC,
Nonparty Respondent.

_____

Law Offices of Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Frank J. Haupel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about May 13, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff's application for an order pursuant to CPLR 1021 to substitute nonparty respondent Texas Southern LLC as a defendant in the action, unanimously affirmed, without costs.

As nonparty respondent had no notice of the terms of a judgment against the subject property because such terms were not docketed by the County Register or the County Clerk, the IAS court properly denied plaintiff's application pursuant to CPLR 1021 to substitute nonparty respondent as a defendant in the

underlying enforcement action. Moreover, even if the judgment roll is considered, nonparty respondent had no notice of the specific performance aspect of the judgment. The Bronx County Clerk docketed the judgment as a money judgment only and there is no reference in the County Clerk docket to any specific performance. As an improperly recorded judgment does not give constructive notice of the correct terms of the judgment (*see Puglisis v Belasky*, 118 Misc 336, 337 [1922]), we find that the motion was properly granted.

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J. Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5165 David Jiminian, etc., Index 17509/07
Plaintiff-Respondent,

-against-

St. Barnabas Hospital, et al.,
Defendant-Appellants,

"Jane" Khan, R.N., et al.,
Defendants.

_____

Gabarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, appellant.

Bartlett, McDonough & Monaghan, LLP, White Plains (Edward J. Guardaro, Jr. of counsel), for Christopher Leong, D.O., appellant.

Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered June 10, 2010, which, to the extent appealed from, in this action alleging medical malpractice and wrongful death, denied the motions of defendants Christopher Leong, D.O., and St. Barnabas Hospital for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

The motion court correctly determined that following defendants' showing of entitlement to judgment as a matter of

law, plaintiff demonstrated the existence of triable issues of fact precluding dismissal of the action as against defendants through plaintiff's own testimony and the report submitted by his expert. Plaintiff's testimony concerning his wife's complaints of dizziness and shortness of breath are res gestae, admissible as simple expressions of suffering by the injured party, who is no longer available by reason of her death, which occurred less than 12 hours following her complaints (*see* 58 NY Jur 2d, Evidence and Witnesses § 338; *Tromblee v North Am. Acc. Ins. Co.*, 173 App Div 174, 176 [1916], *affd* 226 NY 615 [1919]). Accordingly, triable issues exist as to whether defendant hospital departed from good and accepted medical practice in failing to properly investigate and address the decedent's complaints.

The report of plaintiff's expert also conflicts with the conclusions of Leong's expert on the issue of whether the decedent was at an increased risk for a pulmonary embolism secondary to deep vein thrombosis, whether Leong failed to properly recognize and treat that risk, and whether said failure

was the proximate cause of death (*see e.g. Bradley v Soundview Healthcenter*, 4 AD3d 194 [2004]).

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

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5166 Esther Gutierrez, Index 14501/04
Plaintiff-Respondent-Appellant,

-against-

Broad Financial Center, LLC,
Defendant-Respondent,

Schindler Elevator Corporation,
Defendant-Appellant-Respondent.

_____

Sonageri & Fallon, L.L.C., Garden City (James L. Sonageri of counsel), for appellant-respondent.

Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of counsel), for respondent-appellant.

Callan, Koster, Brady & Brennan LLP, New York (David A LoRe of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about November 9, 2009, which, insofar as appealed from, in this action for personal injuries allegedly sustained when plaintiff tripped and fell while exiting an elevator that had misleveled three inches below the floor of the building, granted the motion of defendant building owner Broad Financial Center, LLC's (BFC) for summary judgment dismissing the complaint as against it, and for summary judgment on its first and second cross claims against defendant Schindler Elevator Corporation for common-law indemnification, and denied defendant Schindler's

motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

BFC made a prima facie showing that it neither created nor had actual or constructive notice of the misleveling of the subject elevator. Indeed, the record demonstrates that there were no prior complaints as to the defective condition of the elevator (*see Gjonaj v Otis El. Co.*, 38 AD3d 384 [2007]; *Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [2005]). In opposition, plaintiff failed to raise a triable issue of fact and thus, the complaint was properly dismissed as against BFC.

Plaintiff likewise failed to rebut Schindler's prima facie showing that it too neither created nor had notice of the misleveling. However, the record presents a viable negligence claim as against Schindler under the doctrine of res ipsa loquitur. The alleged misleveling of the elevator was not an event that ordinarily occurs in the absence of negligence; deposition testimony and an elevator maintenance agreement established that Schindler had exclusive control over the inspection, maintenance and repair of the subject elevator; and the record is devoid of any evidence that plaintiff contributed

to the misleveling of the elevator (*see generally Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]; *see Dickman v Stewart Tenants Corp.*, 221 AD2d 158 [1995]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5167 The People of the State of New York, Ind. 6502/99
Respondent,

-against-

Roderick Turner,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (John P. Collins, J.), entered October 1, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously dismissed, without costs, as moot.

Since defendant was released on parole during the pendency of this appeal and is not currently in custody, he lost any eligibility for resentencing he may have had (*see* CPL 440.46[1]). Therefore, this appeal is moot (*see People v Orta*, 73 AD3d 452 [2010], *lv denied* 15 NY3d 755 [2010]).

In any event, defendant was also ineligible for resentencing at the time he filed his motion in that he was released on

parole from custody on his drug conviction but reincarcerated for a parole violation (*see People v Pratts*, 74 AD3d 536 [2010], *lv granted* 15 NY2d 895 [2010]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter Manzanet-Daniels, Román, JJ.

5168 In re Jamoneisha M.,

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

Ebony M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

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

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

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Order of disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about November 17, 2009, which, upon a finding of neglect against respondent mother, placed the subject child with the Commissioner of Social Services until the completion of the next permanency hearing, scheduled for May 5, 2010, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and appeal therefrom otherwise dismissed, without costs, as moot.

The appeal from the disposition has been rendered moot by the expiration of the order appealed from (*see Matter of Taisha R.*, 14 AD3d 410 [2005]).

The finding of neglect is supported by a preponderance of the evidence showing, inter alia, that respondent left the child with an inadequate caretaker and without providing her contact information, that she was responsible for the burn on the child's arm, and that she failed to adequately treat her own mental health issues (*see* Family Court Act §§ 1012[f]; 1046[b][a]). Contrary to respondent's contention, the court properly admitted the child's out-of-court statement that the mother burned her, which was corroborated by an Office of Children and Family Services intake report (*see Matter of Nicole V.*, 71 NY2d 112, 117-118 [1987]), regardless of the absence in the petition of an allegation that respondent acted intentionally (*see* Family Court Act § 1012[f] [no requirement to prove intentional act]). The court also properly admitted hospital records that postdated the filing of the petition by a few days, since these records were relevant to respondent's mental health history and her failure to seek necessary treatment preceding the filing of the petition

(*compare Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 438 [2010], *lv denied* 16 NY3d 702 [2011] [court properly excluded testimony regarding mother's willingness, post-petition, to exclude father from home]). The court also properly admitted a prior neglect finding against respondent with respect to her other child, since it tended to establish that respondent's inappropriate actions, such as leaving her child with an inadequate caretaker, were ongoing (*see Matter of Jennifer Q.*, 231 AD2d 429 [1996]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5169 Margarita Correa, etc., et al., Index 304954/08
Plaintiffs-Respondents,

-against-

Orient-Express Hotels, Inc.,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 3, 2010, which, insofar as appealed from as limited by the briefs, denied defendant's pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, without costs.

In this wrongful death action, plaintiffs allege that decedent slipped and fell while working in premises owned by nonparty 21 Club, Inc., which is wholly-owned by nonparty 21 Club Properties, Inc., which, in turn, is wholly-owned by defendant.

Neither the affidavit nor the deposition testimony defendant offered constitutes the type of documentary evidence that may be

considered on a motion pursuant to CPLR 3211(a)(1) (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]). The remainder of the evidence does not "conclusively establish[] a defense to the asserted claims as a matter of law" because it does not irrefutably establish that defendant neither owned nor controlled the premises (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Wright v C.H. Martin of White Plains Rd., Inc.*, 23 AD3d 295, 296 [2005]).

We reject defendant's argument that, even if it controlled 21 Club, Inc. and thus can be considered its alter ego, this action would still be barred by the exclusivity provisions of the Workers' Compensation Law. Defendant's liability is premised upon its ownership and/or control of the premises, not its ownership and/or control of 21 Club, Inc. Accordingly, whether or not defendant is the alter ego of 21 Club, Inc. is irrelevant. Further, defendant's argument relies upon a factual issue, whether it controlled 21 Club, Inc. and thus constituted its alter ego, which cannot be determined on this pre-answer motion

to dismiss.

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

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5171 The People of the State of New York, Ind. 4556/06
Respondent,

-against-

Abel Richiez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Megan R. Roberts of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered on or about February 3, 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: MAY 26, 2011

CLERK

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

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5172 Katherine De La Cruz, et al., Index 300398/09
Plaintiffs-Appellants,

-against-

Joaquin Hernandez,
Defendant-Respondent.

_____

Law Office of Louis Atilano, Bronx (Louis Atilano of counsel), for appellants.

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

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 20, 2010, which granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to reinstate plaintiffs' threshold claims with respect to the "permanent consequential limitation of use" and "significant limitation of use" categories of serious injury within the meaning of Insurance Law § 5102(d), and otherwise affirmed, without costs.

Plaintiffs allege that they sustained serious injuries to their necks and lower backs as a result of being rear-ended by defendant in June 2007. Defendant made a prima facie showing that plaintiffs' injuries were not permanent or significant by submitting the affirmed reports of a neurologist who, based upon

examinations of plaintiffs in October and November 2009, found no neurological disabilities and full ranges of motion, and concluded that all cervical and lumbar-sacral strains/sprains had been resolved (*see Porter v Bajana*, 82 AD3d 488, [2011]; *Amamedi v Archibala*, 70 AD3d 449, 449 [2010], *lv denied* 15 NY3d 713 [2010]; *Ayala v Douglas*, 57 AD3d 266 [2008]). However, the sworn reports of plaintiffs' treating chiropractor setting forth treatment from the time of the accident until early 2010, including the results of range of motion tests performed a few days after the accident and then over 3½ years later, raise triable issues of fact as to the extent of plaintiffs' injuries and causation (*see Tsamos v Diaz*, 81 AD3d 546 [2011]; *McClelland v Estevez*, 77 AD3d 403, 404 [2010]; *Colon v Bernabe*, 65 AD3d 969, 970 [2009]).

The conclusion of defendant's radiologist that plaintiffs' injuries were due to degenerative changes, without further elaboration, is insufficient to satisfy defendant's prima facie burden as to causation, given that plaintiffs were only 31 and 26 years old at the time of the accident and when the MRIs were taken (*see June v Ahktar*, 62 AD3d 427, 428 [2009]). In any event, plaintiffs' chiropractor's attribution of the injuries to the accident raised a factual issue (*see Linton v Nawaz*, 62 AD3d

434, 440-441 [2009], *affd* 14 NY3d 821, 822 [2010]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [2011]; *Malloy v Matute*, 79 AD3d 584 [2010]).

Defendant made a prima facie showing of absence of a 90/180-day category injury under Insurance Law § 5102(d) by pointing to plaintiffs' deposition testimony that they both were confined to bed and home for less than a month. Plaintiffs failed to raise an issue of fact to defeat summary judgment. Their affidavits averring that they were confined to bed and home for about 5½ months, submitted in opposition to defendant's summary judgment motion, "can only be considered to have been tailored to avoid the consequences of [their] earlier testimony" (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Their testimony that they were unable to perform their customary daily activities for at least six months after the accident is not supported by objective medical evidence (*see Gaddy v Eyler*, 79 NY2d 955, 958 [1992]; *DeJesus v Paulino*, 61 AD3d 605, 607 [2009]). Their treating chiropractor never indicated in his reports that he advised them to remain home or to refrain from their daily activities, and the chiropractor's general statement that plaintiffs were unable to perform "substantially all of the

material acts which constituted [their] usual and customary daily activities" is insufficient to raise an issue of fact (*see Valentin v Pomilla*, 59 AD3d 184, 187 [2009]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5174 Steven Upsher, Index 305814/09
Plaintiff-Respondent,

-against-

Subbaro V. Ramineni, M.D., et al.,
Defendants-Appellants.

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Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for appellants.

Toberoff, Tessler & Schochet, LLP, New York (Brian Schochet of counsel), for respondent.

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Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered July 13, 2010, which, insofar as appealed from as limited by the briefs, denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(2), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Dismissal of the complaint is warranted in this action where plaintiff alleges that while incarcerated, he received negligent medical care from defendants doctors and nurses, who were all employees of the Department of Correction. "Correction Law § 24 provides that an action against a Department of Correctional Services employee for 'any act done or the failure to perform any act within the scope of the employment' (Correction Law § 24[1])

must be commenced in the Court of Claims as a claim against the state (*see* Correction Law § 24[2])" (*Koehl v Mirza*, 39 AD3d 1092, 1092-1093 [2007], *mod on other grounds* 13 NY3d 897 [2009]; *see De Paolo v State of New York*, 99 AD2d 762, 763 [1984]; *Ruffin v Deperio*, 97 F Supp 2d 346, 355-356 [2000]). There exists no basis to deviate from the plain language of section 24 (*see generally Matter of Polan v State of N.Y. Ins. Dept.*, 3 NY3d 54, 58 [2004]), which immunizes "any officer or employee" from individual liability for acts or omissions taken "within the scope of the employment."

Furthermore, defendants correctly contend that the United State Supreme Court's decision in *Haywood v Drown* (__ US __ , 129 S Ct 2108 [2009]) has no bearing on this matter, as it does not involve a claim brought under 42 USC § 1983.

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, Román, JJ.

5175N Tamika N. Frank, Index 308391/08
Plaintiff-Appellant,

-against-

Luz M. Garcia, et al.,
Defendants-Respondents.

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Timothy P. Devane, New York, for appellant.

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Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered April 23, 2010, which denied plaintiff's motion for a default judgment as against defendant Luz M. Garcia and for an extension of time to serve defendant Angela A. Beras, and dismissed the complaint as abandoned, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the complaint reinstated, the motion granted as against Garcia and Beras, the latter to be served within 120 days of the date of this decision and order.

Plaintiff's motion for a default judgment against Garcia was erroneously denied since plaintiff moved for the entry of judgment within one year after Garcia's default, thereby rendering CPLR 3215[c] inapplicable. The record shows that Garcia was served with the summons and complaint by delivery to a person of suitable age and discretion followed by proper mailing

on December 24, 2008, and proof of service was filed on December 29, 2008. Thus, Garcia had until January 28, 2009 to answer the complaint (*see* CPLR 308[2]; 3012[c]). Plaintiff moved for a default judgment against Garcia by notice of motion dated January 22, 2010.

The court improvidently exercised its discretion in denying plaintiff's motion for an extension of time to serve defendant Beras pursuant to CPLR 306-b. Plaintiff made a showing of due diligence, establishing good cause for her motion to extend the time to serve Beras, as well as a showing that the extension was warranted in the interest of justice (*see generally Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). Plaintiff's papers outline the reasonable steps taken to locate Beras, including her attempts to serve Beras within the 120 days after the action was filed, and demonstrate that failure to timely serve process was the result of circumstances beyond plaintiff's control, namely, the inability to locate Beras. Although her motion was not filed until almost one year after the date of her process server's affidavit, the expiration of the statute of limitations, the meritorious nature of the cause of action, and

the lack of any potential prejudice to defendant warrant an extension of time for plaintiff to serve Beras (*see de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312 [2004]).

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

ENTERED: MAY 26, 2011

CLERK

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5317N Lillian Roberts, etc., et al., Index 116602/10
Plaintiffs-Appellants,

-against-

David A. Paterson, etc., et al.,
Defendants-Respondents.

_____

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger of counsel), for appellants.

Eric T. Schneiderman, Attorney General, New York (Laura R. Johnson of counsel), for David A. Paterson, respondent.

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

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 19, 2011, denying plaintiffs' motion for a preliminary injunction requiring defendants to fund health insurance benefits for retirees of the New York City Off-Track Betting Corporation (NYC OTB) pending determination of plaintiffs' plenary action for the same relief, unanimously affirmed, without costs.

The City and the State are precluded by the NY Constitution, article X, § 5, and Racing, Pari-Mutuel Wagering and Breeding Law § 614 from assuming the legal obligation to pay the NYC OTB retirees' health insurance benefits. Thus, plaintiffs cannot

show a probability of success on the merits or otherwise meet the "heightened standard" governing their application for a mandatory preliminary injunction (*see Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264, 273 [2009]).

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

ENTERED: MAY 26, 2011

CLERK

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

3447 The People of the State of New York, Ind. 1020/03
Respondent,

-against-

Christopher McCoy,
Defendant-Appellant.

_____

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

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

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Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered July 2, 2008, resentencing defendant to a term of 8 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was not barred by double jeopardy, since defendant was still serving his prison term at that time, and therefore had no reasonable expectation of finality in his illegal sentence (*People v Lingle*, __ NY3d __, 2011 NY Slip Op 03308 [Apr. 28, 2011]). Defendant's due process argument is also without merit (*id.*). Defendant's remaining challenges to his resentencing are similar to arguments that were rejected in *People v Williams* (14 NY3d 198 [2010], *cert denied* __ US __, 131 S Ct 125 [2010]) or

are otherwise without merit.

Defendant also argues that he should be permitted to withdraw his guilty plea on the ground that the plea court inadequately advised him of the PRS portion of his sentence (*see People v Catu*, 4 NY3d 242 [2005]). That claim is not properly before this Court on this appeal from the judgment of resentence (*see People v Jordan*, __ NY3d ___, 2011 NY Slip Op 02717 [Apr. 5, 2011]).

We perceive no basis for a reduction of sentence.

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

ENTERED: MAY 26, 2011

CLERK

Saxe, J.P., Acosta, Freedman, Richter, Abdus-Salaam, JJ.

3513-
3514 The People of the State of New York,
Respondent,

-against-

Angel Cordero,
Defendant-Appellant.

Ind. 3393/99

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Harold Adler, 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: MAY 26, 2011

CLERK

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

Tom, J.P., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

3943 Sergey Tatishev, et al., Index 111377/06
Plaintiffs-Respondents,

-against-

The City of New York,
Defendant-Appellant,

Police Officer Simon Urena,
Defendant.

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Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for appellant.

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

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered August 28, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

After this appeal was argued, the Court of Appeals clarified that "the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104(b)" (*Kabir v County of Monroe*, 16 NY3d 217, 220 [2011]). "Any other injury-causing conduct of such

a driver is governed by the principles of ordinary negligence" (*id.*). Here, the injury-causing conduct of the police driver -- making a left turn at a green light, within the speed limit, and not contrary to any restriction on movement or turning -- does not fall within any of the categories of privileged conduct set forth in Vehicle and Traffic Law § 1104(b). Accordingly, plaintiffs' claim is governed by principles of ordinary negligence, whether or not the police driver was responding to an emergency. Because the record presents a triable issue as to whether the police driver was negligent when his vehicle struck the pedestrian plaintiff in the crosswalk, we affirm the denial of defendants' motion for summary judgment.

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

ENTERED: MAY 26, 2011

CLERK

Sweeny, J.P., Moskowitz, DeGrasse, Freedman, Richter, JJ.

4202 In re Dominique 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 (John A. Newbery of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Robert R. Reed, J. at suppression and fact-finding hearings; Nancy M. Bannon, J., at disposition), entered on or about February 1, 2010, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he had committed acts which, if committed by an adult, would constitute the crime of possession of an imitation firearm, in violation of Administrative Code of the City of New York § 10-131(g), and placed him on probation for a period of 12 months, affirmed, without costs.

The court properly denied appellant's suppression motion. The police officers responded to a radio run based on an anonymous tip that a male black approximately 16 years of age was pointing a BB gun into the air. According to the radio run, the

subject was sitting on a park bench, had a black bag, and was wearing a white T-shirt, black shorts and white sneakers. From approximately one block away, the officers went to the location and saw approximately six young men, including appellant, in the park. Appellant, who was sitting on a bench, was the only one who matched the description. The officers asked appellant if he had a gun. Appellant stated that he had a BB gun in his bag, and showed it to the officers. The radio run, coupled with the description of the suspect that matched defendant's appearance, gave the police a founded suspicion that criminal activity was afoot (*see People v De Bour,* 40 NY2d 210, 223 [1976]). Therefore, the police acted within their common-law right to seek explanatory information while stopping short of making a forcible seizure when they asked appellant if he had a gun. A different conclusion is not warranted by the slight discrepancy in the description of appellant's clothing (*see e.g. People v Smalls,* 292 AD2d 213 [2002], *lv denied* 98 NY2d 681 [2002]). In reaching its conclusion, the hearing court credited the police officers' testimony and rejected that of appellant. We find no basis for disturbing the court's credibility determinations inasmuch as they are supported by the record (*see People v Prochilo*, 41 NY2d 759 [1977]). We therefore disagree with the dissent's premise

that there was an unlawful seizure since that premise seems to be based upon testimony that the court did not credit. *People v Moore* (6 NY3d 496 [2006]), a case cited by the dissent, is distinguishable because it involved a gunpoint stop that "unquestionably constituted a seizure of [the suspect's] person" before any inquiry occurred (*id.* at 499). We also distinguish *Matter of Jahad R.* (12 AD3d 154 [2004]) and *Matter of Koleaf J.* (285 AD2d 418 [2001]), cases cited by the dissent, because those cases involved anonymous tips that led to seizures, as opposed to the exercise of the police officers' common-law right to inquire upon a founded suspicion that criminal activity was afoot (*see People v De Bour,* 40 NY2d at 223). Moreover, the anonymous tip in this case was corroborated by the police officers' observation of appellant's clothing, the black bag in his possession, and the fact that he was seated on a bench as described in the radio run (*compare Matter of Jahad R.,* 12 AD3d at 155).

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

FREEDMAN, J. (dissenting)

I respectfully dissent, and would grant appellant's motion to suppress the BB gun that formed the basis of his adjudication for violating Administrative Code of City of NY § 10-131(g). The facts here are that two police officers received a radio run based on an anonymous tip describing a black male of about 16 years of age sitting on a park bench near 2741 Schley holding a BB gun, and then putting it into a duffel bag. It is not clear whether the caller said black duffel bag or just duffel bag. The caller further stated that the suspect was wearing a white shirt, black shorts, and sneakers. Two plainclothes officers shortly thereafter approached appellant, who was with six or seven others. They did not see a gun.

According to the officers, they "went to the guy that matched the description with the white shirt" and "had a black bag." Officer Franco testified, "I approached [appellant] and I asked him if he had a BB gun on him. He said yes and handed it over to me . . . from out of his bag." Appellant testified that four officers approached him and the others and asked "who has a BB gun" and then said, "Open your bags, everyone open their bags." The others opened their bags, but he did not, and Officer Franco then took his bag, opened it, and removed the BB gun. He

also stated that after the others had opened their bags, he "told Officer Franco that [the other] kids had nothing to do with this situation." Appellant, aged 14, was arrested immediately after the officers obtained the gun. By this time there were other police officers present, including Officer Ortiz, who prepared the arrest report. The arrest report stated that appellant was wearing "shorts-black," "sandals-black," "T-shirt or Tank Top-Gray," and "headgear-unk unknown color." There was no indication that appellant changed his shoes or his shirt between the time of the arrest and the time the arrest report was prepared. The report also indicated that there had been a frisk.

The hearing court believed the officers' testimony, and did not credit appellant's testimony concerning the arrest. For purposes of review, I will credit the court's findings. The issue is whether, under the standards set forth in *People v De Bour* (40 NY2d 210 [1976]) and reiterated in *People v Hollman* (79 NY2d 181 [1992]), the People have established a sufficient basis for a level 2 or 3 inquiry. According to *De Bour* and *Hollman*, there are four levels of police intrusion, each of which is justified by a different degree of suspicion. The first, "the minimal intrusion of approaching to request information," or level 1 inquiry, is authorized where "there is some objective

credible reason for that inference not necessarily indicative of criminality" (*De Bour*, 40 NY2d at 223). Requesting information concerning identity, address, purpose or destination falls into this category. Here, the radio run, although anonymous and not corroborated, was sufficient for the officers to approach appellant, who was in the vicinity of the alleged sighting, and request information.

Level 2, defined as "the common-law right to inquire, is activated by a founded suspicion that criminal activity is afoot" (*id.*). Level 3, a forcible stop and detention, is authorized where a police officer "entertains a reasonable suspicion that a particular person has committed, is committing or is about to commit a felony or misdemeanor" (*id.*).

At that point, an officer may detain and frisk the person if the officer reasonably suspects that he is in danger of physical injury because the person is armed. Approaching a teenager seated on a bench in the company of other teens and pointedly asking if he has a BB gun on him could be a level 2 inquiry, but under the circumstances here, it was a pointed and threatening inquiry; thus, it comes closer to a level 3 detention. Appellant testified that the officers approached the group and demanded that they open bags, and seized an unopened bag; this intrusion

clearly constitutes a level 3 stop, which is justified only where the officer has a reasonable suspicion to believe that the suspect has committed, is committing, or is about to commit a crime or is armed. Two police officers asking a seated individual if he has a gun on him, i.e., if he is committing a crime, is more than a common-law inquiry, although it might not be a full-fledged level 3 detention.

The facts of this case are insufficient to justify the detention that occurred here. The officers had received an anonymous tip that a 16-year-old had a BB gun that he put into a bag. The description of the alleged perpetrator included black shorts, a white top, and white sneakers. Appellant was 14 years old, and was wearing a gray shirt or tank top and black sandals. He was also wearing headgear, not mentioned by the caller. Finally, he had a black book bag, not a duffel bag. Only the black shorts, and possibly the bag, fit the description that the officers received from the radio run. No one came forward to identify the "suspect" during the time that the officers were present, and no follow-up calls were received. Thus, the officers had neither reasonable suspicion that criminal activity was afoot nor reasonable suspicion that a particular person, appellant, was about to commit a felony or misdemeanor. In

People v Moore (6 NY3d 496 [2006]), the Court of Appeals determined that an anonymous tip about an individual wearing a red shirt and grey hat was an insufficient basis for a detention. Similarly, in *Matter of Jahad R.* (12 AD3d 154 [2004]), and *Matter of Koleaf J.* (285 AD2d 418 [2001]), this Court rejected anonymous phone calls with general descriptions of young people allegedly handling guns as a sufficient basis for level 3 detentions. Based on the foregoing, I find that there was insufficient justification for the detention that occurred here, and would grant the suppression motion.

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

ENTERED: MAY 26, 2011

CLERK

Saxe, J.P., Friedman, DeGrasse, Freedman, Abdus-Salaam, JJ.

4325 ABKCO Music & Records, Inc., Index 110349/05
Plaintiff-Appellant,

-against-

Nathaniel Montague, et al.,
Defendants-Respondents.

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Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for appellant.

Goldweber & Epstein, LLP, New York (Jill L. Kibkow of counsel), for respondents.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered August 2, 2010, which, after a nonjury trial, granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, the motion denied, and judgment in the amount of $325,000 granted to plaintiff. The Clerk is directed to enter judgment accordingly.

It is uncontroverted that from 1999 to 2005 plaintiff advanced funds to defendants to aid them in cataloging a collection of African American art and memorabilia. Plaintiff asserts that the funds advanced constituted a loan, while defendants contend that the advances were intended as gifts. In support of its claim, plaintiff presented three witnesses who testified that the advances were made as loans. At the close of

plaintiff's case, defendants moved for a trial order of dismissal. After the court reserved decision on the motion, defendants rested without presenting a case. The court then granted the motion to dismiss, concluding that plaintiff failed to make out a prima facie case because the testimony in support of its claim was given by interested witnesses and therefore could be discounted. We disagree.

As we understand their position on appeal, defendants acknowledge that the advances they received from plaintiff were to be repaid in the event defendants sold the art collection. In this regard, defendants state in their brief, "Since the collection has not yet been sold, no payment is due." Defendants thus recognize that the advances were not gifts. Moreover, at trial, plaintiff introduced a letter from defendants' accountant that referred to plaintiff as having made a loan to defendants. Defendants, on the other hand, offered no evidence of any kind, but rested at the close of plaintiff's case. Given that plaintiff established a prima facie case and defendants failed to present any countervailing evidence, plaintiff is entitled to judgment.

We note that the absence of a specified time for repayment in the parties' oral loan agreement does not defeat plaintiff's

claim. As Supreme Court recognized in denying defendants' pretrial motion for summary judgment, where no time for repayment is specified in a loan agreement, the loan is payable immediately upon demand *(see Bradford, Eldred & Cuba R.R. Co. v New York, Lake Erie & W. R.R. Co.,* 123 NY 316, 326-327 [1890]).

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

ENTERED: MAY 26, 2011

CLERK

Tom, J.P., Sweeny, Catterson, Acosta, Manzanet-Daniels, JJ.

4652 The People of the State of New York, Ind. 6694/05
Respondent,

-against-

Umberto Fernandez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered January 24, 2007, convicting defendant, after a plea of guilty, of manslaughter in the second degree, and sentencing him to an indeterminate prison term of 3 to 9 years, modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to time served, and otherwise affirmed.

At the time of the incident, defendant was a 52-year-old-law abiding U.S. citizen with no criminal record. He lived with his sister and his mother, who suffers from multiple illnesses and is legally blind. In addition to caring for his mother, he supported his four young children, who live in the Dominican Republic.

Luis Gomez and his group of friends were known for causing property damage and perpetrating acts of violence in the community. In fact, defendant had previously had problems with Gomez. On this occasion, on December 21, 2005, defendant was returning home from work at 3:30 A.M., after having worked a long shift at his job at a restaurant. As defendant tried to enter the building, he encountered Gomez and his group. Gomez insulted defendant and prevented him from entering his apartment building. Although defendant attempted to avoid a confrontation with Gomez and his friends, Gomez took a metal object out of his pocket, presumably brass knuckles, and punched defendant in the face, breaking his nose and causing him to bleed profusely. According to defendant's sister, defendant was bleeding "a lot," his face was "totally swollen," and he was confused and uncoordinated.

Defendant was able to make his way up to his apartment, where he tried to clean up. Nonetheless, the blood continued to flow from his nose, and he was experiencing extreme pain, physical weakness and disorientation. Defendant then left his apartment to go to the hospital. He also wanted to ask Gomez for an apology, fearing that if he did not confront Gomez, he would be the target of more violent attacks by Gomez and his group. Defendant did not know whether Gomez and his group would be

downstairs. Consequently, he equipped himself with a kitchen knife. He put the kitchen knife under his coat for protection, explaining later that it was because "that group was very tough and dangerous." He further stated that he did not intend to kill anyone.

Upon returning downstairs, defendant found Gomez and one of his friends, Michael Fernandez, loitering in the vestibule. Gomez and Fernandez blocked defendant from leaving the building. At that juncture, defendant twice asked Gomez for an apology. Gomez refused, and instead taunted defendant, "loosened his jacket like a boxer," raised his hands and lunged at defendant with one hand. Fearing another savage beating and assuming that Gomez had a weapon in his hand, defendant pulled out the knife and lunged at Gomez's hand, stabbing him in the chest instead. Gomez and Fernandez took off running, and defendant returned to his apartment. It is not clear from the record whether defendant was able at the time to flee in safety.

Defendant did not pursue Gomez or Fernandez. Instead, he returned to his apartment without full knowledge of the extent of the injuries he had inflicted on Gomez. Nonetheless, he was in such a state of shock following the altercation that the police found him in a closet in a fetal position, crying and bleeding

profusely.

On October 20, 2006, defendant was convicted, after a jury trial, of second-degree manslaughter. On November 17, 2006, Justice Berkman sentenced him to an indeterminate prison term of five to fifteen years. In a thorough opinion by Justice McGuire, this Court reversed the judgment, and remanded for a new trial, on the ground that the trial court failed to charge criminally negligent homicide as a lesser included offense (64 AD3d 307 [2009]). Subsequently, defendant pleaded guilty to manslaughter in the second degree and was sentenced to three to nine years. When the plea was entered, the prosecutor volunteered that, while his policy was to oppose parole in most cases, he would not do so in this case.

We now reduce defendant's sentence to time served (*see People v Rosenthal*, 305 AD2d 327, 329 [2003] [this Court "possesses broad, plenary powers to modify a sentence that is unduly harsh or severe under the circumstances, in the interest of justice, even though the sentence falls within the permissible statutory range"], quoting *People v Delgado*, 80 NY2d 780, 783 [1992]; *see also* CPL § 470.15[2][c]; *People v Martinez*, 124 AD2d 505, 506 [1986] [in deciding what sentence is appropriate, this Court must consider various factors including "the nature of the

crime, the defendant's circumstances, the need for societal protection, and the prospects for the defendant's rehabilitation"]).

Before this incident, defendant had lived a productive, crime free-life, caring for and providing support for his elderly and infirm mother, as well as his four children (*see People v Easton*, 216 AD2d 220, 221 [1995], *lv denied* 87 NY2d 845 [1995] [noting defendant's lack of criminal record, excellent employment history, support for three young children, and the exceptional nature of the incident as the basis for a sentence reduction]). There were 65 letters submitted to sentencing court on behalf of defendant. The common themes in these letters were defendant's compassion, decency, commitment to family, hard work, peaceful nature, positive influence on others and disbelief that he could have committed the crime of which he was convicted. We believe that, in causing Gomez's death, defendant acted wholly out of character. He was an older man in extreme pain and in fear of an unrepentant young man who terrorized him and committed a vicious act of violence. Defendant did not go downstairs with the express intention of killing Gomez. Indeed, when he encountered Gomez, defendant simply asked for an apology. Defendant wanted Gomez to accord him the basic level of respect and dignity to

which everyone is entitled. He wanted to be able to live without fear. Unfortunately, defendant not only failed to acquire Gomez's respect, but, also, it appears that he was about to be subjected to a further beating at the hands of Gomez. In drawing his knife, defendant acted out of terror.

We recognize that this is a tragic case in which a young man was killed. However, in light of the circumstances discussed above, we believe that a prison term of three to nine years is unduly harsh. Defendant has already been incarcerated for more than five years. This period of imprisonment is more than sufficient punishment for the aberrational act he committed.

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

SWEENY, J. (dissenting)

I dissent.

This defendant, with the advice of counsel, entered into a negotiated plea. It was discussed with and accepted by a very experienced criminal judge, who, having already presided over the trial in this matter, was fully familiar with all the facts and circumstances. After a thorough voir dire and presumably taking into consideration all the mitigating factors the majority relies on, the judge accepted the plea, and defendant was sentenced exactly as promised.

The facts are virtually undisputed. This defendant, returning to his apartment after allegedly being "terrorized" by the victim and his friends, ignored the entreaties of his sister, and not only went back downstairs to demand an apology from his attackers, but did so armed with a 10" serrated kitchen knife, "the biggest knife [he] could find." The end result of their confrontation was the death of the victim, 22-year-old Luis Gomez, from a three-to four-inch knife wound.

The broad, plenary power of an appellate court to modify a sentence, especially a negotiated one, may be exercised only where the sentence was unduly harsh or severe (*see People v Delgado*, 80 NY2d 780 [1992]; *People v Suitte*, 90 AD2d 80[1982];

CPL § 470.15 [2][c]), and the case must present extraordinary circumstances to warrant a reduction (*People v McNeil*, 268 AD2d 611, 612[2000]; *People v Bass*, 261 AD2d 651[1999]). Even then, the court's intrusion into that area should be rarely exercised (*People v Sheppard*, 273 AD2d 498, 500 [2000], *lv denied* 95 NY2d 908). No such circumstances exist here.

Defendant, rather than face a retrial that, as the judge fully explained, would include the lesser charge of criminally negligent homicide, made a reasoned decision to avoid a potentially longer sentence and accept the offer of three to nine years, a lesser sentence than the one imposed after the trial. Such a sentence for the death of a young man was fair and does not provide a sufficient basis for the extraordinary exercise of interest of justice jurisdiction.

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4720 Pascuela De La Rosa, Index 101893/09
Plaintiff-Respondent,

-against-

Maria A. Gomez, et al.,
Defendants,

Eligio F. Hidalgo, et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Steven N. Feinman of counsel), for appellants.

O'Connor, Redd, LLP, White Plains (John Grill of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered August 17, 2010, which, insofar as appealed from as limited by their briefs, denied the motion by defendants Hidalgo and San for summary judgment dismissing plaintiff's claims under the permanent consequential and significant limitation categories of serious injury under Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established prima facie entitlement to summary judgment as a matter of law with respect to whether plaintiff sustained a "permanent consequential limitation of use of a body organ or member," or a "significant limitation of use of a body

function or system" within the meaning of Insurance Law § 5102(d) by submitting the reports of two physicians who examined the plaintiff and found full range of motion in her cervical and lumbar spine, her right shoulder, hip, and knee (Yagi v Corbin, 44 AD3d 440, 440 [2007]).

In opposition to defendants' motion, however, plaintiff raised an issue of fact with respect to the aforementioned categories by presenting "contemporaneous and qualitative medical evidence regarding alleged range-of-motion limitations causally related to the accident" (*Blackmon v Dinstuhl*, 27 AD3d 241, 242 [2006]), and a recent medical examination evincing the same (*Bent v Jackson*, 15 AD3d 46, 48 [2005]). In particular, plaintiff submitted a sworn report from Jean Daniel Francois, M.D., a neurologist who examined plaintiff both days after the accident and again recently in response to defendants' motion. Employing objective range of motion testing at both examinations, Francois concluded that plaintiff, as a result of the accident, suffered a permanent disability to her cervical and lumbar spine. Defendants' motion for summary judgment was thus properly denied

(*Linton v Nawaz*, 62 AD3d 434, 439 [2009], *affd* 14 NY3d 821 [2010]; *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 354-355 [2002]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Moskowitz, Román, JJ.

4728N Rene Baulieu, et al., Index 114779/08
Plaintiffs-Appellants,

-against-

Ardsley Associates L.P., et al.,
Defendants-Respondents,

Powerhouse Maintenance Inc.,
Defendant.

_____

Gorton & Gorton LLP, Mineola (John T. Gorton of counsel), for appellants.

Torino & Bernstein, P.C., Mineola (Vincent J. Battista of counsel), for respondents.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered August 24, 2010, which, in this personal injury action, denied plaintiffs' motion to strike the answer of defendants Ardsley Associates L.P. and ISJ Management Corp., unanimously modified, on the facts and in the exercise of discretion, to preclude defendant Ardsley Associates L.P. from asserting at trial either the negligence or responsibility of M.R. Snow Plowing, Inc. for the maintenance or repair of the alleged defective condition, and otherwise affirmed, without costs.

Plaintiffs' failure to provide an affirmation of good faith

in accordance with 22 NYCRR 202.7 "is excusable because any effort to resolve the present dispute non-judicially would have been futile" (*Carrasquillo v Netsloh Realty Corp.*, 279 AD2d 334, 334 [2001][internal quotation marks omitted]).

The delayed production of records pertaining to M.R. Snow Plowing, Inc. until after the statute of limitations had expired prejudiced plaintiffs. Accordingly, plaintiffs' motion is granted to the extent indicated.

We have considered plaintiffs' other contentions and find them unavailing.

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5176 The People of the State of New York, Ind. 4637/03
Respondent,

-against-

Isaac Diggins,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Simpson Thacher & Bartlett, LLP, New York (Nicholas F. Cohen of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered October 22, 2009, which denied defendant's CPL 440.10 motion to vacate a judgment of the same court (Robert H. Straus, J.), rendered June 15, 2004, unanimously affirmed.

Defendant has not demonstrated that his attorney rendered ineffective assistance when the attorney generally declined to participate in defendant's trial in absentia. The motion court conducted an evidentiary hearing, and the record supports the court's detailed findings of fact and conclusions of law (25 Misc 3d 1218[A]), 2009 NY Slip Op 52187[U]).

The record demonstrates that defendant's counsel, whose ability to conduct a defense was impaired by his client's absence, pursued a "protest strategy" (*People v Aiken*, 45 NY2d 394, 399 [1978]) or "strategy of silence" (*United States v Sanchez*, 790 F2d 245, 254 [2d Cir 1986], *cert denied* 479 US 989 [1986]). There is a presumption of prejudice where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. . . ." *United States v Cronic*, 466 US 648, 659 [1984]). However, that presumption is inapplicable to the facts of this case (*see Sanchez*, 790 F2d at 254).

When we apply both the state and federal effective assistance standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]), we conclude that counsel's strategic decisions were objectively reasonable. This conclusion applies to his nonparticipation in general, as well as to each of the individual instances of nonparticipation cited by defendant. Similarly, we conclude that defendant was not prejudiced by any aspect of counsel's nonparticipation. Defendant has not shown a reasonable probability that any of his attorney's alleged errors affected

the outcome of the trial or undermined confidence in the result. There was overwhelming evidence of defendant's guilt, including the evidence that he possessed a loaded operable firearm with intent to use it unlawfully against another person.

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5177 In re Matter of William Claudio, Index 109385/09
Petitioner-Appellant,

-against-

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

_____

Jeffrey L. Goldberg, P.C., Lake Success (Jeffrey L. Goldberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered November 17, 2009, as amended December 14, 2009, which denied this CPLR article 78 petition seeking to annul respondents' denial of accidental disability retirement benefits, and dismissed the proceeding, unanimously affirmed, without costs.

The court properly denied the petition seeking to annul respondents' determination and to remand the matter for reconsideration of whether petitioner suffered from a psychiatric disability that was causally related to his alleged line-of-duty injury. The determination was not arbitrary and capricious, an

abuse of discretion or contrary to law (*see Matter of Mulet v Kelly*, 49 AD3d 336 [2008]).

Credible evidence rebutted the presumption that petitioner's disability was caused by his work in recovery operations at the World Trade Center site in the aftermath of 9/11 (Administrative Code of City of NY § 13-252.1 [1][a]; *Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 761 [1996]), and evidence from numerous mental health professionals supported the Medical Board's determination that petitioner's disability was not the natural and proximate result of his employment at Ground Zero (*see Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II,* 60 NY2d 347 [1983]; *see also Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139 [1997]).

We note that the Board of Trustees made its own independent determination as to the Medical Board's recommendation on causation (*see* Administrative Code § 13-168 [a]; *see also Matter of Picciurro v Board of Trustees of N.Y. City Police Pension Fund, Art. II*, 46 AD3d 346, 348 [2007]), prior to adopting the

Board's findings (*see Matter of Brady v City of New York*, 22 NY2d 601 [1968]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5179-
5180 Index 111435/09

Delos Insurance Company,
formerly known as Sirius
America Insurance Company, et al.,
Plaintiffs-Appellants,

-against-

Smith & Laquercia, LLP,
Defendant-Respondent.

_____

Rubin, Fiorella & Friedman LLP, New York (Denise A. Palmeri of counsel), for appellants.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered April 13, 2010, dismissing the complaint, pursuant to an order, same court and Justice, entered April 9, 2010, which granted defendant's motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7), unanimously modified, on the law, to reinstate the complaint as to plaintiff Delos Insurance Company f/k/a Sirius America Insurance (Delos/Sirius), and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered November 24, 2010, which denied plaintiffs' motion to renew and reargue, unanimously dismissed, without costs, as academic.

The complaint should be reinstated as to plaintiff Delos/Sirius because, accepting the facts as alleged in the complaint as true and affording plaintiff the benefit of every reasonable inference, it sufficiently asserts viable causes of action for malpractice (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Delos/Sirius has standing to pursue its claims against defendant since it is undisputed that defendant represented Delos/Sirius in one declaratory judgment action. As to the second declaratory judgment action, the record supports the conclusion that a "near" privity relationship existed between the two (*see State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434 [2000]; *Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 60 [2007]; *Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 175 [2004]).

However, the complaint should be dismissed as to Delos/Sirius's insured co-plaintiffs Dennis Organization, Inc. and Rick Dennis, because it fails to allege they suffered damages as a result of defendant's alleged negligence that were not recompensed after Delos/Sirius, their insurer, paid to settle the

underlying personal injury action (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442-443 [2007]; *Stawski v Pasternack, Popish & Reif, P.C.*, 54 AD3d 619, 620 [2008]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Catterson, Renwick, DeGrasse, JJ.

5181 Terrance Smith, Index 302521/09
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

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

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

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered October 20, 2010, which, in an action for personal injuries, denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint as against it, with leave to renew upon completion of discovery, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of NYCHA dismissing the complaint.

NYCHA established its entitlement to judgment as a matter of law. It submitted, inter alia, an affidavit of a surveyor showing that it neither owned, controlled nor maintained the public staircase upon which plaintiff is alleged to have fallen and sustained injury (*see Grullon v City of New York*, 297 AD2d

261, 262-263 [2002]). In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submitted a conclusory affirmation from counsel noting a reference to the public stairway in the metes and bounds description contained in the deed to the parcel of land owned by NYCHA which abuts the public staircase. This evidence is plainly insufficient to contradict the surveyor's opinion that the stairway lay outside the bounds of NYCHA-owned property (*see id.*). Accordingly, there is no evidence in the record under which NYCHA could be held liable for plaintiff's injury (*Usman v Alexander's Rego Shopping Ctr., Inc.*, 11 AD3d 450 [2004]).

Furthermore, that discovery had not been completed does not foreclose the grant of summary judgment. Plaintiff failed to put forth any evidence on NYCHA's motion (*see Chemical Bank v PIC Motors Corp.*, 58 NY2d 1023, 1026 [1983]; *Doherty v City of New York*, 16 AD3d 124, 125 [2005]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5186 Vincent Buccino, Index 104522/05
Plaintiff-Appellant,

-against-

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

P & O Ports North America, Inc., et al.,
Defendants.

_____

Mitchell Dranow, Sea Cliff, for appellant.

Cerussi & Spring, White Plains (Jennifer L. Christiansen of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 13, 2010, which granted the City defendants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Plaintiff regularly bicycled to his job at the New York piers, employing one route. The court correctly found, as a matter of law, that a speed bump on the 20-foot-wide roadway at the entrance to Pier 94, coupled with a car parked near the speed bump, which car plaintiff had seen in the same location many times before, did not constitute a dangerous condition. The speed bump and the legally parked car – which left at least 10 feet for vehicles to pass through – were "plainly observable and

did not pose any danger to someone making reasonable use of his or her senses" (*Rivera v City of New York*, 57 AD3d 281, 282 [2008]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5188 The People of the State of New York, Ind. 4369/08
Respondent,

-against-

Jarred Knight,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered November 20, 2008, as amended January 7, 2009, convicting defendant, after a jury trial, of two counts of criminal sale of a controlled substance in the third degree, and sentencing him to concurrent terms of 1 year, unanimously affirmed.

The court properly replaced a sworn juror with an alternate. Although defendant objected to discharging the juror, he did not preserve his claims that the court made insufficient inquiry, applied the wrong standard and failed to make the requisite findings (*see People v Wynn*, 35 AD3d 283, 284 [2006], *lv denied* 8 NY3d 928 [2007]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on

the merits.

The record establishes that the juror was "unavailable for continued service" (CPL 270.35[1]). In making such a determination, a court may consider whether continued service would cause a juror "compelling hardship, rather than mere inconvenience" (*People v Belgrave*, 172 AD2d 335, 336 [1991], *lv denied* 78 NY2d 962 [1991]). The juror described extraordinary work-related problems that were sufficient to meet this standard.

Furthermore, the record also indicates that the juror was "grossly unqualified to serve" (CPL 270.35 [1]). That standard is met "when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict" (*People v Buford*, 69 NY2d 290, 298 [1987]). Here, the juror never expressly stated that his difficulties would affect his ability to reach an impartial verdict. However, his statements support a fair inference that his circumstances would have affected his ability to concentrate on jury service.

Moreover, aside from the juror's extraordinary circumstances, the juror also had a pressing medical situation involving his wife. That commitment alone would most likely have delayed the trial by at least a half day, and possibly a full day. "The Court of Appeals has held that the 'two-hour rule'

gives the court broad discretion to discharge any juror whom it determines is not likely to appear within two hours" (*People v Kimes*, 37 AD3d 1, 24 [2006], *lv denied* 8 NY3d 881 [2007], citing *People v Jeanty*, 94 NY2d 507, 517 [2000]).

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5189 Molecular Securities, Inc., Index 602892/08
Plaintiff-Appellant-Respondent,

-against-

TyraTech, Inc.,
Defendant-Respondent-Appellant.

_____

Pryor Cashman LLP, New York (Lisa M. Buckley of counsel), for appellant-respondent.

Reed Smith LLP, New York (Casey D. Laffey and Steven T. Voigt of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered June 7, 2010, which, insofar as appealed from as limited by the briefs, denied plaintiff Molecular Securities, Inc.'s motion for summary judgment on its breach of contract claim, and granted its motion to dismiss defendant TyraTech, Inc.'s counterclaim for breach of fiduciary duty, denied defendant's motion for summary judgment on that counterclaim, and denied defendant's motion for summary judgment dismissing plaintiff's breach of contract claim, unanimously modified, on the law, to the extent of granting defendant's motion dismissing plaintiff's breach of contract claim, and otherwise affirmed,

without costs. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint in its entirety.

Under the plain language of the letter agreement, the conveyance of TyraTech common stock held by XL Tech Inc. in satisfaction of the debt it owed to a third-party investor was not a "Transaction" triggering the $3 million "closing fee" owed to Molecular. That conveyance, a strict foreclosure under UCC article 9, was not a "sale of part or all of the shares of TyraTech Common Stock held by XL Tech," and in order to give effect to all the letter agreement's provisions, the provision defining a "Transaction" as the "sale or other disposition of any material portion of the assets of TyraTech" cannot be read as including a conveyance of the TyraTech common stock held by XL Tech (*see God's Battalion of Prayer Pentecostal Church, Inc. v Miele Assoc., LLP*, 6 NY3d 371, 374 [2006]; *S.M. Flickinger Co. v 18 Genesee Corp.*, 71 AD2d 382 [1979]). Accordingly, Molecular's breach of contract claim must be dismissed.

The court properly dismissed TyraTech's counterclaim for breach of fiduciary duty.

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5190 In re Earl B.G.,
Petitioner-Appellant,

-against-

Shenette T.,
Respondent-Respondent.

_____

John J. Marafino, Mount Vernon, for appellant.

_____

Order, Family Court, New York County (Lori S. Sattler, J.), entered on or about April 13, 2010, which dismissed without prejudice petitioner father's violation petition, granted respondent mother's petition to modify a visitation order of the same court (Karen I. Lupuloff, J.), entered on or about September 6, 2007, and terminated the subject child's visits with the father until further court order, unanimously affirmed, without costs.

There was a sound basis for the court's determination that the circumstances had changed sufficiently to modify the original visitation order. It was clear from the record that the incarcerated father behaved in a threatening and inappropriate manner in court, and that he was transferred to various maximum security disciplinary facilities due to what prison authorities viewed as serious infractions. The record also discloses that

the mother had unsuccessfully attempted to find an adult to accompany the child on the 16-hour trip to visit the father in prison. The court's determination was entitled to deference (*see Matter of Celenia M. v Faustino M.*, 77 AD3d 486 [2010], *lv denied* 16 NY3d 702 [2011]).

The father's due process rights were not violated where he was permitted to participate in the visitation modification proceedings via video conferencing (*see Matter of Arlenys B.(Aneudes B.)*, 70 AD3d 598, 599 [2010]). Given the father's conduct and the court's concern for safety, the court providently exercised its discretion in directing that the father participate only by video conference. Moreover, the father's attorney was present during the proceedings and the father had the opportunity to question the mother about visitation (*see id.*).

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

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

ENTERED: MAY 26, 2011

CLERK

Andrias, J.P., Friedman, Catterson, Renwick, DeGrasse, JJ.

5193N In re Gemini Real Estate Advisors, LLC, et al., Petitioners-Appellants, -against- Byron Realty I Corporation, Respondent-Respondent. Index 116519/10

Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York (Joshua S. Androphy and Thomas J. Fleming of counsel), for appellants.

Davidson & Grannum, LLP, Orangeburg (Carlos Ricca of counsel), for respondent.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 14, 2011, denying the petition to stay arbitration, and dismissing the proceeding, unanimously affirmed, with costs.

Petitioners' December 20, 2010 letter to the arbitrator, which requested that the arbitrator reopen the proceedings so that petitioners could present arguments on the merits, and which was sent before petitioners moved the court for relief, constitutes participation in the arbitration that precludes the

grant of a stay (*see* CPLR 7503(b); *Matter of Commerce & Indus. Ins. Co. v Nester*, 90 NY2d 255, 263 [1997]).

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

ENTERED: MAY 26, 2011

CLERK