

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 20, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., DeGrasse, Manzanet-Daniels, Román, JJ.

2336N Nancy Keith, etc., Index 105272/05
Plaintiff-Respondent,

-against-

Forest Laboratories, Inc., et al.,
Defendants-Appellants.

Porzio, Bromberg & Newman, P.C., New York (Allan I. Young of
counsel), for appellants.

Douglas & London, P.C., New York (Virginia E. Anello of counsel),
for respondent.

Order, Supreme Court, New York County (Helen E. Freedman,
J.), entered May 13, 2008, which granted plaintiff's motion for a
protective order precluding disclosure of plaintiff's mental
health/social work records, unanimously affirmed, without costs.

Plaintiff Nancy Keith commenced this wrongful death action
as administrator of the estate of her late husband Gary Keith,
alleging negligence, strict liability and breach of warranty.
Plaintiff also asserted an individual claim for loss of
consortium. Following plaintiff's deposition, defendants sought
the production of plaintiff's mental health records concerning
treatment she received from a social worker prior to her
husband's death. Upon receipt of defendants' demand for medical

authorization for the release of said records, plaintiff moved for a protective order arguing that the records requested were privileged since she had withdrawn her individual cause of action.

CPLR 3101(a) calls for "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." Evidence is material if sought "in good faith for possible use as evidence-in-chief or rebuttal or for cross-examination" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968] [internal quotation marks omitted]). However, privileged material, such as information obtained by a social worker, in a professional capacity, from a client (CPLR 4508[a]), is generally immune from discovery, much like information obtained by a medical doctor in connection with the treatment of a patient (CPLR 4504[1]; 3101[b]; *Dillenbeck v Hess*, 73 NY2d 278, 284 [1989]; *Kaplowitz v. Borden, Inc.*, 189 AD2d 90, 92 [1993]; *Scalone v Phelps Mem. Hosp. Ctr.*, 184 AD2d 65, 70-71 [1992]). Thus, a litigant seeking discovery of such records is required to demonstrate that the party has waived the privilege by putting his or her condition in controversy (*id.*; *Velez v Daar*, 41 AD3d 164, 165 [2007]; *Avila v 106 Corona Realty Corp.*, 300 AD2d 266, 267 [2002]).

Here, plaintiff's application for a protective order was properly granted. After the withdrawal of her loss of consortium

claim, her only remaining claim, for wrongful death, is in a representative capacity, thereby precluding disclosure of her mental health/social work records (see *Napoli v Crovello*, 49 AD3d 699, 699-700 [2008]; *Scalone* at 73).

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

ENTERED: APRIL 20, 2010

CLERK

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

2365 Orbimed Advisors, LLC, etc.,
Plaintiff-Respondent,

Index 650316/08

-against-

QVT Fund LP,
Defendant-Appellant,

Winston & Strawn LLP,
Defendant.

Simpson Thacher & Bartlett LLP, New York (Barry R. Ostrager of counsel), for appellant.

Storch Amini & Munves, P.C., New York (Bijan Amini of counsel), for respondent.

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered November 18, 2009, which denied defendant QVT Fund LP's motion to dismiss the complaint, unanimously affirmed, with costs.

Plaintiff Orbimed, on behalf of the former stockholders of Biosynexus, Inc., a closely held biopharmaceutical company, seeks a declaration that it is entitled to money in an escrow account pursuant to an agreement that merged Biosynexus into defendant QVT. The merger agreement contained an indemnification clause requiring the stockholders to indemnify QVT for damages relating to any breach of the warranties and representations contained in the merger agreement. The indemnity provision limited the stockholders' liability to the escrow amount and provided that indemnity was available only if damages exceeded \$250,000.

However, to recover under the indemnity provision, QVT had to "deliver a Claim Notice to the Indemnifying Party," triggering the indemnifying party's requirement to deliver a response within 20 days, after which the parties would use a 30 day period within which to make good faith efforts to resolve the dispute. The indemnity provision expired one year from the closing date, but provided:

If an Indemnified Party delivers to an Indemnifying Party, before expiration of a representation or warranty, either a Claim Notice based upon a breach of such representation or warranty, or an Expected Claim Notice based upon a breach of such representation or warranty, then the applicable representation or warranty shall survive . . .

The merger agreement defined "Claim Notice" as a:

written notification which contains (i) a description of the Damages incurred or reasonably expected to be incurred . . . and the Claimed Amount of such Damages, to the extent then known, (ii) a statement that the Indemnified Party is entitled to indemnification under Article VI for such Damages and a reasonable explanation of the basis therefor, and (iii) a demand for payment in the amount of such Damages.

The merger agreement defined "Expected Claim Notice" as "a notice that, as a result of a legal proceeding instituted by or written claim made by a third party, an Indemnified Party reasonably expects to incur Damages for which it is entitled to indemnification under Article VI." Additionally, the merger agreement provided that "[a]ll notices . . . hereunder shall be

in writing.” Finally, the merger agreement provided that “[t]his Agreement (including the documents referred to herein) constitutes the entire agreement among the Parties and supersedes any prior understandings, agreements or representations by or among the Parties.”

Within one year, QVT delivered a letter to Orbimed advising that it was making an indemnification claim based on Biosynexus’s false representations and breached warranties regarding a certain license it had with a third-party and the manufacturing costs, market potential and effectiveness of a certain drug Biosynexus had sought to develop.

Orbimed’s complaint for declaratory relief alleges that QVT’s letter is not compliant with the merger agreement’s requirements of a Claim Notice or Expected Claim Notice and that QVT did not incur damages in excess of \$250,000. QVT’s motion, purportedly one to dismiss the complaint pursuant to CPLR 3211(a), but which “should be taken as a motion for a declaration in [QVT’s] favor and treated accordingly” (Siegel, NY Prac § 440, at 745 [4th ed]), asserts to the contrary.

We cannot say as a matter of law that QVT’s letter complies with the merger agreement’s requirements that a Claim Notice contain a “description” of the damages incurred or expected to be incurred and a “reasonable explanation” of the basis for the claim. We can say that the letter does not identify the

warranties or representations made in the merger agreement, or any other document delivered pursuant to the merger agreement, that were breached; does not identify the section of or manner in which the license was breached; and does not identify any "legal proceeding" or "written claim" by a third party, terms that are part of the definition of an Expected Claim Notice. That Orbimed may at all relevant times have been aware of these particulars does not negate the contractual requirement of written notice (*cf. MRW Constr. Co. v City of New York*, 223 AD2d 473, 473 [1996], *lv denied* 88 NY2d 803 [1996]). That Biosynexus may have been in breach of the license at the time it entered into the merger agreement is irrelevant to whether QVT gave proper notice of that breach for purposes of indemnification under that agreement.

Moreover, even if QVT's letter were a proper Claim Notice or Expected Claim Notice, in order to recover under the indemnification clause, QVT must prove that it sustained damages of more than \$250,000. In the present context, that would require conclusive documentary evidence of damages (CPLR 3211[a][1]), that QVT fails to submit. We reject QVT's argument that, with respect to the issue of damages, a "judicial admission" Orbimed made in its (now withdrawn) claim against Biosynexus's former attorneys, binds Orbimed. The \$11 million in damages that Orbimed sought against the attorneys was based on

the amount that QVT is seeking and withholding by not allowing disbursement of the \$11 million escrow fund. This was not an admission that QVT or Orbimed actually sustained these damages. Indeed, Orbimed's allegations against the attorneys -- "[i]f there was a breach of the representations and warranties in . . . the Merger Agreement . . ., [such] was due to the negligence and malpractice of [the attorneys]" -- were plainly cast as a hypothetical alternative (see CPLR 3014; 3017[a]), in much the manner of a third-party claim.

We have considered QVT's other arguments and find them unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

performed (see *Coggeshall Painting & Restoration Co. v Zetlin*, 282 AD2d 364 [2001]), which was "not incidental or related to home improvement work" (Administrative Code of City of NY § 20-386[2]) and for which plaintiff need not be a licensed home improvement contractor to recover (see *Raywood Assoc. v Seibel*, 172 AD2d 154 [1991]).

To the extent plaintiff has stated a valid cause of action against Ruben for foreclosure of its mechanic's lien, the remaining defendants were properly named, as necessary parties (see Lien Law § 44[1]).

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

ENTERED: APRIL 20, 2010

CLERK

determining whether defendant was in fact shown in the video, as there was evidence that defendant had changed his appearance after the crime by altering his hairstyle (see *People v Russell*, 79 NY2d 1024 [1992]; *People v Rivera*, 259 AD2d 316 [1999]). Defendant's related argument concerning a detective's testimony is without merit.

The court's *Sandoval* ruling balanced the appropriate factors and was a proper exercise of discretion (see *People v Hayes*, 97 NY2d 203 [2002]).

The record refutes defendant's claim that he received inadequate time to question the panelists about his right not to testify at trial and the principle of accomplice liability. In this regard we note the court's own extensive preliminary examination covering these matters. Accordingly, the court did not abuse its discretion in imposing a time limit on initial voir dire questioning by the prosecutor and defense counsel (see *People v Jean*, 75 NY2d 744 [1989]; *People v Rodriguez*, 184 AD2d 317, 318-319 [1992], *lv denied* 80 NY2d 909 [1992]).

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2552 Belkis Acosta, Index 20917/05
Plaintiff-Respondent,

-against-

Riverdale Development, LLC, et al.,
Defendants-Appellants,

Prometheus Assisted Living, LLC, et al.,
Defendants.

Shay & Maguire LLP, East Meadow (Jaret SanPietro of counsel), for Riverdale Development, LLC, Kapson Riverdale Corp., Kapson Senior Quarters Corp., Henry Johnson Associates, Inc., Henry Hudson Parkway Building, Inc. and ARV Assisted Living, Inc., appellants.

Ahmuty, Demers & McManus, New York (Patrick J. Kenny of counsel), for Otis Elevator Company, appellant.

Louis Atilano, Bronx, for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered May 15, 2009, which granted plaintiff's motion to vacate a default judgment and restore this matter to the trial calendar, unanimously affirmed, without costs.

A compliance conference was held during the pendency of a stay of the action. Defendants appeared, but plaintiff, then pro se, did not. The conference was adjourned, and plaintiff was never notified of the adjournment date. Initially, we note that the action was improperly dismissed under § 202.27 of the Uniform Court Rules. Although plaintiff did not appear for the adjourned conference, she was wholly ignorant of the conference date through no fault of her own. Thus, § 202.27(b) is inapplicable.

We need not consider the merits of plaintiff's claim because the order entering the default under § 202.27 was improperly entered. Finally, vacatur here was consistent with the strong public policy favoring resolution of cases on their merits (*Telep v Republic El. Corp.*, 267 AD2d 57, 58-59 [1999]).

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

ENTERED: APRIL 20, 2010

CLERK

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

2553 Carmen Rivera, as Administratrix Index 14189/06
of the Estate of Victor Ramos,
Plaintiff-Appellant,

-against-

GT Acquisition 1 Corp., et al.,
Defendants,

Meadowbrook Farms, Inc., et al.,
Defendants-Respondents.

John V. Decolator, Garden City, for appellant.

Camacho Mauro & Mulholland, LLP, New York (Andrea Sacco Camacho
of counsel), for Meadowbrook Farms, Inc., respondent.

Velella & Basso, Bronx (Gary S. Basso of counsel), for Blickmeyer
& Siebelits, Inc., respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.),
entered August 24, 2009, which, insofar as appealed from, granted
the motion of defendant Blickmeyer & Siebelits, Inc. (B & S) and
the cross motion of defendant Meadowbrook Farms, Inc.
(Meadowbrook) for summary judgment dismissing the complaint and
all cross claims as against them, unanimously affirmed, without
costs.

Plaintiff's decedent was struck and killed by a truck owned
by defendant GT Acquisition 1 Corporation and driven by defendant
Vives. Plaintiff commenced this action against, inter alia,
B & S and Meadowbrook on the theory that the Meadowbrook truck
was double parked on the road and caused an obstruction to Vives'

view thereby contributing to the accident.

B & S and Meadowbrook met their prima facie burden of establishing their entitlement to summary judgment by submitting Vives' deposition testimony that there was nothing obstructing his view prior to the accident. In opposition, plaintiff failed to raise a triable issue of fact. Although Vives initially testified that he could not recall if there was an obstruction to his right, in response to a more specific question, he clarified that his vision had not been blocked.

The motion court properly disregarded the uncertified police report and unauthenticated photographs as they constituted inadmissible hearsay (see *Coleman v Maclas*, 61 AD3d 569 [2009]). While hearsay statements may be used to oppose a summary judgment motion, such evidence is insufficient to warrant a denial of the motion where it is the only evidence submitted in opposition (see *Briggs v 2244 Morris L.P.*, 30 AD3d 216 [2006]). Here, the hearsay reports were the only evidence in support of the claim that Vives' vision was obstructed.

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: APRIL 20, 2010

CLERK

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 20, 2010

CLERK

as a level three offender, we need not reach defendant's other claims. In any event, we find those claims unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

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: APRIL 20, 2010

CLERK

evidence that petitioner pled guilty to a misdemeanor charge arising out of that conduct established the administrative charges of willful misrepresentation of income and non-verifiable income, and petitioner admitted the factual basis for the charges at the hearing. Petitioner's contention that her conduct did not constitute non-desirability or breach of rules need not be resolved, since it is undisputed that her conduct supported the charges of misrepresentation and failure to provide income verification, which are grounds for lease termination.

The penalty was imposed following a hearing conducted in compliance with NYCHA's termination of tenancy procedures, at which the hearing officer explained the proceedings, and petitioner availed herself of the opportunity provided to present evidence in mitigation and to make a statement urging that probation would be an appropriate penalty (*see Matter of Jackson v Hernandez*, 63 AD3d 64, 69 [2009]). Notwithstanding the hardship to petitioner and her son resulting from termination, the penalty imposed for egregious misrepresentation over a five-year period does not shock the conscience (*see Matter of Featherstone v Franco*, 95 NY2d 550 [2000]; *Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235, 236 [2007], *lv denied* 9 NY3d 816 [2007]). Accordingly, the court lacked authority to annul

the penalty and remit for further consideration (see *Matter of Featherstone*, 95 NY2d at 554).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2562 In re Hebrew S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Andrew Shapiro of counsel), for presentment agency.

Order, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about June 16, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts, which, if committed by an adult, would constitute the crimes of grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and placed him on probation for a period of 12 months, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the findings to petit larceny and criminal possession of stolen property in the fifth degree, respectively, and otherwise affirmed, without costs.

Except as indicated, the finding was based on legally sufficient evidence and was not against the weight of the evidence. The evidence supports the inferences that appellant took a laptop computer belonging to his school, and that he did

so with larcenous intent. However, we conclude that testimony that the laptop was purchased for \$1349.40 one year before the theft was insufficient proof that it was still worth over \$1000 (see e.g. *People v Gonzalez*, 221 AD2d 203, 204-205 [1995]). This was not a case in which value could be inferred from the circumstances (compare e.g. *People v Carter*, 19 NY2d 967 [1967] [value in excess of \$500 established by proof that owner paid \$3300 for car 10 months before theft]). Although this issue was unpreserved, we choose to review it in the interest of justice. In any event, the finding was also against the weight of the evidence with regard to the element of value.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2563-

2564 Roger Jazilek,
Plaintiff-Respondent,

Index 110012/05

-against-

Abart Holdings, LLC,
Defendant-Appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for appellant.

Sokolski & Zekaria, P.C., New York (Robert E. Sokolski of counsel), for respondent.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered December 11, 2009, awarding plaintiff principal damages of \$12,377.85, treble damages of \$31,205.31, and legal fees of \$30,545.86, unanimously affirmed, with costs. Appeal from amended order (same court and Justice), entered October 28, 2009, which granted plaintiff's motion and denied defendant's cross motion for summary judgment, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant owns the apartment building at 50 East Third Street in Manhattan. From about 1981 through March 2002, defendant leased apartment 1B to a prior tenant, under a rent-stabilized lease. The stabilized tenant then agreed to vacate the premises and surrender all of her rights. The apartment's registered legal rent on file with the State Division of Housing and Community Renewal at that time was \$812.34 per month.

After the tenant of record vacated the premises, the landlord commenced a holdover proceeding in Housing Court against plaintiff herein, on the grounds that he was an illegal subtenant. On April 2, 2002, the parties executed a so-ordered settlement stipulation whereby the landlord offered plaintiff a two-year lease in his own name, at a monthly rent of \$2,200, with a "preferential rent" of \$1,800 per month during the two-year term.

On April 2, 2002, in accordance with the stipulation, the parties executed a two-year lease with a rider reciting that the apartment's "legal regulated rent" was \$2,200 and providing for a "lower preferential rent" of \$1,800 during the term of the lease. In March 2004, the parties executed a renewal lease with a similar rider reciting a "legal regulated rent" of \$2,299 per month and a preferential rent of \$1,881.

In July 2005, plaintiff commenced this action seeking a declaration that the stipulation was "void as against public policy" because it violated the Rent Stabilization Law (RSL) and Code (RSC), and that he was the apartment's "lawful rent-stabilized tenant," and also a declaration as to the apartment's maximum legal rent. Plaintiff also sought damages and treble damages for any rent overcharges, as well as attorneys' fees. On a prior appeal, the Court of Appeals held that the "stipulation violates the Rent Stabilization Code and is void as against

public policy" (10 NY3d 943, 944).

We reject defendant's contention that since the Court of Appeals held the stipulation to be void, the parties should be restored to the status quo ante the stipulation, thus permitting defendant to pursue its claims against plaintiff as a holdover from an illegal sublet. Review of the parties' lease reveals it was a freestanding agreement, not specifically tied to the stipulation. Rather than incorporating or otherwise referring to the stipulation, the lease instead contains a merger clause expressly reciting that "All promises made by the Landlord are in this lease. There are no others." Additionally, the stipulation did not in any way compel defendant to renew plaintiff's lease, which the landlord did in 2004. Hence, even assuming that the initial lease was, contrary to its own terms, inextricably bound to the voided stipulation, the renewal lease was completely independent of the stipulation.

Moreover, the holding of the Court of Appeals specifically voided only the stipulation, not the parties' lease agreement. The lease expressly provided that if any of its terms were found to be "illegal, the rest of this lease remains in full force." Hence, although the lease provision setting the rent at \$2,200 and deregulating the apartment is violative of the RSL and thus void, the balance of the lease, and with it the parties'

landlord-tenant relationship, is unaffected (see RSC [9 NYCRR] § 2520.12 [(t)he provisions of any lease . . . shall remain in force pursuant to the terms thereof, except insofar as those provisions are inconsistent with . . . the RSL or this Code, and in such event such provisions shall be void and unenforceable]).

In calculating the amount of the rent overcharges, the motion court correctly declined to apply any periodic or other rent increases, other than a vacancy increase of 20% (see RSC [9 NYCRR] § 2522.8[a][1]), which the parties agreed applied. A landlord's failure to file a "proper and timely" annual rent registration statement results in the rent being frozen at the level of the "legal regulated rent in effect on the date of the last preceding registration statement" (RSL § 26-517[e]; see RSC [9 NYCRR] § 2528.4[a]). The rent registration filed by the landlord in February 2004 was false, as it continued to list the prior tenant as tenant of record, and listed the prior rent of \$812.34, instead of the actual paid "preferential" rent of \$1,800. The rent registration filed in June 2004 was also defective, as it listed a legal rent of \$2,200, vastly in excess of \$974.81, the highest possible legal rent at that time. As such, both the February and the June 2004 rent registration statements were nullities (*Thornton v Baron*, 5 NY3d 175 [2005]), and no further registration statements were filed.

The court also correctly held treble damages to be

applicable. In support of its argument that the overcharge was not willful, defendant relies on the so-ordered stipulation containing the agreed-upon rental figure of \$2,200. Although that document recites that the rent for the apartment shall be set at \$2,200 per month, there is no representation that this number constitutes the apartment's legal regulated rent. In any event, a representation in a stipulation – even a so-ordered stipulation – “is not to be equated with a judicial finding” (*Urban Assoc. v Hettinger*, 177 AD2d 439 [1991], *lv denied* 79 NY2d 759 [1992]). Hence, it cannot be presumed that in so-ordering the stipulation, the Housing Court was making any finding that the stated monthly rent was the legal regulated rent.

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

ENTERED: APRIL 20, 2010

CLERK

Here, petitioner failed to make such a showing. His claim that his father used financial leverage over him to obtain the waiver and consent does not provide a sufficient basis to make out a claim of economic duress (see e.g. *767 Third Ave. LLC v Orix Capital Mkts., LLC*, 26 AD3d 216, 218 [2006], lv denied 8 NY3d 803 [2007]; *Edison Stone Corp. v 42nd St. Dev. Corp.*, 145 AD2d 249 [1989]). Nor does the affirmation of petitioner's former psychiatrist demonstrate that petitioner suffered from a cognizable mental disability at the time he signed the waiver and consent, and the evidence does not show that petitioner was otherwise incapable of safeguarding his legal rights at that time (see *Matter of Bobst*, 234 AD2d 7 [1996], lv dismissed 90 NY2d 844 [1997]).

Furthermore, absent a valid excuse for the 12-year delay in seeking to vacate the decree, and given the prejudice that would result from revoking the probate decree, petitioner was guilty of gross laches (see *Matter of Linker*, 23 AD3d 186, 189 [2005]).

We have considered petitioner's remaining arguments, including his challenge to his mother's testamentary capacity, and find them unavailing.

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

ENTERED: APRIL 20, 2010

CLERK

note asking if jurors could take into account their knowledge of the purpose of methadone in deciding the case, and it appropriately cautioned the jury that such knowledge must be based on ordinary experience rather than special expertise (see *People v Arnold*, 96 NY2d 358, 364-368 [2001]; *People v Maragh*, 94 NY2d 569, 574-576 [2000]). We conclude that the note addressed a matter of common knowledge (see Prince, Richardson on Evidence, § 2-206 [Farrell 11th ed]), and that the court was not obligated to tell the jury not to consider the purpose of methadone. In any event, any error was harmless (see *People v Crimmins*, 36 NY2d 230 [1975]). Even assuming that the jury drew the inference that the alleged buyer was a drug addict, and also assuming that such an inference was unwarranted, this factor was of little value in determining which party was the seller, and it was unlikely to have affected the verdict.

We decline to invoke our interest of justice jurisdiction to dismiss the noninclusory concurrent count.

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2567-

2568

Pala Dawkins,
Plaintiff-Respondent,

Index 301635/09

-against-

Rhoenna Campbell-Robinson, et al.,
Defendants-Appellants.

Littler Mendelson, P.C., New York (Eric D. Witkin of counsel),
for appellants.

Sherwood Allen Salvan, New York, for respondent.

Orders, Supreme Court, Bronx County (Paul Victor, J.),
entered on or about August 10, 2009 and November 18, 2009,
respectively, which denied defendants' motions to dismiss the
complaint, unanimously reversed, on the law, without costs, and
the motions granted. The Clerk is directed to enter judgment
dismissing the complaint.

Plaintiff's claims of defamation, wrongful discharge and
intentional infliction of emotional distress are preempted by
section 301 of the federal Labor Management Relations Act, 1947
(29 USC § 185), because they require interpretation of a

collective bargaining agreement (*Griffiths v Triangle Servs., Inc.*, 59 AD3d 278 [2009]).

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

ENTERED: APRIL 20, 2010

CLERK

plaintiff's testimony that she routinely rides this bus line and routinely finds the bus "filthy" with "food, bottles, cans and newspapers strewn about" does not raise an issue of fact as to whether defendants had constructive notice of the allegedly hazardous condition of the steps by reason of a dangerous recurring condition in the area of the steps that was routinely left unaddressed. A general awareness that debris may have been present on the bus is insufficient to raise an issue of fact as to whether defendants had notice of whatever it was on the steps that caused plaintiff to fall (see *Gordon v American Museum of Natural History*, 67 NY2d 836, 838 [1986]; *Solazzo v New York City Tr. Auth.*, 6 NY3d 734 [2005], *affg* 21 AD3d 735, 736 [2005]; *Arrufat v City of New York*, 45 AD3d 710 [2007]).

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

ENTERED: APRIL 20, 2010

CLERK

without costs.

Paragraph 2(d) of the parties' settlement stipulation, which obliges defendant to pay out of the trust two-thirds of tuition increases above \$16,380, does not contain any plain language extinguishing defendant's obligation. Had defendant wanted to extinguish his obligation to pay the excess tuition, he could -- and should -- have done so explicitly (*see Ventricelli v DeGennaro*, 221 AD2d 231, 232 [1995], *lv denied* 87 NY2d 808 [1996]; *see generally Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]).

Given the facts in the record, neither plaintiff's conduct nor that of her counsel was frivolous, warranting sanctions. Their actions were not without merit in law, were not undertaken primarily to delay or prolong the resolution of the litigation or to harass defendant, nor did they assert material factual statements that were false (22 NYCRR 130-1.1; *see Intercontinental Bank Ltd. v Micale & Rivera*, 300 AD2d 207 [2002]).

However, the court did err when it directed the co-trustee to make certain payments to defendant. Where a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith (*Matter of Preiskel*, 275 AD2d 171, 181 [2000]). The court does have the authority to exercise absolute discretion

in correcting abuses that are arbitrary or the result of bad faith (see *Matter of Gilbert*, 156 Misc 2d 379, 383 [1992]). However, the record contained no evidence of any abuse of discretion or bad faith by the trustee, nor, indeed, did plaintiff make an allegation to that effect. On the contrary, according to a representative of JP Morgan, for 16 years the bank chose to make those payments to enable defendant to pay the required tuition. Accordingly, the direction that JPMorgan should make such payments from the trust should be deleted.

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

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

ENTERED: APRIL 20, 2010

CLERK

that established he was admitting his intentional participation in a robbery (*see People v McNair*, 13 NY3d 821 [2009]).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2573 Kathleen Newman, Index 106161/07
Plaintiff-Respondent,

-against-

Ashutush Datta, et al.,
Defendants-Appellants.

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

Sinel & Associates, PLLC, New York (Jessica Keeley of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered July 7, 2009, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Insofar as "a fracture" is one statutory definition of "serious injury" (Insurance Law § 5102[d]), we conclude that defendants failed to establish prima facie that plaintiff's dental injury did not constitute a serious injury within the meaning of the statute (*see Kennedy v Anthony*, 195 AD2d 942, 944 [1993]; *see also Sanchez v Romano*, 292 AD2d 202, 203 [2002]). Defendants' expert dentist, based on his examination of plaintiff, identified at least two fractured teeth about which he made no finding that the fractures antedated plaintiff's accident (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]).

We would find, in any event, that plaintiff raised an issue

of fact through an affidavit by her oral surgeon, who stated that, based upon his examination of her and review of her dental records, it was his opinion that the accident caused fractures in two of plaintiff's teeth and that, as a result, plaintiff would be required to undergo extensive and ongoing dental treatment (see *Kennedy*, 195 AD2d at 944).

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

ENTERED: APRIL 20, 2010

CLERK

Andrias, J.P., Sweeny, Renwick, Abdus-Salaam, Manzanet-Daniels, JJ.

2574 In re Lawrence Parker,
Petitioner,

Index 340863/08

-against-

Warden of George R. Vierno
Correctional Facility, et al.,
Respondents.

Lawrence Parker, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Edward F.X. Hart of counsel), for respondents.

Determination of respondent New York City Department of Correction, dated August 21, 2008, which, after a hearing, found that petitioner inmate violated the disciplinary rule prohibiting possession of contraband (tobacco), and directed that petitioner be detained for 90 days in punitive segregation, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Robert E. Torres, J.], entered November 8, 2005), dismissed, without costs.

Contrary to petitioner's contention, his due process rights were not violated because his request for a hearing facilitator was denied and a witness testified outside of his presence. An inmate is entitled to a hearing facilitator only if he is non-English speaking or sensory-deprived (see 7 NYCRR 253.2).

Petitioner has made no such showing and, as evidenced by his

papers and the hearing, was more than able to understand the charges and the proceedings. A witness is also allowed to testify outside of the petitioner's presence if doing so is necessary for institutional safety or correctional goals (7 NYCRR 253.5[b]). Here, the record indicates that the witness was unable to testify because he was needed elsewhere. Since the witness's testimony was recorded and made available to petitioner at the hearing, petitioner's due process rights were not violated (see 7 NYCRR 253.5[b]).

The record reveals that during a search of petitioner's cell, tobacco was discovered in his garbage can. Although the tobacco was discovered when the garbage can was emptied outside of petitioner's cell, a reasonable inference of possession arises from the fact that the contraband was discovered in his garbage can - an item within petitioner's control (see *Matter of Tavaréz v New York City Dept. of Correction*, 50 AD3d 251, 251 [2008]). This inference, together with the report and notice of infraction and testimony adduced at the hearing, provides substantial evidence to support the determination (*id.*).

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

ENTERED: APRIL 20, 2010

CLERK

avoid an upward departure to level three (see *People v DeFreitas*, 213 AD2d 96, 101 [1995], *lv denied* 86 NY2d 872 [1995]). In any event, the alleged deficiencies in counsel's performance did not affect the outcome or deprive defendant of a fair hearing.

Defendant's argument that the People failed to provide him with notice of their intent to seek a risk level classification different from the Board's recommendation is improperly raised for the first time on appeal (see *People v Charache*, 9 NY3d 829 [2007]).

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

ENTERED: APRIL 20, 2010

CLERK

(*Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1 [1974]), Gallin neither was negligent nor directly supervised and controlled plaintiff's work (see *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]).

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

ENTERED: APRIL 20, 2010

CLERK

Mazzarelli, J.P., Catterson, DeGrasse, Román, JJ.

1568 Tetla Roques, etc.,
Plaintiff-Appellant,

Index 13721/06

-against-

David H. Noble, M.D., et al.,
Defendants-Respondents,

Our Lady of Mercy Medical Center,
Defendant.

Thomas Torto, New York (Jason Levine of counsel), for appellant.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for David H. Noble, M.D. and University Diagnostic Medical Imaging, respondents.

Martin Clearwater & Bell LLP, New York (Arjay G. Yao of counsel), for Kamran Tabaddor, M.D. and New York Neuroscience Institute, P.C., respondents.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered July 1, 2008, reversed, on the law, without costs, the motions denied and the cause of action reinstated.

Opinion by Román, J. All concur except DeGrasse, J. who dissents in an Opinion.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
APRIL 20, 2010

Gonzalez, P.J., Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1375 Wong v Chang

Appeal, previously perfected for the April 2010 Term,
withdrawn.

Gonzalez, P.J., Mazzarelli, Nardelli, Acosta, Abdus-Salaam, JJ.

M-462 JPMorgan Chase Bank, N.A. v Parkcentral Global Hub
Limited

Appeal and motion deemed withdrawn.

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

M-888 Kodjovi v Trustees of Columbia University in the City
of New York - Kodjovi

Appeal from the order of the Supreme Court, New York
County, entered May 7, 2009 withdrawn; time to perfect appeal
from the judgment entered June 5, 2009 enlarged to the September
2010 Term.

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

M-922 Weiser LLP v Coopersmith

Motion deemed withdrawn.

Gonzalez, P.J., Tom, Friedman, McGuire, Abdus-Salaam, JJ.

M-1230 In re New York City Asbestos Litigation
Czukiewski v A.O. Smith Water Products Co. - Kohler Co.
Motion withdrawn.

Gonzalez, P.J. Tom, Mazzarelli, Andrias, Saxe, JJ.

M-1146 People v Anderson, Erin

M-1147 People v Caldwell, Shawn

M-1148 People v Delorbe, Calvin

M-1149 People v Gonzalez, Milton

M-1151 People v Hurdle, Walter K.

M-1152 People v James, Mark, also known as Townsend, Mark

M-1155 People v Lopez, Ramon

M-1156 People v Medina-Gonzalez, Franklin F.

M-1158 People v Richardson, Johntell E.

M-1159 People v Silvestre, Roger

M-1160 People v Spann, Gerard

M-1162 People v Weekfall, Bobby

M-1163 People v West, Darryl

M-1164 People v Winston, Darnell

Leave to prosecute appeals as poor persons granted, as indicated.

Gonzalez, P.J., Mazzairelli, Nardelli, Acosta, Abdus-Salaam, JJ.

M-390 People v Mack, Roosevelt

Leave to prosecute appeal as a poor person granted, as indicated.

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

M-762 Mode Contempo, Inc. v Raymours Furniture Company, Inc.

Appeal, cross appeal and motion deemed withdrawn.

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

M-743 Vadhan v Sanchez

Motion deemed withdrawn.

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

M-1222 People v Rivera, Jose

Leave to prosecute appeal as a poor person granted, as indicated.

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

M-1216 People v Bellinger, Artis

Leave to prosecute appeal as a poor person denied, with leave to renew, as indicated.

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

M-671 Intrepid Aircraft Leasing (France) Sarl v Closed Joint
Stock Company Aerosvit Airlines, doing business as
Aerosvit Airlines Corp.

Appeal and motion deemed withdrawn.

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

M-521

M-522 Estate of Lantz v L-M Dialysis Corporation; In the
Matter of Lantz v For the Dissolution of Lower
Manhattan Dialysis Center, Inc.

Appeals consolidated; said appeals dismissed unless
perfected for the September 2010 Term, as indicated (M-521/M-
522).

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, JJ.

M-691

M-937 Yu v The New York City Department of Housing
Preservation and Development - Chinatown Apartments,
Inc.

Proceeding dismissed (M-691/M-937).

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

M-429

M-755 Ferguson v Sherman Square Realty Corp. - DeRosa

M-825

Appeal dismissed (M-429/M-755/M-825).

Mazzarelli, J.P., Friedman, DeGrasse, Abdus-Salaam, Manzanet-Daniels, JJ.

M-587 Ovando v New York City Housing Authority
 (And a third party action)

 Enlargement of time to perfect appeal denied; appeal
dismissed.

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Román, JJ.

M-1244 People v Steward, Anthony

 Leave to prosecute appeal as a poor person granted, as
indicated.

Mazzarelli, J.P., Sweeny, Freedman, Román, JJ.

M-1214 People v Lewis, Michael

 Moving papers deemed a timely filed notice of appeal;
leave to prosecute appeal as a poor person granted, as indicated.

Mazzarelli, J.P., Saxe, Nardelli, Abdus-Salaam, Román, JJ.

M-533 Branche v Holloway

 Stay denied.

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

M-1108 Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce

 Reargument or other relief denied.

Andrias, J.P., Saxe, Catterson, Freedman, Abdus-Salaam, JJ.

M-1005 Salata v Jacksom - Knight Time Security of New York, Inc.,
doing business as Titan Security, Inc.

Motion dismissed, as indicated. The interim order of a
Justice of this Court, dated February 25, 2010 vacated.

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

M-1296 JPMorgan Chase Bank, N.A. v Faith Ministries, Inc. -
Withdraw

Motion deemed withdrawn.

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

M-731 Portillo v New York City Transit Authority

Motion deemed withdrawn.

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

M-414 Jovicevic v Structure Tone, Inc. - Donnelly Mechanical
Corp. - Latham & Watkins, LLP; Donnelly Mechanical Corp. v
Alfa Piping Corp.

Motion deemed withdrawn.

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

M-4436 In the Matter of Robert M. Simels
(admitted as Robert Matteson Simels),
an attorney an counselor-at-law:

Petition to disbar respondent denied, with leave to renew,
as indicated. No opinion. All concur.

Mazzarelli, J.P., Saxe, Friedman, Sweeny, Nardelli, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-1407 Ralph Anthony Daiuto, Jr., admitted on 3-3-1993,
at a Term of the Appellate Division,
Second Department

Respondent reinstated as an attorney and counselor-at-law
in the State of New York, effective the date hereof. No opinion.
All concur.

Mazzarelli, J.P., Saxe, Friedman, Sweeny, Nardelli, JJ.

In the Matter of Attorneys Who Are in Violation
of Judiciary Law Section 468-a:

M-1669 Vivienne M. Clerissi, admitted on 3-22-1999,
at a Term of the Appellate Division,
First Department

Respondent reinstated as an attorney and counselor-at-law
in the State of New York, effective the date hereof. No opinion.
All concur.

Friedman, J.P., Moskowitz, Renwick, Freedman, Román, JJ.

M-464 In the Matter of Bjorn J. Holubar
(admitted as Bjorn Jeffery Holubar),
an attorney and counselor-at-law:

Respondent suspended from the practice of law in the State
of New York, effective the date hereof, until such time as
disciplinary matters pending before the Committee have been
concluded and until further order of this Court. Opinion Per
Curiam. All concur.

The following orders were entered and filed on April 15, 2010:

Gonzalez, P.J. Saxe, Nardelli, McGuire, Moskowitz, JJ.

M-1604 Martinez v Hunts Point Cooperative Market, Inc. - Lisa
Motor Lines - Frozen Food Express Industries, Inc.;
Hunts Point Cooperative Market, Inc. v Nebraskaland,
Inc., doing business as Cornhusker Farms, Inc.

Enlargement of record on appeal denied. Extension of time
allotted for argument denied, as indicated.

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

M-1555 Payne v Douglas Ellison

Motion to be relieved as counsel denied.

Tom, J.P., Mazzairelli, Andrias, Saxe, DeGrasse, JJ.

M-1599 In the Matter of Cylich v Riverbay Corporation

Preliminary appellate injunction denied.

Tom, J.P., Saxe, Friedman, Nardelli, Catterson, JJ.

M-1318 Asensio v Casa 74th Development, LLC

Injunctive relief granted by a Justice of this Court dated
March 12, 2010 continued on condition plaintiff-appellant perfects
the appeal for the September 2010 Term, as indicated.