SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 1, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, DeGrasse, Abdus-Salaam, JJ.

2700 Allen Simon, et al., Index 305788/09
Plaintiffs-Appellants,

-against-

Sol M. Usher, et al.,
Defendants-Respondents.

_____

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Rhonda E. Kay of counsel), for appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for Sol M. Usher, Sol M. Usher, M.D., P.C., F.A.C.S., Maxwell M. Chait, Hartsdale Medical Group, P.C., and White Plains Hospital Center, respondents.

Rende, Ryan & Downes, LP, White Plains (Roland T. Koke of counsel), for Sheldon Alter, Mid-Westchester Medical Associates, LLP, The Westchester Medical Group, P.C. and Marianne Monahan, respondents.

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Upon remittitur from the Court of Appeals (17 NY3d 625 [2011]), order, Supreme Court, Bronx County (MaryAnn Brigantti-Hughes, J.), entered October 27, 2009, which, in a medical malpractice action, granted the motion of the Usher defendants and defendants Chait, Hartsdale Medical Group, P.C., and White Plains

Hospital Center to change venue from Bronx County to Westchester County, unanimously affirmed, without costs.

The motion to change venue was properly granted upon the grounds that, except for defendants Usher and Usher, M.D., P.C., all of the defendants and plaintiffs reside in Westchester County, and that while Usher, M.D., P.C., maintains a satellite office in Bronx County that it rents one day per month, Usher's primary office is located in Westchester County, the office where plaintiff was treated. Thus, movants met their initial burden of establishing that the Bronx County venue chosen by plaintiffs is improper (CPLR 503[a]; 510[1]; *Hernandez v Seminatore*, 48 AD3d 260 [2008]), and since plaintiffs forfeited their right to select the venue by choosing an improper venue in the first instance, venue is properly placed in Westchester County, where most of the parties reside (*Weiss v Wal-Mart Stores E., L.P.*, 83 AD3d 461 [2011]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6958 The People of the State of New York, Ind. 2922/03
Respondent, 4310/03

-against-

Paul Manning,
Defendant-Appellant.

_____

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

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

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about April 27, 2009, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's discretionary upward departure was based on clear and convincing evidence of aggravating factors not adequately taken into account by the risk assessment instrument. Defendant has an extensive history of possessing, trading and promoting child pornography, and caused a child to create a pornographic video. He admitted that he has frequently communicated with minors on the Internet, in some cases leading to sexual activity. In addition,

the case summary provided reliable information that defendant has been diagnosed with pedophilia. Accordingly, defendant demonstrated a very high risk of reoffending (*see e.g. People v Newman*, 71 AD3d 488 [2010]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6959 Ronald Warnick, Index 17576/07
Plaintiff-Respondent, 84146/08

-against-

1211 Southern Boulevard LLC, et al.,
Defendants-Respondents,

Universal Ceiling Ltd.,
Defendant-Appellant.

[And a Third-Party Action]

_____

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for appellant.

Kuharski, Levitz & Giovinazzo, Staten Island (Lonny R. Levitz of counsel), for Ronald Warnick, respondent.

Hoffman & Roth, LLP, New York (Barry M. Hoffman of counsel), for 1211 Southern Boulevard LLC and Voodoo Contracting Corp., respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 12, 2011, which, to the extent appealed from, denied defendant Universal Ceiling Ltd.'s motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Universal Ceiling (Ceiling) established prima facie that its foreman at the job site, Zbigniew Kulikowski, was a special employee of defendant Universal Contracting Co. (Contracting), the

general contractor for the project (*see Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 557-558 [1991]). Ceiling and Contracting, while separate entities, share the same president, who testified that Kulikowski was Ceiling's employee and had been lent to Contracting for the project and that Contracting reimbursed Ceiling for the wages Ceiling paid Kulikowski. However, the record does not demonstrate conclusively that Kulikowski was Contracting's special employee. Kulikowski testified that he had been an employee of Contracting for 18 years. Moreover, the invoices in the record do not support the president's statement that Contracting reimbursed Ceiling for Kulikowski's wages for the project. Similarly, the checks payable by Contracting to the drywall and other materials supplier for the project do not support Ceiling's claim that Contracting paid for those materials. Most significantly, the record does not indicate whether the president was Kulikowski's "boss" as the president of Contracting or the president of Ceiling. Thus, the record does not demonstrate that Contracting "controll[ed] and direct[ed] the manner, details and ultimate result of [Kulikowski's] work" (*see id.* at 558).

In the event it is determined that Kulikowski is not a special employee of Contracting, liability may be imposed upon Ceiling as a statutory agent under the Labor Law since Kulikowski had the

requisite authority to supervise and control the work (*see Walls v Turner Constr. Co.*, 4 NY3d 861, 863-864 [2005]; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [2011]).

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

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6960 Scott Coaxum, Index 24303/04
Plaintiff-Respondent, 85169/06

-against-

Metcon Construction, Inc.,
Defendant,

200 West 26, LLC, et al.,
Defendants-Appellants.

[And a Third-Party Action]

_____

Lewis Johs Avallone Aviles, LLP, Melville (Seth M. Weinberg of counsel), for appellants.

Melucci, Celauro & Sklar, LLP, New York (Daniel Melucci of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered on or about November 9, 2010, which denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss plaintiff's common law negligence and Labor Law § 200 claims, and Labor Law § 241 (6) claim, to the extent it is based on a violation of 12 NYCRR 23-1.7(e)(1), and otherwise affirmed, without costs.

On or about August 12, 2002, plaintiff was working on premises owned by defendant 200 West 26, LLC and leased by defendant Buy Buy Baby, Inc. Plaintiff was responsible for taping sheetrock prior to

its being painted. While working, he became involved in a dispute with another worker, who, in the course of the dispute, pushed plaintiff. After being pushed, plaintiff stepped back into an open hole and fell, breaking his leg.

Defendants failed to establish they should be relieved from liability on the ground that the coworker's act in pushing plaintiff was an independent intervening act that was a superseding cause of the accident (*see William v 520 Madison Partnership*, 38 AD3d 464 [2007]).

Turning to the merits of the Labor Law claims, the motion court correctly determined that questions of fact exist concerning the hole plaintiff allegedly fell into. Defendants have not conceded the existence of the hole, and there is, at best, conflicting evidence concerning its size and whether its depth was sufficient to render it a gravity-related hazard within the meaning of Labor Law § 240(1) (*see e.g. Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234 [1997]) or a falling hazard as defined by 12 NYCRR 23-1.7(b)(1), thereby stating a claim for violation of Labor Law § 241(6) (*see e.g. Barillaro v Beechwood RB Shorehaven, LLC* 69 AD3d 543 [2010]).

The motion court erred, however, in failing to dismiss the common law negligence and Labor Law § 200 claims as the testimony

is clear that these defendants did not supervise or control the plaintiff's work *(Campuzano v Board of Educ. of City of N.Y.*, 54 AD3d 268 [2008]). In addition, the motion court should have dismissed the Labor Law § 241(6) claim to the extent it was predicated on a violation of 12 NYCRR 23-1.7(e)(1) of the Industrial Code. The section refers only to passageways.

The evidence is clear that the area where the accident occurred was a work area, not a passageway (*see e.g. Canning v Barneys N.Y.*, 289 AD2d 32, 34 [2001]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6961 In re Azmara N.G.,
Petitioner-Appellant,

-against-

Jesse Stephanie S.,
Respondent,

Administration for Children's Services,
Respondent-Respondent.

_____

Louise Belulovich, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Betsy Kramer of counsel), attorney for the children.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about March 31, 2011, which dismissed the maternal great-aunt's petition for custody of the subject children, unanimously affirmed, without costs.

The evidence demonstrated that dismissal of the great-aunt's petition for custody in favor of freeing the subject children to be adopted by their foster parents is in the best interests of the children (*see Matter of Alpacheta C.*, 41 AD3d 285 [2007], *lv denied* 9 NY3d 812 [2007]. Members of the extended biological family do not have a preemptive statutory or constitutional right to custody

in place of non-relatives (*id.*; *see Matter of Peter L.*, 59 NY2d 513, 516 [1983]). The subject children have lived with the foster parents for the majority of their lives and the foster parents, who wish to adopt them, have provided a loving, stable home and they are attendant to the children's special needs, which include extensive medical care.

In contrast, petitioner plans to continue to live with the biological father, whose parental rights were terminated due to his failure to comply with the agency's referrals for mental health services and who has a history of violent conduct. In addition, petitioner, who has a limited relationship with the children, failed to articulate an appropriate plan for their future, which failure included an inability to provide adequate housing and to address the children's special needs.

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6963-
6964 & Dennis Hough, Index 601490/07
M-433 Plaintiff-Appellant,

-against-

USAA Casualty Insurance Company,
Defendant-Respondent.

_____

Stanley K. Shapiro, New York, for appellant.

Robert M. Spadaro, New York, for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered May 13, 2011, which, to the extent appealed from as limited by the briefs, upon reargument, denied plaintiff's motion for summary judgment on its claim for recovery of an unsatisfied judgment against defendant's insured, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered July 6, 2010, unanimously dismissed, without costs, as abandoned.

Defendant's disclaimer of its duty to defend its insured in the underlying action does not bar it from asserting that its insured injured plaintiff intentionally, because that assertion is not a defense extending to the merits of plaintiff's personal

injury claims against the insured (*see Robbins v Michigan Millers Mut. Ins. Co.*, 236 AD2d 769, 771 [1997]). Since the underlying action culminated in a default judgment and the issue whether the insured's acts were intentional or negligent was not litigated, defendant is not collaterally estopped to assert in this action that its insured caused plaintiff's injuries intentionally (*see id.*). There is support for this assertion in the record (*compare Rucaj v Progressive Ins. Co.*, 19 AD3d 270, 273 [2005] [insurer's defenses rejected as a matter of law]).

Since issues of fact exist whether the underlying incident was an "occurrence" within the meaning of the policy, i.e., an accident, or an intentional act outside the scope of coverage, which would render a disclaimer pursuant to Insurance Law § 3420(d) unnecessary, it cannot yet be determined whether defendant's noncompliance with the statute precludes it from disclaiming

coverage (*see Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188-189 [2000]; *Seneca Ins. Co. v Naprawa*, 294 AD2d 183 [2002]).

M-433 - *Dennis Hough v USAA Casualty Ins. Co.*

Motion seeking to submit and append a certified copy of the Superior Court Information granted.

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6966 The People of the State of New York, Ind. 573/07
Respondent,

-against-

Anibal Sanchez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Allen J. Vickey 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.), rendered on or about April 10, 2008,

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

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

ENTERED: MARCH 1, 2012

CLERK

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

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6967 Patricia Ynoa, Index 25261/04
Plaintiff-Appellant,

-against-

New York City Transit Authority,
Defendant-Respondent.

_____

Asta & Associates, P.C., New York (Eliot S. Bickoff of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered October 8, 2010, which granted defendant's motion to set aside the jury verdict and dismissed the complaint, unanimously reversed, on the law, without costs, defendant's motion to set aside the verdict denied, and the complaint reinstated.

The IAS court erred in granting the motion to set aside the verdict on the grounds that there was insufficient evidence to support a finding for plaintiff on the issue of constructive notice. The court did not charge constructive notice, and defendant did not object to that aspect of the charge. It is well settled that the court may not overturn a verdict on an issue not in the charge and not requested by either party (*Kroupova v Hill*, 242 AD2d 218, 220 [1997], *lv denied* 92 NY2d 1013 [1998]).

Defendant is also incorrect that there was insufficient evidence to sustain the jury's finding that the missing turnstile arm constituted an inherently dangerous condition. Whether something constitutes a dangerous condition is almost always a question of fact that turns upon the particular circumstances of each case (*Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]). Here, given the undisputed manner in which the accident happened, i.e., plaintiff's foot became wedged and then snapped under the remaining turnstile arm – which would have been impossible had the bottommost arm been intact – we cannot say there is no rational chain of inferences that would allow the jury to find for plaintiff on this issue (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). In contrast, while comparative fault should generally be charged, here, given the circumstances of how the accident occurred, there was nothing upon which a jury could have based a finding of

comparative fault. Nor was this a case where the possibility of plaintiff's own negligence was apparent from the nature of the accident (*cf. McDonald v Long Is. R.R.*, 77 AD3d 712, 713 [2010]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6969 Norma Iris Maldonado, Index 14892/99
Plaintiff-Respondent,

-against-

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

The New York City Board of Education,
Defendant-Appellant.

_____

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

Linda Trummer-Napolitano, White Plains, for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered February 2, 2010, which, to the extent appealed from as limited by the briefs, in this action for personal injuries allegedly sustained when plaintiff slipped and fell on sand and debris as she descended the exterior staircase of a school building, denied the motion of defendant New York City Board of Education for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Although defendant's submissions in support of the motion, including the testimony of the custodian of the school, indicated that the area of the accident was inspected and cleaned on the morning of the accident, plaintiff's fall did not occur until after

7 P.M. and there was evidence of ongoing construction in the area of the stairs. Under these circumstances, defendant failed to meet its initial burden of showing that it did not have constructive notice of the alleged dangerous condition (*see Nugent v 1235 Concourse Tenants Corp.*, 83 AD3d 532 [2011]; *Edwards v Wal-Mart Stores*, 243 AD2d 803 [1997]; *compare DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [2008], *affd* 11 NY3d 889 [2008]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6971 Patrice Miki, Index 101629/09
Plaintiff-Appellant,

-against-

335 Madison Avenue, LLC, et al.,
Defendants-Respondents.

_____

Jaroslawicz & Jaros LLC, New York (Norman Frowley of counsel), for appellant.

James J. Toomey, New York (Evy L. Kazansky of counsel), for respondents.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered January 20, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this personal injury action, plaintiff allegedly tripped and fell on a bent "lip" on the edge of the metal molding surrounding an access door, which was located on the floor of a heavily-trafficked room on the mezzanine level of premises owned by defendant 335 Madison and managed by defendant Milstein. Defendant General Electric leased the mezzanine level of the premises and subleased it to plaintiff's employer, nonparty American Independence.

The motion court properly dismissed plaintiff's claim that the

access door violated Administrative Code of the City of New York § 28-301.1, since she failed to allege the statute in, or seek leave to add it to, her bill of particulars (*see generally Reilly v Newireen Assoc.*, 303 AD2d 214, 217-218 [2003], *lv denied* 100 NY2d 508 [2003]). Moreover, the claim lacks merit, as the statute merely imposes a general duty on owners to maintain their premises, and does not specifically address the alleged structural defect at issue (*see Guzman v Haven Plaza Hous. Dev. Fund Co., Inc.*, 69 NY2d 559 [1987]; *see also Maksuti v Best Italian Pizza*, 27 AD3d 300 [2006], *lv denied* 7 NY3d 715 [2006]; *cf. Cusumano v City of New York*, 15 NY3d 319, 327-328 [2010, Lippman, Ch. J., concurring]).

Defendants made a prima facie showing of entitlement to judgment as a matter of law with respect to plaintiff's common-law negligence claim by submitting evidence that they did not create or have notice of the alleged dangerous condition. In response, plaintiff failed to raise a triable issue of fact. Indeed, the record shows that plaintiff and her coworkers had entered and exited the subject room several times a day, over a period of years, and there had been no complaints or incidents related to the metal molding or bent lip before the accident (*see Gordon v*

American Museum of Natural History, 67 NY2d 836, 837-838 [1986]).

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

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6972 & M-252 The People of the State of New York, Respondent,

-against-

Ted Johnson, Defendant-Appellant.

Ind. 3778/10

Edward Land, New York, for appellant.

Ted Johnson, appellant pro se.

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

Judgment, Supreme Court, New York County (Thomas A. Farber, J.), rendered December 7, 2010, convicting defendant, after a jury trial, of forcible touching, and sentencing him to a term of one year, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. The conduct described by the victim, which was also observed by police officers, met the definition of forcible touching (*see* Penal Law § 130.52).

Since defendant did not make a timely objection to the jury's mixed verdict, he did not preserve his claim that the verdict was

repugnant, and we decline to review it in the interest of justice. A repugnancy claim can only be preserved by way of an application made after the verdict is rendered, but before the jury is discharged, when it is still possible to remedy any defect by resubmitting the charges (*see People v Alfaro*, 66 NY2d 985 [1985]; *People v Satloff*, 56 NY2d 745, 746 [1982]; *People v Stahl*, 53 NY2d 1048, 1050 [1981]). There is no merit to defendant's suggestion that the preservation requirement was satisfied by events occurring at stages of the proceedings other than the rendition of the verdict. As an alternative holding, we find that the verdict was not repugnant. "If there is a possible theory under which a split verdict could be legally permissible, as charged to the jury, the verdict cannot be repugnant, regardless of whether that theory has evidentiary support in a particular case" (*People v Muhammad*, 17 NY3d 532, 540 [2011]).

The court properly denied defendant's speedy trial motion. The periods of delay at issue were correctly excluded as resulting from pretrial motions, including the time that the motions were under consideration by the court (*see* CPL 30.30[4][a]), regardless of whether a valid accusatory instrument was in place at the time (*see People v Worley*, 66 NY2d 523 [1985]).

We have considered and rejected defendant's remaining claims.

M-252 - *People v Ted Johnson*

Motion to file a pro se supplemental reply brief granted.

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6973 The People of the State of New York, Ind. 865/09
Respondent,

-against-

Francis Rivera,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Paul Wiener 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 (Rena K. Uviller, J.), rendered July 1, 2009, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree, and sentencing him to a term of 6 months, unanimously affirmed.

By pleading guilty, defendant waived his objection to the grand jury instructions (*see People v Garcia*, 216 AD2d 36 [1995]). In any event, there was no impairment of the integrity of the grand jury proceedings (*compare People v Pelchat*, 62 NY2d 97 [1984]). The prosecutor properly instructed the grand jury on the essential elements of the crime of possession of a cane sword, which is a per se weapon, by reading the language of the statute (*see People v Berrier*, 223 AD2d 456 [1996], *lv denied* 88 NY2d 876 [1996]). Under the circumstances, there was no need for any further instructions

concerning the element of mental culpability (*see id.*; *compare People v Wood*, 58 AD3d 242 [2008], *lv denied* 12 NY3d 823 [2009]). Accordingly, the prosecutor furnished the grand jury "with enough information to enable it intelligently to decide whether a crime has been committed" (*People v Calbud*, 49 NY2d 389, 394 [1980]).

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6975-
6976 JDF Realty, Inc., Index 117897/09
Plaintiff-Appellant,

-against-

Scott Sartiano, et al.,
Defendants-Respondents.

_____

Wender Law Group, PLLC, New York (N. Cameron Russell of counsel), for appellant.

McCue Sussmane & Zapfel, P.C., New York (Kenneth Sussmane of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered June 28, 2010, which granted the individual defendants' motion to dismiss the complaint as against them, unanimously affirmed, without costs. Order, same court and Justice, entered June 24, 2011, which denied plaintiff's motion to add a party defendant and granted the LLC defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly reasoned that there was no ground for holding the individual defendants liable for plaintiff's commission based on media reports of their activities and plaintiff's references to them as partners; there was no clear and

explicit evidence that Sartiano intended to be personally bound despite acting as an agent for a disclosed principal (*see Savoy Record Co. v Cardinal Export Corp.*, 15 NY2d 1, 4 [1964]). The promoter liability cases involving the preincorporation liability of individuals, relied on by plaintiff, are distinguishable from the instant circumstance; notably, here the LLC was in existence two weeks before plaintiff was sent a copy of the landlord's executed brokerage agreement containing the commission provision.

The lease and the landlord's brokerage agreement were properly found to be the operative contract for commissions; the existence of these writings barred evidence of any agreement set forth in e-mails and offer sheets generated by plaintiff (*see New York Fruit Auction Corp. v City of New York*, 81 AD2d 159, 165 [1981], *affd* 56 NY2d 1015 [1982]).

In light of the express agreement governing commissions, plaintiff's claim of unjust enrichment was not viable. The limited right to a commission set forth in the writings also precluded the

addition of the landlord as a defendant (*see generally Thompson v Cooper*, 24 AD3d 203, 205 [2005]).

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

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6977 In re William Duffy, Index 101323/11
Petitioner,

-against-

Robert D. LiMandri, as Commissioner of the
New York City Department of Buildings,
Respondent.

_____

La Reddola, Lester & Associates, LLP, Garden City (Robert J. La Reddola of counsel), for petitioner.

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

_____

Determination of respondent, dated December 29, 2010, which revoked petitioner's hoist machine operator license, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Cynthia S. Kern, J.], entered July 14, 2011), dismissed, without costs.

Substantial evidence supports the determination that petitioner's conviction of the crime of conspiracy to commit extortion demonstrates poor moral character which adversely reflects on his fitness to hold a hoist machine operator license, particularly because his crime related to the construction industry

(*see* Administrative Code of City of NY § 28-401.6; § 28-401.19[13]; *Matter of Inglese v Limandri*, 89 AD3d 604 [2011], *lv denied* __ NY3d __, 2012 NY Slip Op 64368 [2012]).

Respondent appropriately considered the factors set forth in Correction Law § 753 and was free to reject the Administrative Law Judge's recommendation that petitioner's license be suspended for one year (*see* NY City Charter § 1046[e]). Moreover, the penalty imposed does not shock our sense of fairness (*see Inglese* at 605).

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

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6978N Delta Enterprise Corp., Index 650528/11
Plaintiff-Appellant,

-against-

Ralph Cohen,
Defendant-Respondent.

_____

Dorsey & Whitney LLP, New York (Laura M. Lestrade of counsel), for appellant.

Serrins & Associates, LLC, New York (Ann Macadangdang of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered September 15, 2011, which, insofar as appealed from, upon granting plaintiff's motion for a preliminary injunction, declined to enforce the tolling provision contained in the restrictive covenant at issue, unanimously modified, on the law, by extending the duration of the existing preliminary injunction until March 1, 2013 or resolution at trial, whichever is earlier, and otherwise affirmed, without costs.

Plaintiff amply demonstrated, by clear and convincing evidence, its entitlement to a preliminary injunction preventing defendant from breaching the restrictive covenants of the confidentiality agreement (*see* CPLR 6301; *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). The provisions are

temporally and geographically reasonable and necessary to protect plaintiff's legitimate business interests (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 389 [1999]; *Crown IT Servs., Inc. v Koval-Olsen*, 11 AD3d 263, 264 [2004]).

However, the preliminary injunction should not have deviated from the durational terms set forth in the confidentiality agreement's tolling provision because there was an abundance of unrefuted documentary evidence showing that it was likely that defendant had repeatedly breached multiple provisions of the agreement, and that he continued to do so after the motion court issued the temporary restraining order. The agreement's tolling provision provides for the tolling of the various restrictive periods "during any period in which Employee is in violation" of the restrictive covenants, and provides that "all restrictions shall automatically be extended by the period Employee was in violation of any such restrictions."

We reject defendant's argument that such a provision is, as a matter of law, unenforceable or violates public policy especially where, as here, there was evidence that defendant consulted with counsel before executing the agreement, that he received $50,000 in consideration thereof, and there are significant and multiple indications of his bad faith (*see Chernoff Diamond & Co. v*

Fitzmaurice, Inc., 234 AD2d 200, 202 [1996]; *Maltby v Harlow Meyer Savage*, 223 AD2d 516 [1996], *lv dismissed* 88 NY2d 874 [1996]). Considering this, extending the duration of the preliminary injunction until two years after entry of the temporary restraining order, or until resolution at trial, whichever is earlier, appears to be the only means by which to ensure the preservation of the status quo pending a final resolution of this action (*see New York Real Estate Inst., Inc. v Edelman*, 42 AD3d 321 [2007]).

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

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

ENTERED: MARCH 1, 2012

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

6979N In re Albert N. Eisenberg, File 2629/10
Deceased.

Law Offices of Seema Verma PLLC,
Petitioner-Appellant,

-against-

Citigroup, Inc., et al.,
Respondents-Respondents.

Law Offices of Seema Verma PPLC, New York (Seema Verma of counsel), for appellant.

SNR Denton US LLP, New York (Ralph M. Engel of counsel), for Citigroup Inc., respondent.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for Attorney General's Office - Charities Bureau, respondent.

Order, Surrogate's Court, New York County (Kristen Booth Glen, S.), entered July 18, 2011, which granted the motion of respondent co-trustee Citigroup, Inc. (Citigroup) to dismiss petitioner law office's (Verma) petition to the extent of holding the petition in abeyance pending resolution of a voluntary accounting proceeding commenced by Citigroup to determine the legal fees earned by several counsel, including Verma, which concurrently represented respondent co-trustee Etsuko Hamada in her fiduciary capacity, and which directed Verma to supplement its petition to clarify the

legal services she rendered to Hamada in her fiduciary capacity, as distinguished from the legal services provided to Hamada to prosecute her personal claims against the trusts and estate, unanimously affirmed, with costs.

Contrary to respondents' contentions, the subject order is appealable as of right (CPLR 5701[a][2][v]). The order decided a motion made on notice and affected a substantial right, since it would subject Verma to a costly hearing to discern the legal services Verma rendered, together with the legal services provided by two other law firms that concurrently represented Hamada (*see General Elec. Co. v Rabin*, 177 AD2d 354, 356-357 [1991]*; Grand Cent. Art Galleries v Milstein*, 89 AD2d 178, 181 [1982]). In any event, the Surrogate's order directing that Verma's fee application await the resolution of the voluntary accounting proceeding was a proper exercise of discretion under the circumstances (*see Matter of Phelan*, 173 AD2d 621 [1991]).

Verma lacks standing to appeal from an October 18, 2010 order of the Surrogate's Court, which granted Citigroup's motion to remove Hamada as a co-trustee of Eisenberg's Revocable Trust to the extent it suspended Hamada's appointment as trustee (*see* CPLR 5511; *State of New York v Phillip Morris Inc.*, 61 AD3d 575 [2009], *appeal dismissed* 15 NY3d 898 [2010]). Even assuming arguendo that Verma

had standing to appeal from the order, it failed to timely appeal within 30 days of service of a copy of the order with notice of entry (*see* CPLR 5513[a]). In any event, the court properly exercised its discretion to suspend Hamada as a co-trustee with Citibank where the record shows that Hamada aggressively pursued her own interests in the proceeds of the trusts and estate, to the apparent neglect of other designated beneficiaries, thus evincing a clear conflict of interest (*see Matter of Wallens*, 9 NY3d 117, 122 [2007]; *Pyle v Pyle*, 137 App Div 568, 572-573 [1910], *affd* 199 NY 538 [1910]).

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

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

ENTERED: MARCH 1, 2012

CLERK

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

6403 Sioni & Partners, LLC, Index 652414/10
Plaintiff-Respondent,

-against-

Vaak Properties, LLC,
Defendant-Appellant,

Kaiko Chan, etc.,
Defendant.

_____

Howard R. Birnbach, Great Neck, for appellant.

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

_____

Judgment, Supreme Court, New York County (Manuel J. Mendez, J.), entered August 5, 2011, awarding plaintiff the total sum of $168,402.60, unanimously affirmed, with costs.

The facts of this case are relatively straightforward, especially defendant Vaak Properties, LLC's steadfast refusal to pay a validly earned broker's fee. On June 4, 2010, plaintiff real estate broker and Vaak Properties entered into an "exclusive right to sell agreement." The agreement gave plaintiff the exclusive right to sell the property, located at 1135 Boynton Aveue, Bronx, New York, at a price of $6.6 million, with a 3% commission. The agreement stated, among other things, "If the broker is able and willing to sell the property at an agreed price, commission of 3%

will be paid to the broker." The agreement also stated that "[i]n the event that the price is negotiated and agreed by the seller, the commission also will be negotiated." This agreement was "valid for 3 months, until September 4, 2010."

Thereafter, plaintiff procured a buyer, who made an offer of $6 million. Plaintiff communicated the buyer's offer to defendant and defendant accepted. Because the buyer's offer was less than the original $6.6 million asking price, defendant and plaintiff entered into a new contract ("Amended Commission Agreement"), on September 2, 2010, in accordance with the original listing agreement. This Amended Commission Agreement stated, in pertinent part:

> "The following constitutes and *confirms* our agreement regarding the proposed sale of the above referenced property . . .
>
> "In connection with the proposed contract of purchase and sale, you agree to pay us, and we agree to accept, as compensation for our services as brokers the sum of $160,000 (one hundred and sixty thousand dollars) as compensation, if as and only when title closes.
>
> "We hereby represent that we are duly licensed real estate brokers in the State of New York and you acknowledge that [plaintiff] is the broker responsible for the sale of the property (emphasis added)."

Both plaintiff and defendant signed this Amended Commission Agreement. However, above the line for defendant's signature was

handwritten: "subject to attorney modifications & approval."

The next day, September 3, 2010, defendant and the buyer entered into a contract for sale of the property. Section 14.01 of the contract states, among other things:

> "If a broker is specified in Schedule D, Seller and Purchaser mutually represent and warrant that such broker is the only broker with whom they have dealt in connection with this contract and that neither Seller nor Purchaser knows of any other broker who has claimed or may have a right to claim a commission in connection with this transaction, unless otherwise indicated in Schedule D. The commission of such broker shall be paid pursuant to separate agreement by the party specified in Schedule D."

According to plaintiff, and unchallenged by defendant, the only broker listed in Schedule D is plaintiff. It is also clear that the only party with whom plaintiff had a "separate agreement" to be paid a commission was defendant.

Over three months later, on December 20, 2010, defendant's principal wrote to plaintiff, indicating that "[t]he attorney has approved $100,000, instead of $160,000, which will be paid at the time of closing." Although the sale closed on January 21, 2011, for the price of $6 million, and despite demands by plaintiff for its brokerage commission, defendant never paid any commission.

On or about December 28, 2010, plaintiff commenced this action, seeking the $160,000 commission agreed to in the Amended

Commission Agreement. Defendant responded, asserting that the payment of a commission "was conditional and the condition was not satisfied," and that "plaintiff was not the procuring cause of the transaction."

On or about April 13, 2011, plaintiff moved for summary judgment, asserting, essentially, that it actively marketed the building, and that the Amended Commission Agreement clearly stated that plaintiff was the procuring cause of the sale, as did the contract of sale. Moreover, even if the Amended Commission Agreement was unenforceable, the exclusive right to sell agreement would govern, entitling plaintiff to a 3% commission, which would be $180,000. Plaintiff also submitted the affidavit of an officer of the buyer, who averred that he learned that the building was for sale through plaintiff, and that the buyer made the offer as a result of plaintiff's efforts.

In response to plaintiff's summary judgment motion, defendant asserted that there was no evidence that defendant's attorney ever approved the Amended Commission Agreement (although it did not pursue this argument on appeal). Defendant argues on appeal that because the Amended Commission Agreement superseded the exclusive right to sell agreement, plaintiff has the burden of showing that he was the procuring cause of the sale. According to defendant,

plaintiff has not met its burden, because plaintiff did not attend three face-to-face meetings between buyer and defendant, which took place after the Amended Commission Agreement was executed; defendant asserts that the "only thing plaintiff brought about was the purchase price." (These three meetings took place after the sales price was agreed to.)

In order for a real estate broker to demonstrate that he or she was the procuring cause of a transaction, the broker must demonstrate a direct and proximate link between the bare introduction [of buyer and seller] and the consummation [of sale] (*Greene v Hellman* 51 NY2d 197, 206 [1980]). Plaintiff's, the buyer's, and even defendant's testimony clearly demonstrate that plaintiff was the procuring cause of the sale. The buyer's affidavit states that he purchased the property "as a direct result" of plaintiff's efforts, and the Amended Commission Agreement contains an acknowledgment by defendant that plaintiff "is the broker responsible for the sale of the property." Additionally, the contract of sale also contains an acknowledgement, in Schedule D, that plaintiff was the only broker with which either defendant or buyer had dealt, and states that the commission "shall be paid pursuant to separate agreement by the party specified in Schedule D [defendant]." That "separate

agreement" is the Amended Commission Agreement, and this acknowledgment in the contract of sale is an admission of plaintiff's right to its commission (*see Helmsley-Spear, Inc. v New York Blood Ctr.*, 257 AD2d 64 [1999]; *May Co. v Monoco Assoc.*, 80 AD2d 798 [1981]).

The court properly determined that plaintiff was entitled to the commission of $160,000 on the sale of the property. Plaintiff and defendant entered into an exclusive right to sell agreement, which expressly anticipated that, "[i]n the event the price is negotiated and agreed by the seller, the commission will also be negotiated." Prior to the expiration of this exclusive agreement, plaintiff negotiated a price with the purchaser, which defendant accepted, and plaintiff and defendant entered into an amended commission agreement, whereby defendant agreed to pay and plaintiff agreed to accept $160,000 as the commission. This amended agreement was not a new listing agreement that superseded the exclusive listing agreement; it was simply an agreement as to the amount of commission that plaintiff had already earned and was perfectly consistent with the exclusive right to sell agreement. Moreover, the Amended Commission Agreement expressly stated that defendant acknowledged that plaintiff was the procuring cause of the sale of the property and that the commission was contingent

only on the closing of the sale, which ultimately occurred.

Plaintiff not only called the property to the buyer's attention and introduced the buyer to defendant, it also provided information about the property to the buyer, arranged for the buyer to visit the property, and brought about the ultimate purchase price. Thus, plaintiff was entitled to its commission, without the need to prove it was the procuring cause of the sale, since a broker with an exclusive right to sell need not show that it was the procuring cause of the sale (*see Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 268 [1995]) ["an exclusive right to sell agreement entitles the broker to receive a commission on a sale to any purchaser, whether or not the broker played a part in the negotiations"]). In any event, both the contract of sale and the Amended Commission Agreement expressly establish that plaintiff was the procuring cause.

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

ENTERED: MARCH 1, 2012

CLERK

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

6799 Modesta Brignoni, Index 103809/07
Plaintiff-Appellant,

-against-

601 West 162 Associates, L.P.,
Defendant-Respondent,

La Villa Food Center, et al.,
Defendants.

_____

Gorayeb & Associates, P.C., New York (Roy A. Kuriloff of counsel), for appellant.

Abrams, Gorelick, Friedman & Jacobson, P.C., New York (Bridget Quinn Choi of counsel), for respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered January 12, 2011, which, granted the motion of defendant 601 West 162 Associates, L.P. (601) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff was injured when a trapdoor collapsed underneath her causing her to fall into the basement of the premises. 601, an out-of-possession landlord, failed to establish as a matter of law that the defective condition that allegedly caused the entire trapdoor, including its hinges, to collapse under plaintiff was not a structural defect (*see e.g. Bernardo v 444 Rte. 111, LLC*,

83 AD3d 753, 754 [2011]). Contrary to 601's contention, whether the trapdoor might have opened and closed properly is not dispositive of whether it was structurally defective (*cf. Malloy v Friedland*, 77 AD3d 583 [2010]; *Baez v Barnard Coll.*, 71 AD3d 585 [2010]).

601's argument that it did not have a right to reenter the premises to inspect or make repairs, is belied by the plain language of the lease. Thus, as an out-of-possession landlord with a right of reentry, it may be liable for plaintiff's injuries if it has "constructive notice of a 'significant structural or design defect in violation of a specific statutory safety provision'" (*Heim v Trustees of Columbia Univ. in the City of N.Y.*, 81 AD3d 507 [2011], quoting *Quinones v 27 Third City King Rest.*, 198 AD2d 23, 24 [1993]). Here, an issue of fact exists as to whether 601 had constructive notice of the defective condition. The testimony of 601's property manager and superintendent showed they were both aware of the trapdoor, and that they frequented the bodega. Moreover, there is evidence that the hinges on the trapdoor were readily visible and that they appeared old and rusty (*see Serna v 898 Corp.*, __ AD3d __, 2011 NY Slip Op 09202 [1st Dept 2011]).

601's reliance on the lease provision that its obligation to

make structural repairs is not triggered unless the tenant notifies it in writing of the need for such repairs, is unavailing, as plaintiff's claim is based on constructive, not actual, notice. In any event, the provision permitting reentry imposes a separate obligation to repair structural defects in conformance with statutory safety provisions.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Sweeny, Moskowitz, DeGrasse, JJ.

6894 Cara Muhlhahn, Index 102846/10
Plaintiff-Respondent,

-against-

Andrew Goldman, et al.,
Defendants-Appellants.

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Miller Korzenik Sommers LLP, New York (Louise Sommers of counsel), for appellants.

Catafago Law Firm, P.C., New York (Jacques Catafago of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 24, 2011, which, in this defamation action, to the extent appealed from denied defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) to the extent of sustaining plaintiff's claims based on 9 of 13 challenged statements, unanimously reversed, on the law, without costs, and the motion to dismiss plaintiff's claims based on challenged statements 4, 5, 6, 7, 8, 9, 10, 11 and 12, granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendant Goldman's affidavit and the attached recordings of his interviews with plaintiff should have been considered on the motion. An affidavit is an appropriate vehicle for authenticating and submitting relevant documentary evidence (*see*

Suss v New York Media, Inc., 69 AD3d 411, 412 [2010]), and may provide "connecting link[s]" between the documentary evidence and the challenged statements (*Standard Chartered Bank v D. Chabbott, Inc.*, 178 AD2d 112 [1991]). Here, Goldman's affidavit was sufficient to authenticate the recordings of his interviews with plaintiff, since he stated in his affidavit that he was a participant in the recorded conversations and that the recordings were complete and accurate and had not been altered (*see People v Ely*, 68 NY2d 520, 527 [1986]; *Lipton v New York City Tr. Auth.*, 11 AD3d 201 [2004], *lv denied* 5 NY3d 707 [2005]). Contrary to the motion court's finding, Goldman never stated that the recordings were "excerpts" or "highlights" of plaintiff's statements. Instead, he stated that the attached recordings were only some of the many recorded interviews of plaintiff that he had conducted. Moreover, in his reply affidavit, Goldman clarified that his opening affidavit was only meant to authenticate the evidence and aid the court by highlighting relevant statements.

Based on the documentary evidence and Goldman's affidavit, challenged statements 4, 5, 7, 8, 10, and 12 are true or substantially true, and thus are not actionable (*see e.g. Gondal v New York City Dept. of Educ.*, 19 AD3d 141, 142 [2005]; *Chinese*

Consol. Benevolent Assn. v Tsang, 254 AD2d 222, 222-223 [1998]). In addition, statements 4 through 10 either contain non-actionable opinion or are not reasonably susceptible of a defamatory connotation (*see Ava v NYP Holdings, Inc.*, 64 AD3d 407, 412-413 [2009], *lv denied* 14 NY3d 702 [2010]; *Guerrero v Carva*, 10 AD3d 105, 111 [2004]). In any event, a claim based on challenged statements 6, 7, and 8 is barred by the single instance rule (*see Bowes v Magna Concepts*, 166 AD2d 347 [1990]).

We also dismiss plaintiff's claim based on challenged statement 11, which states, in pertinent part, that plaintiff "has made herself an outlaw of sorts by not carrying malpractice insurance." Plaintiff admitted on The Brian Lehrer Show that she did not carry malpractice insurance, and the recording of that radio interview was adequately authenticated.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6937 The People of the State of New York, Ind. 3824/06
Respondent,

-against-

Walter Hurdle,
Defendant-Appellant.

_____

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

Walter Hurdle, appellant pro se.

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

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Judgment, Supreme Court, Bronx County (Martin Marcus, J. at suppression hearing; Albert Lorenzo, J. at plea and sentencing), rendered January 15, 2010, convicting defendant of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police had probable cause to believe that defendant had been driving with a suspended license. Accordingly, they lawfully arrested defendant for the corresponding misdemeanor (*see* Vehicle and Traffic Law § 511), and were fully entitled to conduct a

search incident to arrest (*see People v Troiano*, 35 NY2d 476 [1974]).

Defendant did not preserve his claim that the officer lacked a founded suspicion of criminality to support a common-law inquiry regarding whether defendant had a suspended license, or his claim that the officer should have issued a summons rather than making an arrest, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. In addition, we have considered and rejected defendant's pro se claims.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6938 Beth Abraham Health Services, Index 102367/09
Plaintiff-Respondent,

-against-

Mildred Eccleston-Johnson,
Defendant-Appellant.

_____

George Bundy Smith, New York, for appellant.

Abrams, Fensterman, Fensterman, Eisman, Greenberg, Formato & Einiger, LLP, Lake Success (Sean P. Lenihan of counsel), for respondent.

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Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 14, 2011, in an action to recover for care and services provided to defendant, awarding plaintiff the total amount of $57,278.58, and bringing up for review an order, same court and Justice, entered on or about November 22, 2010, which granted plaintiff's motion for summary judgment, unanimously affirmed, without costs.

The affidavit of service is prima facie evidence of proper service, and no issue of fact is raised by defendant's conclusory denial of service (*see Chinese Consol. Benevolent Assn. v Tsang*, 254 AD2d 222, 223 [1998]). Plaintiff nursing facility made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that defendant resided at the nursing

facility during the time specified, failed to pay the amount due and owing, was not eligible to receive Medicare benefits, and was denied Medicaid benefits. In response, defendant failed to offer any evidence sufficient to raise an issue of fact. Defendant failed to preserve her argument that necessary parties have not been joined in this action, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits; defendant has not provided any evidence that she was not competent to enter into a contract at the time she entered the nursing facility or that a third party consented to pay for the facility's services.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6939 RDLF Financial Services, LLC, Index 119185/06
Plaintiff-Respondent,

-against-

Marc A. Bernstein, et al.,
Defendants-Appellants,

North Fork Bank,
Defendant.

_____

Michael J. Collesano, New York, for appellants.

Reisman Peirez Reisman & Capobianco LLP, Garden City (Jerome Reisman of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered December 8, 2010, which denied the Bernstein defendants' motion to vacate a judgment entered June 10, 2009, and an order entered May 12, 2010, unanimously affirmed, with costs.

Contrary to defendants' contention, they were not entitled to an automatic stay pursuant to CPLR 321(c), which "is meant to afford a litigant, who has, through no act or fault of his own, been deprived of the services of his counsel, a reasonable opportunity to obtain new counsel before further proceedings are taken against him in the action" (*see Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 389 [2010]). Here, defendant Marc A. Bernstein, representing himself and his firm, was disbarred after

he pled guilty to stealing client funds (*see Matter of Bernstein*, 78 AD3d 94, 95-97 [2010]). Because his removal from the bar was the product of his own wrongdoing, defendants were not entitled to an automatic stay. In any event, the record demonstrates that defendants retained new counsel prior to any action being taken against them.

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

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6943 Janine Feaster-Lewis, etc., Index 14179/01
Plaintiff-Respondent,

-against-

Ohad Rotenberg, M.D., et al.,
Defendants,

Mercy Obstetrics and Gynecology, P.C., et al.,
Defendants-Appellants.

_____

Pilkington & Leggett, P.C., White Plains (Michael N. Romano of counsel), for appellants.

Pegalis & Erickson, LLC, Lake Success (Steven E. Pegalis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Robert E. Torres, J.), entered June 2, 2011, which, to the extent appealed from as limited by the briefs, denied the motion of defendants Mercy Obstetrics and Gynecology, P.C., Edilberto Martinez, M.D., and Lois Brustman, M.D., for summary judgment dismissing the complaint and all claims as asserted against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this medical malpractice action, plaintiff mother allege that defendants departed from accepted standards of prenatal care in failing to consult with the attending physician, failing to

schedule a cerclage procedure before 15 weeks 5 days gestation, and improperly advising her that the risks of cerclage outweighed the benefits because she had a shortened cervix.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by submitting evidence that they did not depart from accepted medical practice (*Bacani v Rosenberg*, 74 AD3d 500, 501-502 [2010], *lv denied* 15 NY3d 708 [2010]). In response, plaintiff failed to raise an issue of fact. Plaintiff testified that, before March 1, 1999, she had no recollection of speaking with any doctor, other than Dr. Rotenberg, about having a cerclage; that she had no recollection of speaking with Dr. Martinez about a cerclage after a sonogram on March 1; and that she did not recall speaking with Dr. Brustman about cerclage on March 4, which, based on the record, would have been the only date such a conversation could have occurred. By contrast, in her affidavit submitted in opposition to the motion, plaintiff asserted that on her first visit with defendants on January 5, 1999, she stated that she was "there for a cerclage," and that, after being advised that her cervix had shortened, was told by both Dr. Martinez and Dr. Brustman that the risks of performing a cerclage outweighed its benefits. Plaintiff's affidavit clearly contradicts her deposition testimony, and thus is insufficient to

raise a triable issue of fact (*Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]; *see also LoBianco v Lake*, 62 AD3d 590, 591 [2009]). Because plaintiff's expert's conclusions are based on the feigned facts in plaintiff's affidavit, the expert's affirmation also fails to raise a triable issue of fact (*see Bacani*, 74 AD3d at 502).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6944 The People of the State of New York, Docket 45830C/07
Respondent,

-against-

Monica Jimenez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered July 15, 2009, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing her to a conditional discharge, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The court was free to accept or reject any part of the victim's testimony; there is no basis for disturbing the court's determination to credit that testimony in part. The fact that the court acquitted defendant of other charges does not warrant a different result (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant's claim that the prosecutor violated the advocate-witness rule (Rules of Professional Conduct [22 NYCRR

1200.0] rule 3.7 [former Code of Professional Responsibility DR 5-102(a)(22 NYCRR 1200.21[a])]), as well as defendant's related claims of prosecutorial misconduct, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal. Without objection, the trial prosecutor made a factual statement to the court concerning a matter within the prosecutor's personal knowledge. There was no substantial likelihood of prejudice to defendant resulting from the prosecutor's continued participation (*see People v Paperno*, 54 NY2d 294 [1981]), particularly since this was a nonjury trial (*see People v Moreno*, 70 NY2d 403, 406 [1987]). The remaining claims of prosecutorial misconduct are without merit.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6945 Peter Brackenbury, Index 308921/08
Plaintiff-Appellant,

-against-

Edward W. Franklin, Jr., et al.,
Defendants-Respondents.

_____

Adam D. White, New York (Steven B. Kaufman of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 20, 2011, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's application for leave to amend or supplement his bill of particulars to assert a claim of serious injury under the categories of "significant disfigurement" and "fracture" of Insurance Law § 5102(d), unanimously affirmed, without costs.

Photographs of plaintiff's healed, thin scar on his hand were not sufficient to establish an issue of fact as to whether plaintiff sustained a "significant disfigurement" as a result of the accident. Similarly, plaintiff failed to present evidence sufficient to establish a prima facie claim based on a fracture

of his fourth metacarpal. No fracture was diagnosed by his doctor contemporaneous with the accident, and the doctor's equivocal observation of a "[p]robable healed fracture" in an X ray taken a year and a half after the accident is insufficient (*see Glover v Capres Contr. Corp.*, 61 AD3d 549, 550-551 [2009]; *O'Bradovich v Mrijaj*, 35 AD3d 274 [2006]).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6946 The People of the State of New York, Index 30064/08
Petitioner-Respondent,

-against-

Derrick S.,
Respondent-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for respondent.

_____

Order of commitment, Supreme Court, New York County (Robert M. Stolz, J.), entered on or about October 1, 2010, which, upon a fact-finding that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that respondent is a dangerous sex offender requiring confinement (*see* Mental Hygiene Law §§ 10.03[e], 10.07[f]). He admitted to sexually abusing four girls between the ages of 8 and 11, he has failed to complete any sex offender programs, and both experts testified that he continues to suffer from a cognitive disorder that makes him believe that the victims were attracted to him.

Respondent argues that the State's expert's opinion should

be given little weight because the expert departed from the results of the STATIC-99R actuarial assessment of the risk of recidivism. The expert's testimony shows that he considered clinical findings as well as the statistical likelihood of recidivism in determining that respondent requires secure confinement. However, respondent offers no support for his contention that the consideration of clinical factors undermined, rather than enhanced, the expert's opinion (*see e.g. Matter of State of New York v Andrew O.*, 68 AD3d 1161, 1169 [2009], *revd on other grounds* 16 NY3d 841 [2011]; *State of New York v Frank V.*, 32 Misc 3d 1217[A], 2011 NY Slip Op 51351[U], *3 [2011]).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Acosta, DeGrasse, Román, JJ.

6947 Harvey S. Shipley Miller, as Trustee of the Trust Known as Judith Rothschild Foundation, Plaintiff-Appellant, Index 111380/09

-against-

Todd Cohen, et al., Defendants,

Martin Cohen, et al., Defendants-Respondents.

_____

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Goldberg & Rimberg PLLC, New York (Brad Coven of counsel), for respondents.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 31, 2011, which granted the motion of defendants Martin Cohen, CJR Associates LP, Marc Lowenberg, Lowenberg Family Limited Partnership, Lowenberg II Family Limited Partnership and Lowenberg III Family Limited Partnership for summary judgment dismissing the third cause of action to pierce the corporate veil of Icon Group LLC, and which denied plaintiff's cross motion for leave to amend the complaint to add a fraudulent conveyance claim, unanimously reversed, on the law, the third cause of action reinstated, and leave to amend the

complaint granted, with costs.

Movants failed to sustain their burden of demonstrating that Icon Group, against which plaintiff obtained a judgment in a prior action, was not their alter ego, that the corporate formalities were observed, and that they were solely investors in projects developed by Icon Group. Icon Group's principals testified that it did not have an independent source of funds and that its investment decisions were dependent on funding from movants. Thus, Icon Group did not have business discretion to enter into contracts, absent movants' assent, and it was not treated as an independent profit center (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). There was also evidence that Icon group paid some of movants' personal expenses. Moreover, plaintiff contends that he did not have adequate discovery, and the testimony of Icon Group's principals in the prior action was evasive and non-responsive. Movants failed to sustain their burden of demonstrating the absence of a triable issue of fact on this cause of action.

The court also improperly denied plaintiff's cross motion for leave to amend the complaint to assert fraudulent conveyance claims. On a motion for leave to amend a pleading, movant need

not establish the merit of the proposed new allegations, but must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (see *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [2010]). Here, the court prematurely reached the merits of the proposed amendment, which was adequately pleaded and not clearly devoid of merit.

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

ENTERED: MARCH 1, 2012

CLERK

Tom J.P., Friedman, Acosta, DeGrasse, JJ.

6948 Ingram Batts, et al., Index 113560/07
Plaintiffs-Appellants-Respondents,

-against-

City of New York,
Defendant-Respondent-Appellant,

Neighborhood Partnership Housing
Development Fund Company, Inc., et al.,
Defendants-Respondents.

_____

Blank & Star, PLLC, Brooklyn (Helene Blank of counsel), for appellants-respondents.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent-appellant.

Smith & LaQuercia, LLP, New York (Lana S. Kaganovsky of counsel), for Neighborhood Partnership Housing Development Fund Company, Inc. and West 132 Street, LLC, respondents.

Quirk and Bakalor, P.C., New York (Richard H. Bakalor of counsel), for A. Aleem Construction, Inc., respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 14, 2011, which, insofar as appealed from as limited by the briefs, in this action for personal injuries sustained when a scaffold-supported sidewalk shed collapsed and fell on plaintiffs pedestrians as they walked underneath it, denied plaintiffs' motion for partial summary judgment on the issue of liability and denied defendant City of New York's cross

motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously modified, on the law, the City's cross motion granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against defendant City of New York.

Plaintiffs' motion was properly denied as against defendant A. Aleem Construction Inc., the contractor that constructed the subject sidewalk shed. Viewing the evidence in the light most favorable to the contractor, there is a dispute between the parties' respective experts relating to whether the sidewalk shed was properly constructed. These conflicting opinions of the experts cannot be resolved on a motion for summary judgment (*see Ocampo v Abetta Boiler and Welding Serv., Inc.*, 33 AD3d 332, 333 [2006]).

Defendants owner and developer had a nondelegable duty to ensure due care in the construction of the sidewalk bridge that extended over an area used by pedestrians (*see Tytell v Battery Beer Distrib.*, 202 AD2d 226, 227 [1994]). However, as the motion court held, a finding of negligence on the part of defendant contractor is a prerequisite to the owner and developer's

vicarious liability in this matter (*see Little v Cohen*, 259 AD2d 261 [1999]).

The action as against the City should have been dismissed. Administrative Code of City of NY § 7-201(c)(2) requires plaintiffs to show that the City received prior written notice of the alleged defect as a prerequisite to maintaining an action (*see Tucker v City of New York*, 84 AD3d 640 [2011], *lv denied* 17 NY3d 713 [2011]). Although there is evidence that the City was notified of the unstable nature of the sidewalk shed, where, as here, the City neither created the sidewalk shed through an affirmative act of negligence nor made special use of it, the lack of prior written notice is fatal to plaintiffs' claim against the City (*see id.* at 644-45). "Nor can a verbal or telephonic communication to a municipal body that is reduced to writing satisfy a prior written notice requirement" (*Gorman v Town of Huntington*, 12 NY3d 275, 280 [2009]).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6949 The People of the State of New York, Ind. 591/10
Respondent,

-against-

Christian Wannamaker,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Ellen Dille 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 (Rene K. Uviller, J.), rendered October 13, 2010, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, unanimously affirmed.

The court properly denied defendant's suppression motion. Police officers were on anticrime patrol at a highly crime-prone and drug-prone public housing project. The officers were acting, among other things, as custodians of the New York City Housing Authority buildings, which includes keeping these buildings free of trespassers (*see People v Williams*, 16 AD3d 151 [2005], *lv denied* 5 NY3d 771 [2005]).

The police saw defendant enter one of the project's

buildings, which was barred to trespassers. Defendant entered through a door that had a broken lock, went upstairs, and returned to the lobby after only two or three minutes. While this conduct may have had innocent explanations, an officer also believed defendant looked familiar, perhaps from a wanted poster or a trespass program.

Accordingly, based on the totality of the above-described circumstances, the police had an objective, credible reason for approaching defendant and asking him if he was a resident or visitor (*see e.g. People v Hendricks*, 43 AD3d 361, 363 [2007]; *People v Anderson*, 306 AD2d 54 [2003], *lv denied* 100 NY2d 578 [2003]; *People v Tinort*, 272 AD2d 206 [2000], *lv denied* 95 NY2d 872 [2000]). This brief questioning about defendant's reason for being in the building did not go beyond the bounds of a request for information, and we reject defendant's arguments to the contrary (*see People v Hollman*, 79 NY2d 181, 190-192 [1992]).

Defendant told the officers he had been attempting to visit a particular person in a particular apartment, who was not home. At this point, it was reasonable to momentarily and nonforcibly detain defendant while one of the officers verified the information defendant provided (*see People v Reyes*, 83 NY2d 945 [1994], *cert denied* 513 US 991 [1994]; *People v Bora*, 83 NY2d

531, 535-536 [1994]), particularly since the name defendant supplied seemed possibly fictitious. In any event, the detention did not produce an incriminating response or other evidence. Instead, the police only made an inquiry to a third party, the occupant of the apartment defendant claimed to have attempted to visit (*see People v Lozado*, __ AD3d __, 2011 NY Slip Op 09539 [Dec 27, 2011]). When the occupant's response made it clear that defendant's explanation for his presence was completely false, the police had probable cause to arrest him for criminal trespass.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6950 Mark Levon Helm, etc., Index 604420/04
Plaintiff-Appellant,

-against-

BBDO Worldwide, Inc.,
Defendant-Respondent.

_____

Bleakley Platt & Schmidt, LLP, White Plains (John I. O'Neill of counsel), for appellant.

Davis & Gilbert LLP, New York (Guy R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered August 5, 2010, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's cause of action under New York Civil Rights Law § 51 and denied plaintiff's motion for partial summary judgment on the § 51 claim, unanimously affirmed, without costs.

Plaintiff's claim under New York Civil Rights Law § 51, which prohibits the use of a person's "name, portrait, picture or voice" for advertising or trade purposes without written consent, was properly dismissed. By contract, plaintiff broadly granted his record company the "exclusive and perpetual right to use and control" plaintiff's sound recordings and the "performances

embodied therein," which included the recording that was licenced to and used by defendant in a third-party television commercial. Although plaintiff claims that he never gave written consent for the use of his voice, as it is embodied in that recording, for the instant advertising purpose, he unambiguously authorized defendant to license the recording in the contract (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

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

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6951 The People of the State of New York, Ind. 488/09
Respondent,

-against-

Derris Stapleton,
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 (Yuval Simchi-Levi of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 15, 2009, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of five years, unanimously affirmed.

Defendant did not preserve his claim that the court violated his due process rights by imposing an enhanced sentence, based on defendant's undisputed breach of his plea agreement, without offering him the opportunity to withdraw his plea (*see e.g. People v Drew*, 45 AD3d 441 [2007], *lv denied* 10 NY3d 810 [2008]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits, because the

court specifically warned defendant of the consequences of violating the agreement (*see id.*).

Defendant's argument that the court misapprehended its sentencing discretion is likewise unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Román, JJ.

6952 Stella Asante, et al., Index 6779/07
Plaintiffs-Respondents,

-against-

JPMorgan Chase & Co., et al.,
Defendants-Respondents-Appellants,

United Building Maintenance,
Defendant-Appellant-Respondent.

_____

Wade Clark Mulcahy, New York (Gabriel Darwick of counsel), for appellant-respondent.

White Fleischner & Fino, LLP, New York (Walter Williamson of counsel), for respondents-appellants.

Segal & Lax, New York (Patrick Daniel Gatti of counsel), for respondents.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 13, 2011, which, insofar as appealed from as limited by the briefs, granted defendants JPMorgan Chase & Co. (JPMorgan) and Trustees of Columbia University's (Columbia) motion for summary judgment only to the extent that they would be entitled to contractual indemnification by defendant United Building Maintenance (UBM) if held liable to plaintiffs, denied the motion insofar as it sought summary judgment dismissing the complaint and all cross claims against them, and denied their motion to strike plaintiffs' supplemental/amended bill of particulars, and

denied UBM's motion for summary judgment dismissing the complaint and all cross claims against it, unanimously reversed, on the law, without costs, defendants' motions for summary judgment dismissing the complaint and all cross claims against them granted, and defendants' remaining motions denied as academic. The Clerk is directed to enter judgment dismissing the complaint and all cross claims as against all defendants, without costs.

The complaint should have been dismissed due to the lack of evidence as to how long the water had been on the floor of the ATM lobby on which plaintiff Stella Asante allegedly slipped and fell (*see Keum Choi v Olympia & York Water St. Co.*, 278 AD2d 106 [2000]). Tenant JPMorgan's general awareness that the floor might become wet after inclement weather did not permit an inference of constructive notice (*see O'Rourke v Williamson, Picket, Gross*, 260 AD2d 260 [1999]). Further, JPMorgan cannot be held liable for the failure to remove all snow from the adjacent sidewalks (*see Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 463 [2007]). The same analysis applies to owner Columbia and cleaning contractor UBM.

Columbia was entitled to summary judgment on the additional ground that the undisputed evidence showed that it was an out-of-

possession landlord (*see Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [2011]).

UBM was entitled to summary judgment on the additional ground that no triable issue of fact exists as to whether UBM owed a duty of care to third parties on the subject premises. UBM did not entirely displace JPMorgan's duty to maintain the premises in safe condition (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67-68 [2004], *lv dismissed* 4 NY3d 739 [2004]).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6953-
6954 Peter Lampack Agency, Inc., Index 603525/09
Plaintiff-Appellant,

-against-

Martha Grimes, et al.,
Defendants-Respondents.

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Bierman & Palitz LLP, New York (Stephen H. Palitz of counsel), for appellant.

DavidWolfLaw pllc, New York (David B. Wolf of counsel), for Martha Grimes, respondent.

Dorsey & Whitney LLP, New York (Jonathan M. Herman of counsel), for Penguin Group (USA) Inc., Penguin Putnam Inc., Viking Penguin, Signet, Onyx and New American Library, respondents.

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Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered October 8, 2010 and November 1, 2010, which, insofar as appealed from as limited by the briefs, granted defendant Martha Grimes's motion to dismiss the first through seventh causes of action as against her, granted defendant Penguin Group (USA) Inc.'s motion to dismiss the first through seventh causes of action as against it, and denied plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, with costs.

The contracts at issue in this case are not ambiguous (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]; *Bajraktari Mgt. Corp. v American Intl. Group, Inc.*, 81 AD3d 432 [2011]). It is not reasonable to interpret the phrase "this Agreement" to include either extensions of the 1999-2003 agreements or an agreement for the future work mentioned in the 2005 agreement (for The Black Cat). If Grimes and Penguin had meant to give plaintiff commissions on such extensions and future agreement, they would have said so, especially since the 2005 agreement had a specific Option on Next Work clause (*see e.g. Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Interpreting "this Agreement" to mean only the actual contract signed by the parties, not future agreements or extensions, is consistent with the doctrine that "[a]n at-will sales representative is entitled to post-discharge commissions only if the parties' agreement expressly provided for such compensation" (*Swits v New York Sys. Exch.*, 281 AD2d 833, 835 [2001] [internal quotation marks omitted]; *see also Scott v Engineering News Publ. Co.*, 47 App Div 558 [1900]). Under its interpretation of "this Agreement," plaintiff would be entitled to a 15% commission on The Black Cat and on all future extensions of the 1999-2003 contracts, although it had no role in

negotiating either. This would be an absurd result (*see Scott*, 47 App Div at 560).

Plaintiff contends that it was the "procuring cause" of The Black Cat contract and the extensions of the 1999-2003 agreements. However, the complaint does not allege that plaintiff was the procuring cause of that contract or those extensions; it merely alleges that plaintiff procured the underlying 1999-2005 agreements. Moreover, the documentary evidence shows that plaintiff was not the procuring cause of The Black Cat contract; Grimes's new representative was the procuring cause of that contract. In any event, the procuring cause doctrine is inapplicable here. It is "generally applied to real estate transactions and almost exclusively to individual transactions where a broker seeks to recover commissions for a single sale" (*UWC, Inc. v Eagle Indus.*, 213 AD2d 1009, 1010-1011 [1995], *lv denied* 85 NY2d 812 [1995] [citations omitted]; *see also e.g. Devany v Brockway Dev., LLC*, 72 AD3d 1008 [2010]).

We also find that plaintiff has not pleaded a viable claim for breach of the covenant of good faith and fair dealing (*see Pappas v Tzolis*, 87 AD3d 889, 896 [2011]).

The proposed amended complaint fails to state a cause of action for breach of an implied-in-fact contract because there

exists an express contract covering the same subject matter (*see Julien J. Studley, Inc. v New York News*, 70 NY2d 628, 629 [1987]). It fails to state a claim for promissory estoppel because the promise alleged – to pay commissions for extensions of the agreement – is not a legal duty independent of the agreement but arises out of the agreement itself (*see MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 842-843 [2011]).

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

ENTERED: MARCH 1, 2012

CLERK

Friedman, J.P., DeGrasse, Richter, Román, JJ.

6955-
6955A In re Hon. Lee L. Holzman, Index 108251/11
Petitioner-Appellant,

-against-

The Commission on Judicial Conduct,
Respondent-Respondent.

_____

Godosky & Gentile, P.C., New York (David Godosky of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Robert C. Weisz of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered September 13, 2011, denying the petition seeking, inter alia, to stay the disciplinary proceedings brought against petitioner by respondent pending the resolution of the criminal prosecution of a witness to the disciplinary proceedings, and dismissing the proceeding brought pursuant to CPLR article 78, and order, same court and Justice, entered on or about September 22, 2011, which, upon renewal, adhered to the prior determination, unanimously affirmed, without costs.

Denial of the petition and dismissal of the proceeding was warranted because petitioner failed to exhaust the administrative remedy available to him pursuant to Judiciary Law § 44(7) (*see*

Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 195 [2007]). Petitioner has not demonstrated that doing so would be futile or that irreparable harm would occur absent judicial intervention (*see Bankers Trust Corp. v New York City Dept. of Fin.*, 1 NY3d 315, 322 [2003]; *Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 88 AD3d 72, 81 [2011]). The alleged "possibility of reputational harm" does not constitute irreparable injury warranting the relief sought by petitioner (*Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544, 551 [2007]; *see Mabry v Neighborhood Defender Serv., Inc.*, 88 AD3d 505, 506 [2011]).

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Friedman, Acosta, DeGrasse, Román, JJ.

6956 Whitehouse Early, Inc., et al., Index 308191/09
Plaintiffs-Respondents,

-against-

Progressive Insurance Company,
Defendant-Appellant,

Farlin Corsino Jimenez,
Defendant.

_____

Kaplan, Hanson, Adams, Finder & Fishbein, Yonkers (Michael A. Zarkower of counsel), for appellant.

White, Fleischner & Fino, LLP, New York (Nancy Davis Lyness of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered April 8, 2011, which, among other things, granted plaintiffs' motion for summary judgment declaring that defendant Progressive Insurance Company is obligated to contribute with plaintiff Lancer Insurance Company on a ratable basis to the defense and indemnification of their mutual insureds, plaintiffs Whitehouse Early, Inc. and Frank Ray, in an underlying personal injury action, unanimously affirmed, with costs.

Whitehouse's procurement of an insurance policy from Lancer effective October 9, 2008 did not render Progressive's policy terminated on that date. Rather, Progressive's policy terminated

on November 19, 2008 upon receipt of Whitehouse's request for cancellation (*see Savino v Merchants Mut. Ins. Co.*, 44 NY2d 625, 628 [1978]). Accordingly, the motion court properly determined that Progressive's policy was in effect on November 5, 2008, the date of the underlying accident.

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

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

ENTERED: MARCH 1, 2012

CLERK

Tom, J.P., Saxe, Moskowitz, DeGrasse, Abdus-Salaam, JJ.

5809 Katherine De Jesus, et al., Index 25804/04
Plaintiffs-Respondents,

-against-

Aruna Mishra, M.D.,
Defendant-Appellant,

Jackie Pareja, M.D., et al.,
Defendants.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Leslie D. Kelmachter of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2010, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Karla Moskowitz
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

5809
Index 25804/04

_____x

Katherine De Jesus, et al.,
Plaintiffs-Respondents,

-against-

Aruna Mishra, M.D.,
Defendant-Appellant,

Jackie Pareja, M.D., et al.,
Defendants.
_____x

Defendant Aruna Mishra appeals from an order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2010, which denied her motion for summary judgment dismissing the complaint as against her.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Leslie D. Kelmachter and Jay A. Wechsler of counsel), for respondents.

SAXE, J.

This appeal concerns the tragic stillbirth of an infant at the Bronx-Lebanon Hospital Center on October 13, 2003, in particular, the parents' malpractice claim against Dr. Aruna Mishra, the attending physician who delivered the stillborn infant by emergency c-section.

It is undisputed that when the parties arrived at the hospital's labor and delivery facility that morning, the infant was still alive. There is testimony that they arrived at the hospital emergency room at approximately 9:00 A.M., and that plaintiff mother was at the Labor and Delivery unit changing into a hospital gown at 10:32 A.M. The record contains some inconsistencies as to exactly when indications of fetal distress began; however, these details are not relevant to the issue of Dr. Mishra's liability, since it is undisputed that she was not called in until 11:07 A.M. Nevertheless, the following timetable is useful to clarify the series of events underlying the lawsuit, with the understanding that there may be some disagreement regarding the exact timing of these events.

10:42 A.M.	A fetal heart monitor is attached, and an initial fetal heart rate (FHR) of 140 beats per minute (bpm), a normal rate, is noted.
10:47 A.M.	Fetal monitor tape shows FHR deteriorating to 60 bpm before rebounding.
10:52 A.M.-11:04 A.M.	Fetal monitor tape shows further bradycardic episodes with FHR 60 bpm.
11:04 A.M.	Nurse has difficulty locating the fetal heart rate, contacts resident Dr. Rachana Gavara, who finds low heart rate, and contacts Dr. Mishra, the attending physician.
11:07 A.M.	Dr. Mishra examines plaintiff for the first time, diagnoses fetal distress, and calls for an immediate c-section; anesthesiologist is contacted. Dr. Mishra begins preparing for surgery.
11:11 A.M.	Bedside sonogram apparently detects no fetal heart rate (Chart notation: "Sono no heart rate?").
11:16 A.M.	Plaintiff on the operating table & receiving anesthesia.
11:19 A.M.	C-section performed by Dr. Mishra.

This lawsuit against the hospital and the hospital staff members involved in plaintiff's care asserts, inter alia, claims of negligence, medical malpractice, and the infliction of emotional distress, based upon those defendants' alleged failure to timely notice the fetal bradycardia recorded by the fetal

monitor from at least 10:47 A.M. onward, and the failure to take timely appropriate steps in response. However, none of these claims are being pressed against Dr. Mishra. To the extent that the case concerns Dr. Mishra, plaintiffs no longer allege that any negligence on her part contributed to the fetus's death.

It is undisputed that Dr. Mishra was first called in at 11:07 A.M., at which time she diagnosed fetal distress, directed an emergency c-section, and began preparing to perform the procedure. Plaintiffs failed to show that Dr. Mishra acted improperly in her diagnosis of fetal distress and in her direction of an emergency c-section. Nor is there any allegation or showing that she was negligent by allowing an excessive period of time to elapse after directing the emergency c-section.

Being unable to proceed with a claim that Dr. Mishra contributed to the fetus's death by failing to timely perform a c-section, plaintiffs advance a theory of liability that is rather extraordinary when pressed against a doctor trying to save the life of a neonate. It is based on the notion that Dr. Mishra should not have proceeded with the c-section because in the intervening minutes between her diagnosis of fetal distress and her commencement of the procedure, it appeared that the fetus had died. Consequently, plaintiffs assert, it was an act of medical malpractice for Dr. Mishra to continue with the surgical

procedure and all its potential complications and risks. The claimed injury to the plaintiff is not any complication that actually resulted from the emergency c-section, but "the risks and complications inherent in this surgery including scarring, infection and death." Since there is no indication that plaintiff either died or developed an infection, the only claimed injuries that actually resulted from Dr. Mishra's alleged negligence are scarring at the incision line and the increased probability that future pregnancies will need to be delivered by c-section.

To establish her entitlement to summary judgment, defendant was required to show, prima facie, that she did not depart from good and accepted medical practice in her treatment of plaintiff mother (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Dr. Mishra made the requisite prima facie showing with the affirmation by her expert, who asserted, within a reasonable degree of medical certainty, that the appropriate procedure for plaintiff, who presented with a fetus in distress, was the performance of an emergency cesarean section.

The question is whether the affirmation by plaintiffs' expert successfully raises a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324-325; *Rebozo v Wilen*, 41 AD3d 457, 458 [2007]). The expert asserted that Dr. Mishra departed from

accepted standards of care by failing to call a halt to the properly ordered c-section once the fetal monitor and sonogram failed to detect a fetal heartbeat.

Plaintiffs emphasize that summary judgment is generally denied when the parties' medical experts disagree (citing *Frye v Montefiore Med. Ctr.*, 70 AD3d 15 [2009]). However, competing experts almost always disagree; the question here is whether the claim of plaintiffs' expert, that performing a c-section was a departure, is sufficiently supported in the record to raise an issue for the trier of fact. I conclude that the opinion offered by plaintiffs' board-certified expert lacks sufficient foundation to raise an issue of fact. Indeed, on this record, there is no merit to the claim that it was a departure to fail to halt the c-section in the face of indications that the fetus had died after the procedure was directed.

First, it is important to note that as a general matter, physicians are expected and often required to attempt to resuscitate individuals who stop breathing or whose hearts stop beating. Indeed, in a case cited by plaintiffs, this Court recently approved the proposition that malpractice may be committed by emergency responders who arrive after the patient has experienced "cardiac death" and fail to follow the medical protocols for attempting resuscitation (*see King v St. Barnabas*

Hosp., 87 AD3d 238 [2011]). Where infants are delivered without any palpable heartbeat, or without respiration, or both, substantial resuscitation efforts are undertaken and may proceed for extended periods (*see e.g. Golub v Good Samaritan Hosp. Med. Ctr.*, 2010 NY Slip Op 31603[U] [Sup Ct, Suffolk County 2010]; *Ferreira v Wyckoff Hgts. Med. Ctr.*, 24 Misc 3d 91 [App Term, 2d Dept 2009], *affd* 81 AD3d 587 [2011]). In fact, plaintiff's chart reflects that such efforts were made here, immediately upon delivery of the infant.

Yet, plaintiffs' expert claims that the apparent absence of a heartbeat should have caused Dr. Mishra to call off the emergency c-section. He fails to acknowledge that this would have precluded any attempt at resuscitation. Moreover, he offers no facts from which it could be inferred that the information available to Dr. Mishra at the time she began the c-section would have justified the conclusion that the fetus had been dead too long for any attempt at resuscitation upon delivery to succeed. Indeed, plaintiffs' expert does not suggest the length of time after the fetal heartbeat has definitively stopped that precludes any possibility of resuscitation, although evidence on that point could have raised an issue of fact as to whether the planned c-section had become unnecessary. In the absence of any factually founded assertion that attempts at resuscitation would have been

pointless, the claim that Dr. Mishra should have halted the properly ordered emergency c-section is conclusory.

Moreover, the expert accepted as fact that the fetus's heart had conclusively ceased beating at 11:11 A.M., relying primarily on the chart notation that seems to indicate that a sonogram detected no fetal heartbeat at 11:11 A.M. and on fetal monitor tapes showing that by 11:11 A.M. no fetal heartbeat was detected. These indicators are too equivocal to establish that the fetus had irretrievably expired at that time. To rely on the sonogram to call a halt to the c-section, Dr. Mishra would first have had to accept as a certainty that the sonography was performed properly and the finding accurate. Even less reliable is the fetal monitor tape indicating that the monitor failed to detect a heartbeat (*see* 3A Louisell & Williams, Medical Malpractice ¶ 17G.14[2], at 17G-102). Neither indicator would have justified the doctor's abandoning any further attempts at saving the infant.

However, even accepting that the sonogram and fetal monitor tape established the time of fetal death, the claim of malpractice must still fail because the expert did not state how much time must pass after the point that the fetal heart ceases beating before resuscitation becomes impossible.

There is simply insufficient evidence in the record

supporting the opinion of plaintiffs' expert that Dr. Mishra acted in violation of medical standards.

This is not to suggest that a plaintiff can never establish medical malpractice based on a physician's performing an unnecessary c-section to remove an already deceased fetus. However, to make such a case, the plaintiff must, at least, establish the existence of a factual basis for a finding that the physician should have concluded that it was too late for surgical intervention and subsequent resuscitation efforts to have any chance of success.

In addition to finding no factual basis for the claim of medical malpractice against Dr. Mishra, we find nothing in the record to support plaintiffs' claims against her for negligent hiring and supervision, lack of informed consent, and negligent infliction of emotional distress. We therefore grant Dr. Mishra's motion for summary judgment dismissing the complaint as against her. Whatever viable claims there may be against the remaining defendants, there is no viable theory of liability pleaded here as against Dr. Mishra.

Accordingly, the order of the Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 20, 2010, which denied the

motion of defendant Mishra for summary judgment dismissing the complaint as against her should be reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

All concur.

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

ENTERED: MARCH 1, 2012

CLERK