Corrected List of January 10, **2012** to reflect proper entry date.

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 10, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, Catterson, Moskowitz, Acosta, JJ.

5485 The People of the State of New York, Respondent, Ind. 206/03

-against-

Julio Fuentes,
Defendant-Appellant.

_____

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

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

_____

Appeal from order, Supreme Court, Bronx County (John P. Collins, J.), entered February 11, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law, and the matter remanded for further proceedings consistent with this decision to include specifying and informing defendant of a proposed sentence.

Defendant's release on parole during the pendency of this appeal did not mandate dismissing the appeal as moot (*see People*

v Santiago, 17 NY3d 246 [2011]*; see also People v Paulins*, 17 NY3d 238 [2011]). Accordingly, we review defendant's arguments on the merits, and find that substantial justice does not dictate denial of resentencing pursuant to the Drug Law Reform Act of 2009. We leave the length of the new sentence to the discretion of Supreme Court.

The Decision and Order of this Court entered herein on June 30, 2011 is hereby recalled and vacated (*see* M-3061 decided simultaneously herewith).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Andrias, J.P., Friedman, DeGrasse, Freedman, Manzanet-Daniels, JJ.

6027 The People of the State of New York, Respondent, Ind. 1975/06

-against-

Victor Gonzalez, Defendant-Appellant.

_____

Davis Polk & Wardwell LLP, New York (Matthew S. Miller of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Caesar D. Cirigliano, J.), rendered May 6, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's attorney served and filed a CPL 250.10 notice of intent to present psychiatric evidence, in connection with a defense of extreme emotional disturbance (EED), but later withdrew the notice. After the People's case, which included a videotaped confession in which defendant made numerous statements to the effect that he had "lost his mind" on the day of the murder, the defense rested without presenting a case or cross-examining any of the People's witnesses regarding defendant's mental state.

The court granted defendant's request that the jury be instructed regarding the EED defense, finding that the evidence presented by the People, in particular the videotaped confession, supported the charge. The People opposed, stating that they had been led to believe, by the withdrawal of the CPL 250.10 notice, that the defense would be justification, not EED. The People thereupon moved to present a rebuttal case, including the testimony of the psychologist who had examined defendant after he filed the CPL 250.10 notice, and had prepared a report. Defendant opposed the People's request, arguing that the statute did not authorize the People to "introduce psychiatric evidence to rebut their own case," and that granting such a request would violate defendant's Fifth Amendment right against self incrimination.

The court granted the People's motion, reasoning that in requesting the EED instruction defendant had "offered" his statements in support of his application for the charge and given "notice of intent to proffer evidence of EED." Defendant thereupon withdrew his request for an EED charge.

The court properly construed defendant's request for an EED charge as the equivalent of a "notice of intent to proffer psychiatric evidence" under CPL 250.10, entitling the People to reopen its case and to present psychiatric evidence. CPL 250.10

defines psychiatric evidence as, inter alia, "[e]vidence of mental disease or defect to be offered by the defendant in connection with the affirmative defense of extreme emotional disturbance" (CPL 250[1][b]). When defendant requested the EED charge based on his statements to the police, defendant "offered" that evidence "in connection with" the EED defense, notwithstanding the fact that defendant did not present a case or cross-examine the People's witnesses concerning his mental state.

In *People v Berk* (88 NY2d 257, 262-264 [1996], *cert denied* 519 US 859 [1996]), the Court of Appeals noted that the statute "broadly defines 'psychiatric evidence,'" mandating that *any* evidence regarding a mental disease or defect offered in connection with the defense of extreme emotional disturbance be preceded by notice. The Court noted that the declared purpose of the statute was to "'prevent disadvantage of the prosecution as a result of surprise,'" citing the "unfair disadvantage" to the People occasioned by the "sudden interposition" of a psychiatric defense. The "primary aim" of the statutory notice requirement, as "manifestly establishe[d]" by the legislative intent, "was to ensure the prosecution sufficient opportunity to obtain the psychiatric and other evidence necessary to refute the proffered defense of mental infirmity" (*id.*, at 262-264 [internal quotation marks, citation and emphasis omitted]). The Court of Appeals

underscored, in *Berk*, that the statute should be construed as applicable to "*any* mental health evidence to be offered by the defendant in connection with" a defense of extreme emotional disturbance, not merely psychiatric examinations (*id*. at 625). This broad statutory mandate encompasses, in this case, the request for an EED charge based on the videotape that was in evidence.

To allow defendant to recharacterize his statements as evidence of EED, yet not permit the People the opportunity to present evidence in rebuttal, would be manifestly unfair, effectively allowing the defense to "sandbag" the prosecution, and defeat the very purpose of the statute.

The psychiatric evidence offered by the People was obtained, with defendant's consent, when defendant gave notice of his intention to present an EED defense. Defendant necessarily waived any Fifth Amendment rights regarding that evidence, to the extent it would be offered in relation to the EED defense. In any event, defendant's statements to the psychiatrist were never used against him at trial.

We limit our holding to the facts herein and express no opinion concerning a case where a defendant has not filed such initial CPL 250.10 notice.

We have considered and rejected defendant's other contentions.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

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

6092 In re Commissioner of Department of Social Services of the City of New York, etc.,
Petitioner-Respondent,

-against-

Charles B.,
Respondent-Appellant.

_____

Charles B., appellant pro se.

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

_____

Order, Family Court, New York County (Susan B. Larabee, J.), entered on or about November 10, 2010, which denied respondent father's objection to the Support Magistrate's order denying his application to reduce his child support arrears owed to the Department of Social Services that accrued during the period of his incarceration, unanimously affirmed, without costs.

The Family Court properly denied the application. Family Court Act § 451(1) provides that a "modification, set aside or vacatur shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section." Respondent's reliance on *Matter of Blake v Syck* (230 AD2d 596, 599 [1997], *lv denied* 90 NY2d 811 [1997]) is misplaced, as in

that case the father's income never exceeded the poverty income guidelines, and accordingly the child support arrears could not exceed $500 (*see* Family Ct Act § 413[1][g]; *see also Matter of Commr. of Social Servs. v Campos*, 291 AD2d 203 [2002]).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6495-
6496 Rhonda Epstein, Index 304191/95
Plaintiff-Respondent-Appellant,

-against-

Scott Epstein,
Defendant-Appellant-Respondent.

Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, New York County (Matthew F. Cooper, J.), entered on or about April 6, 2010 and May 12, 2010,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated December 29, 2011,

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6497- 6497A
Melissa Smith,
Plaintiff-Appellant,

-against-

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

Index 111178/05

Charles F. Darlington, White Plains, for appellant.

Molod Spitz & DeSantis, New York (Marcy Sonneborn of counsel), for DAG Hammarskjold Tower, N.V. and the Board of Manangers of DAG Hammarskjold Tower, N.V., respondents.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for municipal respondent.

Order, Supreme Court, New York County (Karen Smith, J.), entered May 12, 2010, which granted defendants' motions for summary judgment dismissing the complaint and all cross claims, and denied plaintiff's cross motion for summary judgment on the issue of liability, and order, same court (Geoffrey D. Wright, J.), entered April 14, 2011, which granted plaintiff's motion to renew and reargue her cross motion and adhered to the prior decision, unanimously affirmed, without costs.

Plaintiff testified at her deposition that she had "no idea" how she tripped and fell and she could not identify or mark on photographs the specific rise, declivity or defective condition

of the sidewalk that caused her accident. She stated that she did not feel her foot go into a depression, catch or strike anything, slip, or slide. Citing this testimony, defendants sustained their burden of demonstrating entitlement to summary judgment as a matter of law because a jury would have to engage in impermissible speculation to determine the cause of the accident (see *Siegel v City of New York*, 86 AD3d 452, 454-455 [2011]; *Fishman v Westminster House Owners, Inc.*, 24 AD3d 394 [2005]; *Rudner v New York Presbyt. Hosp.*, 42 AD3d 357, 358 [2007]).

The doctrine of res ipsa loquitur, which requires a showing that the event is the kind which ordinarily does not occur in the absence of someone's negligence, was caused by an agency or instrumentality within the exclusive control of defendant, and was not due to any voluntary action or contribution on the part of the plaintiff (see *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]), is inapplicable here because it is not uncommon for trips and falls to occur without negligence where there is a misstep or loss of balance, and because the area where

the accident occurred was not in the exclusive control of any defendant.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6499 In re Robert L. Meyers, doing business as B&G Roofing,
Petitioner,

-against-

Jonathan Mintz, etc., et al.,
Respondents.

Index 111482/09

Norman A. Olch, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

Determination of respondent Commissioner of the New York City Department of Consumer Affairs (DCA), dated November 17, 2008, which, after a hearing, revoked petitioner's home improvement contractor license and ordered him to pay restitution and a fine, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marylin G. Diamond, J.], entered November 16, 2009) dismissed, without costs.

DCA's determination was supported by substantial evidence. There is no basis to disturb respondent's determination, premised largely on this assessment of witness credibility, that petitioner performed substandard home improvement work on the

complainant's home, failed to correct the errors despite continual requests by the complainant, and supplied a contract in violation of numerous legal requirements (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). In addition, substantial evidence supported the determination ordering petitioner to pay restitution to the complainant because petitioner's substandard repairs and failure to correct them caused the complainant to incur additional costs to repair the damage to his home.

Under the circumstances, the penalty of revoking petitioner's home improvement contractor license was not so disproportionate to the offense as to shock the judicial conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 233 [1974]).

Finally, petitioner has failed to demonstrate bias on the part of DCA (*see Matter of Warder v Board of Regents of Univ. of State of N.Y.*, 53 NY2d 186, 197, *cert denied* 454 US 1125 [1981];

Matter of Mauro v Division of Hous. & Community Renewal, 250 AD2d 392 [1998]).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6503-
6503A

In re Victor B. and Another,

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

– – – – –

Yvonne B.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

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

Karen Freedman, Lawyers for Children, Inc., New York (Ronnie Dane of counsel), attorney for Victor B.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for Maurice B.

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Orders of disposition, Family Court, New York County (Susan Knipps, J.) entered on or about August 17, 2010, which, upon fact-findings of mental illness and permanent neglect, terminated appellant mother's parental rights to the subject children, and committed the guardianship and custody of the children to petitioner and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding that the mother suffers from a mental illness was supported by clear and convincing evidence. The expert testimony and documentary evidence demonstrated that the mother was afflicted with schizotypal personality traits, which, along with her borderline mental retardation, caused her to fail to appreciate the impact of her behavior on her children.

In addition, the finding of permanent neglect entered against the mother was supported by clear and convincing evidence of her failure to plan for the children's future. Petitioner engaged in diligent efforts to strengthen the bond between the mother and the children by making appropriate referrals for services, suitable arrangements for visitation and referrals for additional services when it became clear she had trouble handling her children, who had special needs (*see e.g. Matter of Khalil A. [Sabree A.]*, 84 AD3d 632, 633 [2011]). The mother did not complete some of the services she was referred to, failing drug rehabilitation twice due to positive toxicology tests. Morever, the services which the mother did complete appeared to have no impact on her, as she remained unable to have positive interactions with the children.

A preponderance of the evidence demonstrated that it was in the best interests of the children to terminate the mother's parental rights in order to free them for adoption by their

respective foster families, with whom they have resided in stable, nurturing, well-supported environments *(see e.g. Matter of Fernando Alexander B. [Simone Anita W.]*, 85 AD3d 658, 658 [2011]). We have considered the remaining arguments, including the mother's request for a suspended judgment, and find them unavailing.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6504- The People of the State of New York, Ind. 5222/06
6505- Respondent, 5251/07
6506- 6131/07
6507 -against-

Wayne Hunter,
Defendant-Appellant.

_____

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

Wayne Hunter, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E Seewald and David P. Stromes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered April 13, 2009, convicting defendant, after a jury trial, of attempted assault in the first degree, assault in the second degree and 14 counts of criminal contempt in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 8 years, unanimously affirmed. Order, same court and Justice, entered September 17, 2010, which denied defendant's CPL 440.10 motion to vacate the April 13, 2009 judgment, unanimously affirmed. Judgment, same court (Bonnie G. Wittner, J.), rendered April 24, 2009, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the fourth degree, and sentencing him, as a second felony drug

offender, to a consecutive term of three years, unanimously affirmed.

Defendant claims that his trial counsel rendered ineffective assistance when she requested an intoxication charge in an unrecorded colloquy, but abandoned the issue when the court did not deliver such a charge. Regardless of whether counsel should have followed up on her request, defendant has not established prejudice under either the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The victim testified that defendant declared that he was going to kill her, and acted in a purposeful manner when he struck her with a hammer. Furthermore, defendant testified that his last use of drugs or alcohol was at least eight and a half hours before the incident. According to defendant's testimony, he essentially slept off a drug and alcohol binge, and he never claimed that the drug and alcohol consumption affected his actions.

Accordingly, there was no evidence that intoxication affected defendant's intent to cause serious physical injury (*see People v Sirico*, 17 NY3d 744 [2011]). Defendant has not shown that the court would have delivered an intoxication charge had counsel followed up on her request, and the court's decision on

the CPL 440.10 motion indicates the contrary. Furthermore, defendant has not shown a reasonable probability that an intoxication charge would have been persuasive to the jury, so as to affect the outcome of the trial (*see Strickland*, 466 US at 694).

Defendant also claims that his counsel should have elicited additional evidence relating to intoxication. However, the proposed evidence would have had little or no chance of either persuading the court to charge intoxication, or persuading the jury to accept that defense.

We perceive no basis for reducing any of the sentences.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6508 Antonia Christina Basilotta, etc., Index 115524/09
Plaintiff-Respondent,

-against-

Oren J. Warshavsky, etc., et al.,
Defendants-Appellants.

_____

Patterson, Belknap Webb & Tyler LLP, New York (Frederick B. Warder III of counsel), for appellants.

Law Office of F. Edie Mermelstein, Huntington Beach, CA (F. Edie Mermelstein, of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 8, 2011, which, denied defendants' motion to dismiss the complaint on statute of limitations grounds, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Accepting the allegations in plaintiff's complaint as true and resolving all inferences in her favor, as we must in considering a motion to dismiss (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Benn v Benn*, 82 AD3d 548, 548 [2011]), this legal malpractice action accrued in California at the latest in November 2007, when plaintiff received defendants' letter

unequivocally informing her that they were no longer representing her or prosecuting her underlying actions. Accordingly, under California's applicable one-year statute of limitations (Cal Code Civ Proc § 340.6[a]), this action, commenced in February 2010, is time-barred.

Contrary to the motion court's finding, plaintiff's assertion that it was not until October 2009 that she discovered that Radialchoice, the record company with whom she had held a recording contract, was involuntarily liquidated, did not raise an issue of fact as to whether this action is time-barred. Indeed, plaintiff's allegation was asserted only in her memorandum of law in opposition to the motion, not in her pleadings or any accompanying affidavit (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [2001]). Moreover, plaintiff's alleged discovery is simply an additional facet of the same nonfeasance of which, according to her complaint, she had been aware since November 2007; thus, it does not constitute a separate wrongful act or omission for statute of limitations purposes (*see Peregrine Funding, Inc. v Sheppard Mullin Richter & Hampton LLP*, 133 Cal App 4th 658, 685, 35 Cal Rptr 3d 31, 51 [2005]).

Lastly, plaintiff's allegations support the conclusion that she had inquiry notice of defendants' alleged nonfeasance more

than one year before commencing this action. Indeed, since January 2007, when plaintiff obtained her case files and observed that defendants had performed very little work on her underlying cases, she should have discovered, through the use of reasonable diligence, the facts supporting liability, including the fact that Radialchoice had been involuntary liquidated (*see McGee v Weinberg*, 97 Cal App 3d 798, 803, 159 Cal Rptr 86, 89-90 [1979]).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6509 The People of the State of New York, Ind. 3928/09
Respondent,

-against-

Savannah Stinson,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about March 18, 2010,

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

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

ENTERED: JANUARY 10, 2012

CLERK

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

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6510 Elaine Thompson, Index 116079/09
Petitioner-Respondent,

-against-

Mel Cooper, etc.,
Respondent,

Imperial Capital LLC,
Respondent-Appellant.

_____

Monteiro & Fishman LLP, Hempstead (Michael N. Fishman of counsel), for appellant.

Elaine J. Thompson, respondent pro se.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered October 4, 2010, which denied respondent Imperial Capital LLC's motion to dismiss the petition for failure to state a cause of action, unanimously modified, on the law, to grant the motion as to the claim under Debtor and Creditor Law § 273, and to deem the petition amended to include a claim under Debtor and Creditor Law § 273-a, and otherwise affirmed, without costs.

Petitioner commenced this special proceeding to set aside respondent Cooper's conveyance of his luxury condominium to Imperial, an entity in which he had a substantial stock interest. The petition lacks the factual allegations and evidence required to support a finding that Cooper fraudulently conveyed the

condominium to Imperial in violation of Debtor and Creditor Law § 273 (*see* CPLR 409[b]; *1091 Riv. Ave. LLC v Platinum Capital Partners, Inc.*, 82 AD3d 404 [2011], *appeal dismissed* 17 NY3d 769 [2011]; *Karr v Black*, 55 AD3d 82, 86 [2008], *lv denied* 11 NY3d 712 [2008]).

However, the petition and the documentary evidence, including a money judgment in plaintiff's favor against Cooper and state and municipal transfer forms indicating that Imperial paid little or no consideration for the condominium, are sufficient to raise triable issues whether Cooper, who at the time of the transfer was a defendant in plaintiff's action for money damages, fraudulently conveyed the condominium to Imperial in violation of Debtor and Creditor Law § 273-a (*see Matter of National Enters., Inc. v Clermont Farm Corp.*, 46 AD3d 1180, 1182 [2007]). In view of the foregoing, we nostra sponte deem the petition amended to include a claim under Debtor and Creditor Law § 273-a (*see* CPLR 3025[c]; *Gonfiantini v Zino*, 184 AD2d 368, 369 [1992]).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6514-
6515 The People of the State of New York, Respondent,

Ind. 4244/08

-against-

Jose Guasp,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J., at plea and SORA hearing, Maxwell Wiley J., at sentencing), rendered on or about September 8, 2009,

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

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

ENTERED: JANUARY 10, 2012

CLERK

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

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6516-
6517 Aaron Seligson, et al., Index 601608/99
Plaintiffs-Appellants-Respondents,

-against-

Albert Russo, et al.,
Defendants-Respondents-Appellants.

_____

Leahey & Johnson, P.C., New York (Peter James Johnson, Jr., of counsel), for appellants-respondents.

Kellner Herlihy Getty & Friedman, LLP, New York (Douglas A. Kellner of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J., upon a decision of Herman Cahn, J.), entered October 13, 2009, which, to the extent appealed from as limited by the briefs, upon the receiver's motion, inter alia, to approve his final account, fix his commissions and allocate his commissions and expenses between the parties, held plaintiffs 50% liable for the costs of remediation of an oil leak in a building owned by their former partnership and offset against this liability the sums due them from the receiver's commission escrow account, and held defendants liable for 99.9% of the receiver's commissions and expenses, unanimously affirmed, with costs.

The court properly imposed liability for the costs of remediation of the leak from the oil tank under the partnership's

building pursuant to the Navigation Law, which imposes strict liability on "[a]ny person who has discharged petroleum" onto land "from which it might flow or drain into" the waters of the state, which include "bodies of ... groundwater" (§ 181[1]; §§ 172[8], [18]; *see State of New York v New York Cent. Mut. Fire Ins. Co.*, 147 AD2d 77, 79 [1989]). Neither the "as is" clause in the offering memorandum whose terms were incorporated in defendants' right of first refusal nor the assumption agreement explicitly exculpated plaintiffs, 50% owners of the property when the oil leak was discovered, from liability for the leak (*see Umbra U.S.A. v Niagara Frontier Transp. Auth.*, 262 AD2d 980, 981 [1999]). Plaintiffs' argument concerning our decision in *101 Fleet Place Assoc. v New York Tel. Co.* (197 AD2d 27 [1994], *appeal dismissed* 83 NY2d 962 [1994]) is misplaced. That decision involved a broad provision that did not contain an "as is" clause but explicitly imposed liability for "any violation."

The court properly allocated 99.9% of the receiver's commissions to defendants because 99.9% of the proceeds from the sale of the partnership interests was attributable to them.

We have considered the parties' other contentions and find them unavailing.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6518-
6518A Sara Bostwick, Index 116010/09
Plaintiff-Appellant,

-against-

Christian Oth, Inc., et al.,
Defendants-Respondents.

_____

The Ruth E. Bernstein Law Firm, New York (Ruth E. Bernstein of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered on or about November 24, 2010, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 4, 2010, which denied plaintiff's motion to amend the complaint, and granted defendants' motion for summary judgment dismissing the complaint, unanimously dismissed, with costs, as subsumed in the appeal from the judgment.

The parties' contract unambiguously granted defendants ownership of the copyright in all images created and, further, allowed them to make proofs and previews available to plaintiff to enable her to select photographs for her wedding album. Thus, defendants' only act that plaintiff complains of, i.e., posting

the offending photographs on the website, falls squarely within the four corners of the contract (*see Excel Graphics Tech. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 [2003], *lv dismissed* 2 NY3d 794 [2004]). Plaintiff's e-mailed requests to defendants that they remove the photographs were not a revocation of defendants' right to post the photos. The contract, not plaintiff, was the source of defendants' rights; plaintiff could not revoke a grant of authority she never possessed. Nor was her alleged oral agreement with the photographer valid, in view of the written contract's integration clause explicitly prohibiting oral agreements.

Plaintiff's fraud claim is duplicative of her breach of contract claim (*see Financial Structures Ltd. v UBS AG*, 77 AD3d 417, 419 [2010]). Her claim of negligent infliction of emotional distress is unsupported by reliable proof of either emotional trauma or a threat to her physical safety (*see Bernstein v East 51st St. Dev. Co., LLC*, 78 AD3d 590 [2010]).

Plaintiff's proposed Civil Rights Law §§ 50 and 51 claims are time-barred, pursuant to the first publication rule (*see Nussenzweig v diCorcia*, 9 NY3d 184 [2007]). Plaintiff argues that defendants' continued posting after she requested that the photos be removed constitutes a re-publication or a first unauthorized publication. However, since defendants were within

their right to post the photos, and plaintiff had no authority to revoke that right, neither the initial posting, nor the continued posting – even if it were deemed a re-publication – violated Civil Rights Law §§ 50 and 51. Moreover, defendants were not using plaintiff's photographs "for advertising purposes, or for the purposes of trade" (§ 50); even if they were using the photos for those purposes, they had obtained plaintiff's written consent to do so.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6520-
6521N Village Center for Care, Index 651668/11
Plaintiff-Appellant,

-against-

Sligo Realty and Service Corp.,
Defendant-Respondent.

_____

Cutler Minikes & Adelman LLP, New York (Jonathan Z. Minikes of counsel), for appellant.

Novick, Edelstein, Lubell, Reisman, Wasserman & Leventhal, P.C., Yonkers (Gregory S. Bougopoulos of counsel), for respondent.

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Orders, Supreme Court, New York County (Shirley Werner Kornreich J.), entered June 20, 2011 and June 21, 2011, which denied plaintiff tenant's motion for a *Yellowstone* injunction, and dismissed the action, respectively, unanimously reversed, on the law, with costs, the motion granted and the action reinstated.

Although the subject lease provides for a 10-day cure period, it also provides for an unspecified longer period to cure defaults not capable of complete cure within 10 days, upon condition that the tenant commence curing within the 10-day period and thereafter proceed with good faith and diligence.

Here, tenant demonstrated that its defaults, which included failure to obtain waivers and approvals from City agencies, were

not capable of cure within 10 days and defendant landlord failed to offer any opposing evidence. The tenant commenced to cure the violations within the stated 10-day period and it continued in good faith to undertake efforts to cure by hiring an expediter once apprised that the documentation was insufficient (*see Manhattan Parking Sys.-Serv. Corp. v Murray House Owners Corp.*, 211 AD2d 534 [1995]; *compare KB Gallery, LLC v 875 W. 181 Owners Corp.*, 76 AD3d 909 [2010])). Since the applicable cure period under the express terms of the lease had not ended, landlord's notice of termination was premature and invalid for the purpose of barring tenant from applying for *Yellowstone* relief (*see Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1997]).

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Friedman, J.P., Sweeny, Acosta, Renwick, Abdus-Salaam, JJ.

6522N Scott C. Gibson, Index 650734/09
Plaintiff-Appellant,

-against-

Seabury Transportation Advisor LLC, et al.,
Defendants-Respondents.

_____

Schwartz & Ponterio PLLC, New York (Matthew F. Schwartz of counsel), for appellant.

Satterlee Stephens Burke & Burke LLP, New York (Michael H. Gibson of counsel), for respondents.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered November 26, 2010, which granted defendants' motion to compel arbitration as to the issue of arbitrability, and denied plaintiff's cross motion to sever and stay his claims against defendant Seabury Aviation & Aerospace LLC pending disposition of his claims against defendant Seabury Transportation Advisor LLC, unanimously affirmed, with costs.

The arbitration clause in the parties' agreement "evince[s] a 'clear and unmistakable' agreement to arbitrate arbitrability" (*see Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39, 46 [1997]; *Life Receivables Trust v Goshawk Syndicate 102 at Lloyd's*, 66 AD3d 495, 496 [2009], *affd* 14 NY3d 850 [2010], *cert denied* __US__, 131 S Ct 463 [2010]). It provides that any

"dispute, difference, controversy or claim arising in connection with or related or incidental to, or questions occurring under, the provisions of this Agreement ... [not resolved by mediation] ... shall be submitted to JAMS/Endispute for binding arbitration before a sole arbitrator." The clause provides further that the arbitration shall be conducted under JAMS/Endispute's commercial rules. Rule 11(c) of JAMS Comprehensive Arbitration Rules and Procedure provides that "[j]urisdictional and arbitrability disputes, including disputes over the . . . interpretation or scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter."

Since it has yet to be determined whether plaintiff's claims against Seabury Transportation are arbitrable, it would be premature to sever and stay the claims against Seabury Aviation.

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

ENTERED: JANUARY 10, 2012

CLERK

CORRECTED ORDER - JANUARY 10, 2012

Mazzarelli, J.P., Sweeny, DeGrasse, Richter, Manzanet-Daniels, JJ.

5012 Salimatou Bah, etc., Index 8667/07
5012A Plaintiff-Respondent, 86312/07

-against-

Christopher Benton, et al.,
Defendants-Appellants.

[And Another Action]

_____

Carroll, McNulty & Kull LLC, New York (Sean T. Burns of counsel), for Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc., appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Truck King International Sales & Service, Inc., appellant.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 2, 2010, affirmed, without costs.

Opinion by Manzanet-Daniels, J. All concur.

Order filed.

Corrected Opinion of January 10, **2012** to reflect proper entry date.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
John W. Sweeny
Leland G. DeGrasse
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

5012-
5012A
Index 8667/07
86312/07

_____x

Salimatou Bah, etc.,
Plaintiff-Respondent,

-against-

Christopher Benton, et al.,
Defendants-Appellants.

[And Another Action]

_____x

Defendants appeal from the order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 2, 2010, which, to the extent appealed from as limited by the briefs, denied their motions for summary judgment dismissing the complaint.

Carroll, McNulty & Kull LLC, New York (Sean T. Burns of counsel), for Christopher Benton, Arrow Recycling and Tempesta & Son Co., Inc., appellants.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Truck King International Sales & Service, Inc., appellant.

DeAngelis & Hafiz, Mount Vernon (Talay Hafiz

of counsel), for respondent.

MANZANET-DANIELS, J.

In this case we address the interplay between the *Noseworthy* doctrine and the familiar presumption that applies in cases of rear-end collision. We hold that where a plaintiff has established, through medical evidence, that he has no memory of an accident, plaintiff's burden is to submit prima facie evidence of defendant's negligence. To hold otherwise, in a case involving a rear-end collision, would be to effectively deprive a plaintiff of the benefit of the *Noseworthy* doctrine with respect to his claims against the driver and the owner of the other vehicle.

It is not contested, for purposes of these motions, that plaintiff's significant head injuries plunged him into a coma and resulted in post-traumatic amnesia that rendered him unable to recall or relate the circumstances of the accident. Plaintiff, having presented medical evidence establishing the loss of memory and its causal relationship to defendant's fault, is entitled to the lesser standard of proof applicable to a party unable to present his version of the facts (*see Noseworthy v City of New York*, 298 NY 76 [1948]).

In order to avail himself of the *Noseworthy* doctrine, it was incumbent on plaintiff to present prima facie evidence of defendants' negligence. This he has amply done. Plaintiff

submitted, inter alia, the affirmed reports of accident reconstruction experts who opined that the driver of the truck, defendant Christopher Benton, was negligent in driving in the left lane; in bringing his vehicle to a stop in the right lane in contravention of the Vehicle and Traffic Law when he had sufficient momentum to steer onto the right shoulder; in failing to move his vehicle off the roadway once he was in the right lane; and in failing to deploy the required warning devices, including the setting off of flares and the placement of three reflective triangles around the disabled vehicle, at distances of approximately 10 feet, 100 feet and 200 feet behind the subject vehicle and in the center of the incident lane. Had these devices been properly placed at the appropriate distances, plaintiff would have had over 200 feet to avoid the stalled truck and to be warned of its presence, significantly increasing his ability to react and maneuver his vehicle so as to avoid the truck. Plaintiff's experts noted that placement of reflective triangles was especially critical because the roadway was straight and level, making it more difficult to judge the separation distance between plaintiff and the stopped truck, leaving plaintiff with no perceptual cues but a change in the truck image size. Plaintiff's experts noted that trucks are not permitted in the left lane of the Bruckner Expressway in the area

where the accident occurred, and opined that if the truck driver had been traveling in any other lane he would have been able to stop on the shoulder since he in fact managed to travel the distance from the left to the far right lane. Both plaintiff's experts and the trucking company's expert opined that the repeated breakdown of the truck was the result of negligent repair and faulty service rendered by third-party defendant Truck King, and was an essential factor in causing the subject accident.

The truck driver testified that the vehicle stalled while he was driving in the left lane of the expressway. The driver testified that he placed the truck in neutral, tried several times, unsuccessfully, to restart it, and ultimately steered the truck partially onto the shoulder, with a portion of the vehicle still in the right lane.[1] The driver instructed his helper to "put out the triangles," in the rear of the truck and proceeded to call his boss. He testified that his helper brought two triangles with him and placed at least one of the triangles at the rear of the truck prior to the accident. (It may be noted that applicable safety regulations require placement of three

[1]The driver maintained that only one quarter of the vehicle protruded into the right lane; the police report and the officer on the scene, however, place the vehicle entirely in the right travel lane.

emergency reflective triangles in the case of a stopped emergency vehicle.) The record does not indicate whether this triangle was placed at the required distance from the rear of the truck so as to apprise approaching vehicles of the truck's presence in the roadway in sufficient time to allow approaching vehicles to stop or otherwise avoid the truck; moreover, the police officer who responded to the scene testified that he did not observe any reflective triangles, broken or otherwise, in the roadway. The record similarly is unclear as to whether the truck's flashers were on at the time of impact,[2] and whether, in the gloomy weather, any such flashers would have apprised an approaching vehicle of the presence of the truck in adequate time to stop.

The driver testified that the helper did not know how to deploy the flares, and that he did not deploy the flares himself, even though the flares were contained in the same box as the triangles and nearly three minutes elapsed before the truck was struck in the rear by the vehicle driven by plaintiff. During this time the driver was apparently on the radio with his boss.

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[2]The truck driver testified that he put the flashers on as soon as the truck stalled, and assumed, because they worked on battery, that the flashers were still operable at the time of the accident, though he did not personally observe the flashers illuminated in the minutes prior to the accident. The police officer who responded to the accident could not recall whether the flashers were operational when he arrived on the scene.

The trucking company's accident reconstruction expert cited as three "critical factors" in the happening of the accident the improper servicing of the truck by defendant/third-party defendant Truck King, the characteristics of the stall, which prevented the driver from driving the truck off the roadway, and the presence of the truck in the travel portion of the roadway, a happenstance precipitated by the improper servicing.

The weather conditions at the time of the accident were described as "hazy, ""misty" and "gloomy," and the roadway described as "wet" by officers who arrived on the scene.

Under these circumstances, plaintiff has more than adequately raised a triable issue of fact concerning the reasonableness of the truck driver's actions, and thus he is entitled to a trial on his claims.

Plaintiff alleges that Truck King was negligent in repairing the truck prior to the accident and that its negligence was a proximate cause of the accident. We note that the *Noseworthy* doctrine does not apply to plaintiff's claim against Truck King because that claim is not based upon facts that plaintiff might have testified to had he not lost his memory (*see Bin Xin Tan v St. Vincent's Hosp. & Med. Ctr. Of N.Y.*, 294 AD2d 122 [2002]). We reject Truck King's argument that truck driver Benton's negligence was a supervening cause absolving it of liability, and

the argument by Benton and his employer, defendant Arrow Recycling and Tempesta & Son Co., Inc., that plaintiff's negligence in avoiding the rear-end collision renders their negligence – amply documented above – "immaterial." Whether Truck King's negligence was a proximate cause of the accident and whether Benton's negligence is an intervening cause relieving Truck King of its liability for negligent maintenance of the truck are issues for the trier of fact (*see White v Diaz*, 49 AD3d 134 [2008] [triable issue of fact existed as to negligence of driver of double-parked van, who was sleeping at the time the van was struck in the rear by another vehicle]; *Dowling v Consol. Carriers Corp.*, 103 AD2d 675 [1984] [where buses were stopped "where they had no right to be," on shoulder of expressway, triable issue of fact existed as to whether negligence of bus operator was a proximate cause of accident, even where vehicle in which plaintiff had been traveling experienced recurrence of a mechanical problem], *affd* 65 NY2d 799 [1985]; *Sutton v Carolei*, 244 AD2d 156 [1997] [triable issue of fact existed as to whether negligent repairs to plaintiff's vehicle, which was disabled and struck from behind, was a proximate cause of plaintiff's injuries]).

Further, if the *Noseworthy* doctrine is applicable – as defendants concede it is – Benton and his employer are not

entitled to mechanical application of the presumption which typically pertains in cases of rear-end collision. The *Noseworthy* doctrine entitles a plaintiff to a lesser burden of proof in instances where plaintiff – owing to a defendant's negligence – is rendered incapable of testifying or offering his version of the facts. To say that *Noseworthy* applies, on the one hand, and then to say, on the other, that defendants are entitled to dismissal of the complaint because plaintiff has not put forth a non-negligent explanation for the accident – undermines the very purpose of the doctrine.

We also reject Truck King's argument that as a matter of law its allegedly negligent repair to the truck "merely furnished the occasion for the accident without actually being a cause of the accident." Engineering experts who submitted affidavits on behalf of plaintiff and the truck's owner opined that the truck's mechanical failure on November 24, 2005, the day of the accident, was caused by the misalignment of the moving parts of the engine/transmission assembly, particularly the flex plate. The truck had been brought to Truck King for repairs to address engine stalling on May 24, October 17 and October 31, 2005. In fact, Truck King replaced the flex plate as part of the October 17, 2005 repair.

Accordingly, the order of the Supreme Court, Bronx County

(Lucindo Suarez, J.), entered August 2, 2010, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Christopher Benton, Arrow Recycling and Tempesta & Son Co. and the motion of defendant/third-party defendant Truck King International Sales and Service, Inc. for summary judgment dismissing the complaint as against them, should be affirmed, without costs.

All concur.

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

ENTERED: JANUARY 10, 2012

CLERK