

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 26, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzairelli, Andrias, Moskowitz, Renwick, JJ.

77N Nomura Asset Capital Corporation, Index 116147/06
 et al.,
 Plaintiffs-Respondents,

-against-

Cadwalader, Wickersham & Taft LLP,
Defendant-Appellant.

Cravath, Swaine & Moore LLP, New York (David R. Marriott of
counsel), for appellant.

Constantine Cannon LLP, New York (Amianna Stovall of counsel),
for respondents.

Order, Supreme Court, New York County (Herman Cahn, J.),
entered August 21, 2008, which, in an action for legal
malpractice, inter alia, denied defendant law firm's motion to
compel plaintiff's production of certain privileged attorney-
client communications, unanimously affirmed, without costs.

This legal malpractice action arises from defendant's
allegedly negligent advice in regard to Nomura's formation of the
so-called D5 Trust, a securitized pool of 156 mortgage loans
totaling \$1.8 billion which closed in October 1997. The
transaction was to be compliant with the Internal Revenue Code's
Real Estate Mortgage Investment Conduit (REMIC) regulations. In

November 2000, after several of the loans experienced difficulty, the trustee of the D5 Trust sued Nomura in federal court (the Doctor's Hospital Action), alleging that, contrary to defendant's advice and opinion rendered to Nomura, one of the mortgage loans to Doctor's Hospital of Hyde Park, Illinois did not comply with the REMIC regulations. Specifically, the trustee alleged breach of Nomura's warranties that such mortgage loan was REMIC qualified and that the borrower's real property had a fair market value of at least 80% of the principal amount of the mortgage loan.

Defending the position that the Doctor's Hospital loan was a qualified mortgage for REMIC purposes, Nomura successfully moved for summary judgment (*LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 2004 US Dist LEXIS 18599 [SDNY 2004]). However, on appeal, the Second Circuit reversed in part and remanded the matter to determine whether the loan was, in fact, 80% secured (424 F3d 195 [2005]). As a result, Nomura alleges that, because of defendant's erroneous advice that such mortgage loan was REMIC qualified, it was "left with no viable alternative but to settle the Doctor's Hospital Action for approximately \$67.5 million prior to trial" and seeks to recover the amount of the settlement.

We find no merit to defendant's argument that privileged materials relating to and created after commencement of the

Doctor's Hospital Action have been put "in issue" by this litigation and are therefore discoverable. Such argument fails to recognize that nothing that plaintiff's attorneys could have said or done in the prior lawsuit could have possibly affected plaintiff's reliance on defendant's allegedly erroneous advice given years earlier in connection with the formation of the D5 Trust. "'At issue' waiver of [the attorney-client] privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" (*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56, 63 [2007]). While any communications between plaintiff and its attorneys in the Doctor's Hospital Action that evaluated defendant's prior advice in the allegedly bungled D5 Trust transaction are certainly relevant to the issue of defendant's alleged malpractice, plaintiff disavows any intention to use such communications and defendant fails to show that any such communications are necessary to either plaintiff's claim or its defense (*see id.* at 64 [relevance alone insufficient to put privileged materials "at issue"; "if that were the case, a

privilege would have little effect"]; see also *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370, 374 [2008]). Nor does the question of the reasonableness of the settlement amount that plaintiff seeks to recover, without more, put plaintiff's privileged communications with its attorneys concerning the settlement "in issue" (*Deutsche Bank*, 43 AD3d at 57). No reason appears why the reasonableness of the settlement cannot be determined with the copious materials that defendant has already received, including otherwise privileged communications, dating from before the commencement of the Doctor's Hospital Action. We have considered defendant's other arguments and find them unpersuasive.

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

ENTERED: MAY 26, 2009

CLERK

Gonzalez, P.J., Mazzarelli, Saxe, Moskowitz, Richter, JJ.

399 NAMA Holdings, LLC, etc., Index 601054/08
Plaintiff-Respondent,

-against-

Greenberg Traurig, LLP, etc., et al.,
Defendants-Appellants.

Pollack & Kaminsky, New York (Martin I. Kaminsky of counsel), and
Leslie D. Corwin, New York, for appellants.

Berger & Webb, LLP, New York (Steven A. Berger of counsel), for
respondent.

Order, Supreme Court, New York County (Richard B. Lowe III,
J.), entered November 20, 2008, which denied defendants' motion
to dismiss the complaint or stay the action pending arbitration,
unanimously modified, on the facts, to stay the action pending
the arbitral determination, and otherwise affirmed, without
costs.

Plaintiff, a member of Alliance Network LLC (a limited
liability company), had standing to bring this derivative action
alleging that the law firm and one of its partners representing
the LLC and its managers in other litigation had a conflict of
interest as a result of the managers' involvement and the
partner's hidden financial interest in a competing project. The
motion court correctly discerned the plain meaning of the
company's operating agreement and the unambiguous governing
Nevada statute (Nev. Rev Stat Ann § 86.483), in finding that

plaintiff was not prohibited from bringing derivative claims (see *Jones v Bill*, 10 NY3d 550, 555 [2008]) and that resort to legislative history was unnecessary.

Plaintiff NAMA may also assert an individual claim against defendants as the attorneys for the LLC, because plaintiff has alleged, inter alia, that these defendants colluded with the managers of the LLC to drive NAMA from the underlying project (see *Aranki v Goldman & Assoc., LLP*, 34 AD3d 510, 511-512 [2006]; cf. *Berkowitz v Fischbein, Badillo, Wagner & Harding*, 7 AD3d 385, 387 [2004], lv dismissed 3 NY3d 767 [2004]).

The arbitration ruling denying disqualification of the attorneys at a preliminary stage of that proceeding does not preclude the disqualification claim. The doctrine of res judicata does not apply, absent a final adjudication on the merits (see *Clearwater Realty Co. v Hernandez*, 256 AD2d 100, 101 [1998]). Nor does the doctrine of collateral estoppel conclusively bar plaintiff's claim, because the scope of the arbitral ruling is not entirely clear (see *Jeffreys v Griffin*, 1 NY3d 34, 39 [2003]). Moreover, the issue in this action is particularly fact-laden and its resolution should await further factual development. We note, however, that the burden is on plaintiff, as the opponent of collateral estoppel, to demonstrate the absence of a full and fair opportunity to be heard in the arbitration (*id.*), and plaintiff failed to carry this burden.

The allegations regarding defendants' obstruction of discovery also are not precluded because the claim in this action is not to obtain discovery, but to show how the attorneys allegedly committed misconduct in obstructing it.

However, the court should have granted a stay pursuant to CPLR 2201 in the interest of judicial economy. There are overlapping issues and common questions of fact, and the hearings in the arbitration, that began a year before the commencement of this action, are nearly complete (see *Belopolsky v Renew Data Corp.*, 41 AD3d 322 [2007]; cf. *American Intl. Group, Inc. v Greenberg*, 60 AD3d 483 [2009] [finding that resolution of related action would not dispose of or significantly limit issues before this Court or pose risk of inconsistent rulings]; *Metropolitan Steel Indus., Inc. v Tully Constr. Co., Inc.*, 55 AD3d 363, 364 [2008] [finding it unlikely that significant judicial economies would be served]).

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

ENTERED: MAY 26, 2009

CLERK

Gonzalez, P.J., Tom, Catterson, Richter, Abdus-Salaam, JJ.

535N Robert Krochta, Index 301273/07
Plaintiff-Appellant,

-against-

On Time Delivery Service, Inc., et al.,
Defendants-Respondents.

Alexander J. Wulwick, New York, for appellant.

Blane Magee, Rockville Centre, for On Time Delivery Service,
Inc., respondent.

Gannon, Rosenfarb & Moskowitz, New York (Peter J. Gannon of
counsel), for Ad Mfg. Corp., respondent.

Order, Supreme Court, Bronx County (Nelson S. Roman, J.),
entered on or about April 25, 2008, which, in an action for
personal injuries arising from a trip and fall on a sidewalk in
Nassau County, granted the motion of defendant Ad Mfg. Corp.
(AMC) to change venue from Bronx to Nassau County, unanimously
reversed, on the law, without costs, and the motion denied.

Plaintiff, a Pennsylvania resident, was injured on premises
owned and operated by AMC in Nassau County when he tripped and
fell over packaging material used to wrap merchandise being
delivered by defendant On Time Delivery Service, Inc. Plaintiff
commenced this action in Supreme Court, Bronx County, basing
venue on the residence of defendant AMC, as reflected in its
certificate of incorporation filed January 22, 1970. Prior to
answering, AMC served a demand to change venue to Nassau County

on the ground that the county designated by plaintiff was improper (CPLR 503[a]). AMC then moved to change venue (CPLR 510[1]; 511), submitting documentation from the Department of State indicating that the corporation did not reside in Bronx County at the time plaintiff commenced the action. In reply to plaintiff's opposing argument that venue was proper based on the certificate of incorporation, AMC submitted the affidavit of its vice president attesting that the corporation had been operating out of Nassau County for nearly 30 years. AMC's reply papers further contended that the convenience of material witnesses and the interest of justice also warranted the venue change.

Supreme Court properly denied the motion for change of venue as of right as untimely, having been interposed more than 15 days after service of AMC's antecedent demand (CPLR 511[b]). The court also correctly rejected AMC's application for a discretionary change of venue as having been improperly advanced for the first time in reply (*Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 562 [1992]), noting that, in any event, AMC had failed to demonstrate how the convenience of witnesses or the interest of justice would be served. The court nevertheless exercised its discretion to grant the change of venue "for reasons not enumerated by statute or in the interest of justice as enumerated by statute." The court concluded that the case has only a tenuous connection to Bronx County and, "all things being equal,

a transitory action should be venued in the county of occurrence." This was error.

As this Court stated in *Velasquez v Delaware Riv. Val. Lease Corp.* (18 AD3d 359, 360 [2005]):

"We have long held that 'The designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue' (*Conway v Gateway Assoc.*, 166 AD2d 388, 389 [1990]). Since the certificate of incorporation here was never formally amended to change the principal place of business, the original designation governs" (citing *Nadle v L.O. Realty Corp.*, 286 AD2d 130, 132 [2001]).

While the situs of plaintiff's injury provides a basis to change venue to Nassau County (see e.g. *Young Hee Kim v Flushing Hosp. & Med. Ctr.*, 138 AD2d 252 [1988]), a discretionary change of venue (CPLR 510[3]) still must be supported by a statement detailing the identity and availability of proposed witnesses, the nature and materiality of their anticipated testimony, and the manner in which they would be inconvenienced by the designated venue (see *Leopold v Goldstein*, 283 AD2d 319 [2001]), requirements the court had correctly found to be unsatisfied.

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4899 1166 Junior Mezzanine Lender LLC, Index 601644/07
 Plaintiff-Appellant,

-against-

1166 GP Associates, LLC, et al.,
Defendants-Respondents.

Appeal from an order, Supreme Court, New York County
(Richard B. Lowe, III, J.), entered September 28, 2007,
unanimously withdrawn in accordance with the terms of the
stipulation of the parties hereto. No opinion. Order filed.

Friedman, J.P., Sweeny, McGuire, Renwick, Freedman, JJ.

4900 1166 Junior Mezzanine Lender LLC, Index 601644/07
 Plaintiff-Appellant,

-against-

1166 GP Associates, LLC, et al.,
Defendants-Respondents.

Appeal from an order, Supreme Court, New York County
(Richard B. Lowe, III, J.), entered June 26, 2008, as amended
July 16, 2008, unanimously withdrawn in accordance with the terms
of the stipulation of the parties hereto. No opinion. Order
filed.

The Administrative Law Judge found substantial evidence that the petitioner "suffered or permitted the premises to become disorderly by failing to properly supervise the premises allowing solicitation of male patrons by its female dancers" in violation of section 106(6) of the Alcoholic Beverage Control Law. He also found that petitioner had violated section 106(6) of the ABC Law by failing to properly and meaningfully supervise the premises and stop solicitation from occurring therein, and that open and notorious sexual activity occurred at the premises, such that petitioner knew or should have known of its occurrence.

Contrary to the Authority's determination, the evidence adduced at the hearing does not support the conclusion that the management allowed the solicitation of sex, or even that the dancers at the premises solicited the undercover officers or any other customers.

A fair reading of the record makes it evident that the solicitation was instigated by the officers. To the extent that the SLA may have shown other improper conduct occurred at the premises, petitioner was not put on notice of these charges.

Thus, it cannot be said that the evidence supports the conclusion that solicitation for prostitution, with the knowledge

of management, occurred at the premises, and the determination must be annulled.

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

ENTERED: MAY 26, 2009

CLERK

Tom, J.P., Mazzarelli, Nardelli, Catterson, Moskowitz, JJ.

122 Ari Kramer, as Executor of the Estate of Virginia Casey Bush, etc.,
Plaintiff-Appellant, Index 101978/05

-against-

Ioannis Danalis,
Defendant-Respondent.

Haynes and Boone, LLP, New York (Kenneth J. Rubinstein of counsel), for appellant.

Schillinger & Finsterwald, LLP, White Plains (Peter Schillinger of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered October 2, 2008, which granted defendant's motion for partial summary judgment dismissing the second amended complaint, except for the cause of action for an accounting, and on his first counterclaim declaring that a 2002 agreement between himself and Irving T. Bush is valid, and denied plaintiff's application for distributions, unanimously affirmed, without costs.

In opposition to defendant's showing that Bush, an elderly real estate investor and attorney, was competent and unaffected by undue influence when he and defendant executed the 2002 agreement, plaintiff failed to raise an issue of fact as to the existence of a fiduciary or confidential relationship between Bush and defendant and failed to carry his burden to demonstrate that the subject transaction was the product of undue influence

(see *Sepulveda v Aviles*, 308 AD2d 1, 7-8 [2003]). In the face of affidavits and testimony from lay observers regarding Bush's continued independence as late as 2003 and from the attorney who negotiated, drafted and witnessed the execution of the 2002 agreement, plaintiff failed to submit contrary evidence of Bush's condition at the time (see *Preshaz v Przyziazniuk*, 51 AD3d 752 [2008]; *Matter of Camac*, 300 AD2d 11 [2002]). In addition, plaintiff's purported medical evidence, unsworn and, in one instance, unsigned, and apparently reflecting no more than a request by Bush's wife that he be examined rather than a conclusion by a physician, was inadmissible and therefore insufficient to defeat summary judgment (see *Henkin v Fast Times Taxi*, 307 AD2d 814 [2003]). The other evidence submitted by plaintiff on this issue was insufficiently probative. Plaintiff's claimed need for discovery was "an ineffectual mere hope, insufficient to forestall summary judgment," particularly in light of his failure to seek the deposition testimony of the attorney-drafter of whose identity and role he had long been aware (see *Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [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: MAY 26, 2009

CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

226 Sterling National Bank, Index 121916/03
Plaintiff-Respondent-Appellant,

-against-

Ernst & Young LLP, et al.,
Defendants-Appellants-Respondents.

Mayer Brown LLP, New York (Hector Gonzalez of counsel), for appellants-respondents.

Kaplan Landau LLP, New York (Mark Landau of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Herman Cahn, J.), entered December 5, 2008, which, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint and granted their motion to vacate a portion of the order, same court (John A.K. Bradley, J.H.O.), entered April 2, 2008, directing defendants to respond to certain discovery requests, unanimously affirmed, without costs.

Plaintiff submitted evidence sufficient to raise issues of fact as to whether defendants' allegedly fraudulent misrepresentations induced plaintiff to extend and renew a \$6 million credit facility to nonparty Allied Deals, Inc., of which nine separate loans advanced pursuant to the facility have not been repaid, and whether the misrepresentations directly caused plaintiff's loss (*see Laub v Faessel*, 297 AD2d 28, 31 [2002]). As to transaction causation, the "Terms of Approval" documents

and related memoranda and the affidavit by plaintiff's former vice president indicate that "audited financial statements" were a condition of the extension and renewal of credit to Allied and that the subject loans would not have been advanced without a "clean opinion" as to Allied's 2000 financial statements. As to loss causation, defendants characterize the loans as mere "rollovers" and contend that plaintiff's financial position did not change as a result of any reliance on the 2000 financial statements and audit report. However, plaintiff's vice president stated that the loans were renewed after Allied had repaid them and that, unbeknownst to plaintiff - because the audit reports did not so inform it - the loans were repaid with funds received from other lenders involved in Allied's fraudulent scheme, rather than from legitimate business transactions.

The court's partial vacatur of plaintiff's second and fourth requests for documents was proper. These requests sought documents relevant only to the issue of punitive damages that is premature until plaintiff demonstrates "some factual basis for [its] punitive damage claim" (*Suozzi v Parente*, 161 AD2d 232, 232 [1990]).

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

630-

630A

The People of the State of New York,
Respondent,

Ind. 3633/06

6046/06

-against-

John Nevarez,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Seon Jeong Lee of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 25, 2007, as amended August 14, 2008, and as further amended August 26, 2008, convicting defendant, upon his pleas of guilty, of grand larceny in the third degree and criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to concurrent terms of 3 to 6 years, unanimously affirmed.

The court properly adjudicated defendant a second felony offender. Regardless of any state law issues presented by defendant's predicate felony conviction, that conviction was not "obtained in violation of defendant's rights under the applicable provisions of the constitution of the United States" (CPL 400.21[7][b]).

After sufficient inquiry (see *People v Frederick*, 45 NY2d 520 [1978]), the court properly denied defendant's motion to withdraw his guilty plea. The record establishes that the plea was voluntary (see *People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). Defendant's claim that he manifested a confused mental state at the plea proceeding is contradicted by the record of the thorough plea allocution.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

631 Amy Fabrikant, Index 350394/04
Plaintiff-Respondent,

-against-

Jay A. Fabrikant,
Defendant-Appellant.

Maloof, Lebowitz, Connahan & Oleske, New York (Charles J. Gayner of counsel), for appellant.

Bernard G. Post LLP, New York (William S. Hochenberg of counsel), for respondent.

Judgment of divorce, Supreme Court, New York County (Saralee Evans, J.), entered December 12, 2007, which, to the extent appealed from as limited by the briefs, confirmed the findings of the special referee imputing annual income of \$750,000 to defendant, unanimously affirmed, without costs.

The court properly confirmed the special referee's report, where, as here, it was supported by the record (*see Merchants Bank v Dajoy Diamonds*, 5 AD3d 167 [2004]; *Poster v Poster*, 4 AD3d 145 [2004], *lv denied* 3 NY3d 605 [2004]). The special referee relied on the uncontested, substantial earnings history of defendant (*see Unger v Unger*, 256 AD2d 220 [1998]; *see also Nebons v Nebons*, 26 AD3d 478 [2006]). The special referee also properly relied on the compelling testimony of the independent forensic accountant, who found that numerous companies with which defendant was affiliated or of which he was the sole owner were

used to pay defendant's personal expenses or to "repay" "loans" allegedly made by him to the companies, for which there was no documentation. These companies, with cash flows that were not reflected on their income tax returns and having no apparent business purpose, reflected defendant's deliberate effort to reduce his apparent income thereby avoiding his obligations to plaintiff and his children (see *Cohen v Cohen*, 294 AD2d 184 [2002]; *Wildenstein v Wildenstein*, 251 AD2d 189 [1998]). The special referee also properly relied on the pattern of substantial gifts to defendant from his father to impute income to defendant (see *Rostropovich v Guerrand-Hermes*, 18 AD3d 211 [2005]; *Lapkin v Lapkin*, 208 AD2d 474 [1994]). While it is uncontested that defendant suffers from injuries incurred in a skiing accident, as well as other ailments, defendant's testimony that he was unable to work due to these injuries is unsupported by any medical evidence (see *Davis v Davis*, 175 AD2d 45, 47-48 [1991]; see also *Matter of Castillo v Castillo*, 23 AD3d 653, 654 [2005]), and is contradicted by defendant's own testimony about his traveling on business at a time when he was purportedly unable to travel or work and about his minimal requirements for work --- a lap top and a telephone. The special referee properly rejected the testimony of defendant and his father, both convicted felons, that nearly \$3 million provided to defendant by his father, unsupported by documentation except a promissory note

prepared two days before the commencement of the hearing, was loans and not gifts. Also, to the extent defendant attempts to argue that his felony conviction caused a reduction in his earning capacity, the reduction was self-imposed and did not warrant a reduction in defendant's obligations to his former wife and his children (see *Knights v Knights*, 71 NY2d 865, 866-867 [1988]; *Commissioner of Soc. Servs. v Darryl B.*, 306 AD2d 54 [2003]). Defendant's arguments regarding inconsistencies in the special referee's report are unpersuasive, and his assertions that the forensic accountant lacked sufficient documentation to make conclusions about defendant's various companies is belied by the record. Moreover, to the extent the accountant lacked such documentation it was due to defendant's failure to provide it, and his assertions to the contrary are not credible.

M-1668 *Fabrikant v Fabrikant*

Motion seeking leave to dismiss appeal
denied.

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

632-

632A-

632B In re Toshea C.J., and Others,

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

Nicolie J., etc.,
Respondent-Appellant,

Edwin Gould Services for Children
and Families,
Petitioner-Respondent.

Steven N. Feinman, White Plains, for appellant.

John R. Eyerman, New York, for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar
of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Jody
Adams, J.), entered on or about March 6, 2007, which, inter alia,
respectively found that respondent mother permanently neglected
the subject children, unanimously affirmed, without costs.

Respondent's argument that the agency's petitions were
jurisdictionally defective for failing to specify the diligent
efforts the agency made to encourage and strengthen the parental
relationship (Family Court Act § 614[1][c]) was raised for the
first time on appeal and is therefore unpreserved (see *Matter of
Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review this
issue, we would find that the petitions sufficiently specified
the agency's efforts, which included arranging for respondent to

visit with the children, referring respondent for individual and family counseling and training in parenting skills, and encouraging respondent "to become consistent with both her planning for and engaging in meaningful visits with" the children.

The court's finding that the agency fulfilled its statutory duty to make diligent efforts to encourage and strengthen the parental relationship was supported by clear and convincing evidence that the agency sought respondent's cooperation in developing a plan tailored to respondent's needs, and, *inter alia*, scheduled visitation, attempted to assist her in improving the quality of the visits, and referred her to parenting skills classes and counseling programs (see Social Services Law § 384-b[7][f]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). Respondent testified that the agency provided her with no referrals. However, her caseworker testified that the agency tried to make referrals and respondent refused to accept them. The court's determination that the caseworker's testimony was credible and respondent's incredible is entitled to deference (see *Matter of Amin Enrique M.*, 52 AD3d 316 [2008]).

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dangerous recurring condition (see *DeJesus v New York City Hous. Auth.*, 11 NY3d 889 [2008]; *Casado v OUB Houses Hous. Co. Inc.*, 59 AD3d 272 [2009]).

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ENTERED: MAY 26, 2009

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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

637 In Juli P.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Judith Harris of counsel), for appellant.

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

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 28, 2008, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed an act which, if committed by an adult, would constitute the crime of assault in the third degree, and imposed a conditional discharge for a period of 12 months, unanimously reversed, on the facts and in the exercise of discretion, without costs, the finding of juvenile delinquency and order of conditional discharge vacated and the matter remanded with the direction to order an adjournment in contemplation of dismissal pursuant to Family Court Act § 315.3(1).

Imposition of a juvenile delinquency adjudication was an improvident exercise of discretion, because it was not "the least restrictive available alternative" (Family Ct Act § 352.2

[2][a]). Rather, an ACD, with such counseling as Family Court deems appropriate, would adequately serve the needs of appellant and society in this case (see e.g. *Matter of Jeffrey C.*, 47 AD3d 433 [2008], *lv denied* 10 NY3d 707 [2008]). The court acknowledged that there was no need for protection of the community from appellant, that when appellant injured his friend he did so recklessly rather than intentionally, that this incident was an isolated outburst, and that appellant had expressed remorse. Furthermore, the record establishes that appellant had a good school record and home environment, and did not manifest any other behavior problems.

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resulting from the injury to raise an issue of fact whether plaintiff sustained a serious permanent injury to his right shoulder (see Insurance Law § 5102[d]; *Toure v Avis Rent-A-Car System*, 98 NY2d 345 [2002]). Defendants failed to raise the issue of a treatment gap in their motion papers and we decline to reach their unpreserved argument.

Plaintiff submitted no medical evidence to substantiate his claim that his injuries precluded him from engaging in substantially all his customary daily activities for 90 of the first 180 days after the accident (see *Dembele v Cambisaca*, 59 AD3d 352, 353 [2009]).

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

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ENTERED: MAY 26, 2009

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Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

643 Charles LoBianco, Index 114773/05
Plaintiff-Respondent,

-against-

Christopher Lake, et al.,
Defendants-Appellants,

Altec Capital Services, LLC,
Defendant.

Connors & Connors, P.C., Staten Island (Timothy M. O'Donovan of
counsel), for appellants.

Diamond and Diamond, LLC, New York (Stuart Diamond of counsel),
for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.),
entered October 2, 2008, which, in an action for personal
injuries arising out of a motor vehicle accident, denied
defendants-appellants' motion for summary judgment dismissing the
complaint, unanimously reversed, on the law, without costs, and
the motion granted. The Clerk is directed to enter judgment in
favor of defendants-appellants dismissing the complaint as
against them.

Defendants-appellants made a prima facie showing of
entitlement to judgment as a matter of law by demonstrating that
they were not involved in plaintiff's accident. A nonparty
eyewitness and defendant driver both testified that, after
plaintiff rear-ended another vehicle, he was no longer on his
motorcycle when the motorcycle alone slid across several lanes of

traffic before coming into contact with defendants' truck.

In opposition, plaintiff failed to raise a triable issue of fact as to whether defendants' truck struck plaintiff's body, and plaintiff's speculation as to defendants' alleged negligence was insufficient to raise a triable issue of fact (see *Bernstein v City of New York*, 69 NY2d 1020, 1021-1022 [1987]). Indeed, plaintiff's own deposition testimony indicates that he did not see which vehicle allegedly struck him after his initial collision, and that he only saw defendants' truck parked on the side of the road after the accident. Furthermore, plaintiff's affidavit, in which he states that defendants' truck struck him after going through a red light, is insufficient to defeat defendants' motion, as it contradicts his deposition testimony and denotes an effort to avoid the consequences of his earlier testimony (see e.g. *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]).

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

ENTERED: MAY 26, 2009

CLERK

toward plaintiff at an angle and was moving up and down as well as side to side. The undisputed testimony was that the tag line men on plaintiff's side of the beam could not control the swing of the beam. The crane operator estimated that the beam moved up and down a foot or a foot and a half. The court correctly found that the accident involved an elevation-related risk within the meaning of Labor Law § 240(1) (see *Brown v VJB Constr. Corp.*, 50 AD3d 373, 376 [2008]; see also *Hawkins v City of New York*, 275 AD2d 634, 634-635 [2000]; *Moller v City of New York*, 43 AD3d 371 [2007]).

However, the court incorrectly found that summary judgment in plaintiffs' favor was precluded by an issue of fact as to how the accident occurred. Since plaintiff's injuries were attributable at least in part to defendants' failure to provide proper protection as mandated by the statute, his motion for summary judgment on the issue of liability thereunder should have been granted (see *Cammon v City of New York*, 21 AD3d 196, 201 [2005]). After the barge on which the crane and the beam were situated was struck by waves and caused to rock, the motion was transmitted to the beam, causing it to "jump around." Plaintiff's injuries resulted from the inability of the tag men on plaintiff's side to steady the beam as the crane operator tried to lower it onto the towers. In addition, the scaffold was defective insofar as plaintiff's foot became ensnared between the

wood planks of its platform. That it is unclear from the record whether plaintiff had a tie line or a lifeline does not preclude partial summary judgment in his favor, since his injury was at least partly attributable to the defects in the hoisting equipment and the scaffold.

The Labor Law § 200 and common-law negligence claims were properly dismissed since the evidence showed that neither the owner nor the construction manager exercised the requisite degree of supervision or control over the work giving rise to plaintiff's injury (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]).

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

ENTERED: MAY 26, 2009

CLERK

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

645N-

645NA In re Yolanda Strong,
Petitioner-Respondent,

Index 406141/07

-against-

The New York City Department of Education,
Respondent-Appellant.

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

Yolanda T. Strong, respondent pro se.

Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered August 19, 2008, which granted petitioner's application to annul the determination of respondent Department of Education terminating petitioner's probationary employment as a per diem substitute teacher, unanimously reversed, on the law, without costs, the application denied and the petition dismissed. Appeal from order, same court (Walter B. Tolub, J.), entered August 19, 2008, which, insofar as appealed from, denied respondent's motion to reargue, unanimously dismissed, without costs.

The proceeding is time-barred as it was commenced more than four months after respondent informed petitioner of its determination that she had violated its regulations by using force as a disciplinary technique, and that her name would "remain on the Ineligible Inquiry list, terminating [her]

services with [respondent]" (CPLR 217[1]). Petitioner's time to commence the proceeding was not extended by her administrative appeal of this determination (*Matter of Frasier v Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 766-767 [1988]). In any event, respondent's finding that petitioner engaged in corporeal punishment is not arbitrary and capricious (see *Von Gizycki v Levy*, 3 AD3d 572, 574 [2004]), and the finding of the Unemployment Insurance Appeal Board that petitioner did not engage in corporeal punishment lacks preclusive effect (Labor Law § 623[2]; *Wooten v New York City Dept. of Gen. Servs.*, 207 AD2d 754, 754 [1994], *lv denied* 84 NY2d 813 [1995]).

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

ENTERED: MAY 26, 2009

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(see *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 690 [1995]). We have considered plaintiffs' other arguments, including that defendant tenant's soundproofing plans did not include portions of his apartment covered by the stipulation, and find them unavailing.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

647 In re Ronald S.,
 Petitioner-Appellant,

-against-

 Deirdre R.,
 Respondent-Respondent.

Randall S. Carmel, Syosset, for appellant.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), Law Guardian.

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about December 20, 2007, which, in a proceeding pursuant to article 6 of the Family Court Act, dismissed without prejudice the petitions for modification of an order of visitation, unanimously affirmed, without costs.

The petitions for a modification of the order of visitation based on a change of circumstances were properly dismissed since petitioner has not alleged a material change of circumstances, but instead seeks to relitigate old allegations from prior proceedings (*see Matter of King v King*, 266 Ad2d 546, 547 [1999]). Petitioner was not automatically entitled to a hearing, as he failed to make an evidentiary showing sufficient to warrant it (*see e.g. Matter of Timson v Timson*, 5 AD3d 691 [2004]). Furthermore, contrary to petitioner's contention, the referee did not deny him visitation without ordering an evidentiary hearing.

Rather, she simply refused to modify the visitation order, which remains in effect, in petitioner's favor.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

650-

650A-

650B-

650C	The People of the State of New York,	Ind. 1324/07
	Respondent,	2279/07
		3092/07
	-against-	3330/07

Melic Bradford,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

Judgments, Supreme Court, New York County (Rena K. Uviller, J.), rendered December 13, 2007, convicting defendant, upon his pleas of guilty, of assault in the first degree, robbery in the first degree, criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's motion to withdraw his guilty pleas to assault in the first degree and robbery in the first degree without assigning new counsel in connection with the motion, after sufficient inquiry wherein defendant was afforded a reasonable opportunity to present his contentions (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that defendant knowingly,

intelligently, and voluntarily pleaded guilty (see *People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). With regard to the pleas at issue, defendant stated, without elaboration, that his "lawyer insisted that I take it. I really didn't want to take it." Under these circumstances, and given that defendant concedes on appeal that counsel did not act improperly in any respect, the court was not required to assign new counsel. Counsel negotiated a plea whereby defendant received a favorable disposition involving four separate crimes that were increasingly serious, culminating in the shooting that left defendant's victim paralyzed.

Defendant's argument that his plea was rendered involuntary by the court's failure to mention the mandatory surcharges and fees during the plea allocution is without merit (see *People v Hoti*, 12 NY3d 742 [2009]).

We perceive no basis for reducing the sentences.

M-1997 *People v Melic Bradford*

Motion seeking leave to hold appeal in
abeyance denied.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

655 In re Evelyse Luz S.,

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

 Jose S.,
 Respondent-Appellant,

 St. Dominic's Home,
 Petitioner-Respondent.

Susan Jacobs, The Center for Family Representation, Inc., New York (Michele Cortese of counsel), for appellant.

Warren & Warren, P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

Steven Banks, The Legal Aid Society, New York (Judith Waksberg of counsel), and Proskauer Rose LLP, New York (Nathaniel M. Glasser of counsel), Law Guardian.

Order of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about October 17, 2007, which, upon a finding that respondent father's consent was not required for the adoption of the subject child, committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously reversed, on the facts and as a matter of discretion, without costs, and the matter remanded for a new hearing in accordance herewith to be conducted as expeditiously as reasonably possible.

The evidence did not support a finding that it was in the child's best interests to be adopted by the foster mother, and

the matter should be remanded for a new hearing. The record shows that the child's paternal grandmother is 50 years old and lives in a stable home, which was certified as a suitable kinship foster home. The grandmother cared for the child shortly after birth and the only reason the child was taken from her was because of the agency's concern that she would be unable to care for the child while recuperating from hip surgery. During this time, the agency did not attempt to assist the grandmother, who was incapacitated and physically unable to go to the agency, nor did it take any action to strengthen the relationship.

The grandmother testified that she called the agency on a regular basis following her surgery but no one returned her calls. On the one occasion when she spoke to the supervisor assigned to the case, she was told to speak to the biological mother. The grandmother also testified that she had been led to believe that she would have in-home visits with the child during her period of recuperation, but the agency did not return her calls. Notably, Family Court made no findings with respect to the grandmother's testimony and we cannot conclude it should be disregarded. While the agency and law guardian fault the grandmother for not writing or personally coming to the agency, it was not unreasonable for the grandmother to believe that she only had to telephone the agency to reinstitute visits particularly since she could only walk with the assistance of a

home health care attendant. Once contact was re-established with the agency, the grandmother regularly visited with the child.

Furthermore, although it is understandable that following placement in foster care, the child, who is young, became bonded to the foster mother, who admittedly took good care of her and tended to her special needs, this does not undermine the fact that the child has biological relatives, who are capable of caring for her and have consistently expressed a desire that she remain in the grandmother's care.

In *Matter of Wesley R.* (307 AD2d 360 [2003]), on similar but not identical facts, the Second Department noted that "[t]he central problem . . . is determining whether this short-term trauma [of removing the child from foster care] would have a lasting impact, and whether it would be more than compensated for by the long-term advantages that the child would experience for the remainder of his life as the result of unification" with his biological relatives (*id.* at 361-362). The Court found that under the circumstances, and in light of the passage of time occasioned by the delay inherent in perfecting the appeal, and the pace of the psychological development of the child whose best interests were the primary concern, the record was not sufficient to determine the ultimate issues presented. Accordingly, it found that a new hearing was necessary, addressed to the ultimate question of what arrangement was best for the child in light of

his current conditions (*id.* at 364).

As in *Wesley*, we conclude that Family Court should have considered whether any short-term "trauma" is outweighed by the potential long-term benefit of the child remaining with her grandmother, who asserts that she will ensure that the child maintains ties with her siblings, who reside with the maternal grandmother, and with her foster family. Because the record contained no independent expert testimony on this question, this matter is remanded for a new hearing. We express no opinion on the ultimate issue of the appropriate disposition and we do not limit the evidence to such expert testimony.

To the extent our ruling differs from the prior decision rendered on the mother's appeal from the same order of disposition (*see Matter of Evelyse Luz S.*, 57 AD3d 329 [2008]), we are not bound by that decision given that respondent father's appeal was not before us.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

656 Kisha Mickens, et al., Index 17260/06
Plaintiffs-Appellants,

-against-

Omar Khalid, et al.,
Defendants-Respondents.

Belovin & Franzbalu, LLP, Bronx (David A. Karlin of counsel), for appellants.

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

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 18, 2007, which granted defendants' motion for summary judgment dismissing the complaint on the threshold issue of serious injury, and denied plaintiffs' cross motion for partial summary judgment on the issue of liability as moot, unanimously affirmed, without costs.

Defendants met their prima facie burden through the submission of affirmed reports of their neurologist, orthopedist and radiologist which showed that the injured plaintiff Mickens did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (*see Franchini v Palmieri*, 1 NY3d 536 [2003]; *Dembele v Cambisaca*, 59 AD3d 352 [2009]; *Brown v Achy*, 9 AD3d 30,31 [2004]). In opposition, Mickens failed to raise a triable issue of fact.

While Mickens's treating orthopedist performed range of

motion tests 17 months after the accident and found that her left knee flexed only to 130 degrees, he did not compare that flexion to normal range. Nor did he explain the significance of his findings, or provide a sufficient description of the qualitative nature of the limitations based on the normal function and use of the knee (see *Gorden v Tibulcio*, 50 AD3d 460, 464 [2008]; *Otero v 971 Only U, Inc.*, 36 AD3d 430, 431 [2007]; *Vasquez v Reluzzo*, 28 AD3d 365, 366 [2006]).

Furthermore, Dr. Kramer's opinion that Mickens sustained a torn meniscus, is not supported by objective medical evidence. He also did not explain the basis for his conclusion that Mickens's condition was causally related to the accident. His conclusory statement was not sufficient to establish the necessary causation (see *Migliaccio v Miruku*, 56 AD3d 393 [2008]; *Smith v Brito*, 23 AD3d 273 [2005]). Nor did Dr. Kramer rebut defendants' radiologists finding that plaintiff had a "[d]evelopmental abnormality of the patellofemoral compartment" (see *Reyes v Esquilin*, 54 AD3d 615 [2008]).

Plaintiffs' claim that Kisha Mickens was unable to perform her usual and customary activities during the 90/180 day period

is not supported by objective medical proof (*see Valentin v Pomilla*, 59 AD3d 184, 186-187 [2009]; *Taylor v Vasquez*, 58 AD3d 406, 407 [2009]; *Onishi v N & B Taxi, Inc.*, 51 AD3d 594, 595 [2008]). Furthermore, their claim is at odds with that asserted in the bill of particulars.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

657 Carlos-Cesar Garcia, Index 108964/02
Plaintiff-Appellant,

-against-

Maria Puccio, etc., et al.,
Defendants-Respondents.

Thomas & Associates, Brooklyn (Irene Donna Thomas of counsel),
for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E.
Sternberg of counsel), for respondents.

Order, Supreme Court, New York County (Karen S. Smith, J.),
entered May 5, 2008, granting defendants' motion for summary
judgment dismissing the complaint, unanimously affirmed, without
costs.

On a prior appeal in this action (17 AD3d 199 [2005]), we
found that plaintiff, a teacher, stated a cause of action for
defamation where he alleged that defendant Puccio told a
student's parent that plaintiff had been accused of corporal
punishment before. We noted that defendants' claims of truth and
qualified privilege were affirmative defenses to be raised in the
answer and that "[d]efendants may then move for summary judgment
on any such defense available to them and, upon their making a
prima facie showing of truthfulness or qualified privilege, the
burden would shift to plaintiff" (*id.* at 201).

Defendants' summary judgment motion included Ms. Puccio's

unequivocal denial of making the subject statement, establishing a prima facie showing of a lack of the requisite publication of a defamatory statement (see *Parker v Cox*, 306 AD2d 55 [2003]; *Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 298 [1999]). In opposition, plaintiff failed to establish a triable issue of fact as to whether the alleged statement was made and published (see *id.*; see also *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Rather, plaintiff offered only hearsay, i.e., an out-of-court statement by the parent's mother that Ms. Puccio had made the alleged statement. The statement by the mother that Ms. Puccio made the statement was offered for its truth (i.e., that Ms. Puccio had made the statement). The only statement Ms. Puccio admitted making, that she told the parent that there were "problems" or "problemas" with plaintiff, was a true statement made in response to a direct question, without any elaboration, was not susceptible of a defamatory meaning and did not constitute defamation (see *Dillon v City of New York*, 261 AD2d 34, 38 [1999]). In any event, the statement would be protected by a qualified privilege, having been made by a high school

principal to a student's parent who had a common interest in the subject matter of the conversation (see *Garcia v Puccio*, 17 AD3d at 201; *Hoesten v Best*, 34 AD3d 143, 157-158 [2006]).

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

ENTERED: MAY 26, 2009

CLERK

improperly raised for the first time on appeal (see CPLR 4017, 5501[a][3]; Correction Law § 168-n [3]; *People v Hernandez*, 44 AD3d 565 [2007], *lv denied*, 10 NY3d 708 [2008]). In any event, the additional points at issue are not necessary for a finding that defendant is a level three sex offender.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

660-

660A Alice Delacruz,
Plaintiff-Appellant,

Index 14302/01

-against-

Port Authority of New York and
New Jersey, et al.,
Defendants-Respondents.

Franzblau Dratch, P.C., New York (Brian M. Dratch of counsel),
for appellant.

Wilson Elser Moskowitz Edelman & Dicker, LLP, White Plains
(Helmut Beron of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick,
J.), entered March 24, 2008, upon a jury verdict awarding
plaintiff \$11,148 for past lost wages and \$25,000 for past pain
and suffering, and nothing for future lost wages or pain and
suffering, and defendants' stipulation to increase the award for
past pain and suffering to \$75,000, unanimously affirmed, without
costs. Appeal from order, same court and Justice, entered
February 26, 2008, to the extent it denied in part plaintiff's
post-trial motion with respect to the verdict, unanimously
dismissed, without costs, as subsumed in the appeal from the
judgment.

The stipulated increase in damages for past pain and
suffering, undertaken at the court's urging and as an alternative

to a new trial, was warranted (see *Newman v Aiken*, 278 AD2d 115 [2000]). In reviewing plaintiff's motion to set aside the award of past pain and suffering, Supreme Court employed the "deviates materially from reasonable compensation" test specified by CPLR 5501(c). That statute provides the Appellate Division with the power to review a damages verdict under that standard; it does not expressly provide Supreme Court with similar review power. Whether Supreme Court was authorized to review the award for past pain and suffering under the standard provided by CPLR 5501(c) or was required to review the award under a more restricted standard, e.g. "shocks the conscience" (compare *Ashton v Bobruitsky*, 214 AD2d 630 [1994]; *Prunty v YMCA of Lockport, Inc.*, 206 AD2d 911 [1994] and *Cochetti v Gralow*, 192 AD2d 974 [1993], with *Lauria v New York City Dept. of Environmental Protection*, 152 Misc 2d 543 [1991]; see *Siegel*, *NY Practice* § 407 [4th ed]), is an issue we need not decide. Under our own review pursuant to CPLR 5501(c), we conclude that the jury's award for past pain and suffering of \$25,000 deviates materially from reasonable compensation, and that, as Supreme Court found, \$75,000 is reasonable compensation (see generally *Donatiello v City of New York*, 301 AD2d 436 [2003]).

The jury, after assessing the parties' competing expert medical testimony and viewing surveillance video of plaintiff, reasonably denied future damages, concluding that plaintiff's

present back and knee injuries were related to her weight and degenerative changes, and that she had seemingly made a full recovery from any injury suffered by reason of defendants' negligence (see *Mejia v JMM Audubon*, 1 AD3d 261, 262 [2003]). Furthermore, she was looking for work (see *O'Brien v Barretta*, 44 AD3d 731, 732 [2007]), and had resumed full daily activities.

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

661 Redeemed Christian Church of God Tabernacle of Restoration,
Plaintiff-Appellant, Index 20616/06

-against-

Franciscan Green, et al.,
Defendants-Respondents.

Law Offices of Victor N. Okeke, P.C., Bronx (Victor N. Okeke of counsel), for appellant.

Goldberg, Scudieri, Lindenberg & Block, P.C., New York (David G. Scudieri of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Norma Ruiz, J.), entered February 5, 2008, which, to the extent appealed from, in this action for specific performance of a contract for the sale of real property, denied plaintiff's motion pursuant to CPLR 3211(a)(4) to dismiss a related holdover proceeding in Civil Court or, in the alternative, to stay the holdover proceeding or to consolidate it with this action, and awarded defendants, sua sponte, use and occupancy, unanimously dismissed, without costs, as academic.

It is undisputed that on February 28, 2008, the Civil Court entered a default judgment against plaintiff in the related holdover proceeding. As such, that proceeding has concluded, thereby rendering moot the portion of this appeal addressing it. The appeal is also moot to the extent it addresses the motion court's sua sponte grant of use and occupancy to defendants.

Since defendants never settled an order on that decision, as directed by the motion court, it was abandoned and never took effect (see Uniform Rules for Trial Cts [22 NYCRR] § 202.48(b)).

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

ENTERED: MAY 26, 2009

CLERK

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

662 Prospect Owners Corp., Index 604112/02
Plaintiff-Respondent,

-against-

Gloria Sandmeyer, et al.,
Defendants-Appellants.

John A. Stichter, New York, for appellants.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Cory L. Weiss of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered December 26, 2007, which, inter alia, after a nonjury trial, declared that defendants' use of the south side of the lower roof of the building in which they are tenants was pursuant to a revocable license, unanimously affirmed, without costs.

The trial court correctly found that defendants' right to the use of the roof space adjacent to the 22nd floor portion of their duplex apartment (the south roof) was not, as they contend, governed by their lease, which did not include the south roof in the demised premises, but was pursuant to a license. "Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to a tenant, subject to rights specifically reserved by the lessor" (*American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1994]). The trial evidence established that defendants' use

of the south roof has not been exclusive. Plaintiff, through its agents, has had access to the south roof throughout the years to perform routine maintenance, make roof repairs, gain access to elevator shafts, clean drains, and repair, paint, and maintain the "Tudor City" sign located on the roof. Similarly, the restaurant located on the ground floor of the building has had regular access to the area of the south roof in which its machinery is stored. Both enter the south roof space without defendants' consent. While plaintiff indeed permitted defendants to use the space, its acquiescence did not create a right in them (see *Access v Trebuh's Realty Co.*, 18 AD2d 118, 199 [1963], *aff'd* 16 NY2d 1031 [1965]) but was revocable at will (see *Jossel v Filicori*, 235 AD2d 205, 206 [1997]; *American Jewish Theatre*, 203 AD2d at 156; *Matter of Realty Trade Corp. v City Rent & Rehabilitation Admin.*, 52 Misc 2d 318 [1966]).

Defendants contend that extrinsic evidence of a 48-year course of conduct, including their use of the south roof to the exclusion of all other tenants for a variety of uses continuously throughout that period, plaintiff's failure ever to expressly tell them not to use the space and its alleged acknowledgment and implicit approval of their use thereof, establishes that the parties intended that the demised premises include the south roof from the inception of the lease. However, since the lease and the renewal leases make no reference to defendants' right to use

that space, there is no ambiguity as to whether the space is included in the leased premises (*Matter of Davis v Dinkins*, 206 AD2d 365, 366-367 [1994], *lv denied* 85 NY2d 804 [1995]), and extrinsic evidence may not be considered (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]; see also *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). In any event, given the evidence that the only direct access to the south roof from the apartment is through a window, while the upper terrace is accessible through a door and is undisputedly part of the leased premises, that the co-op conversion offering plan made no reference to the south roof in connection with defendants' apartment, while the upper terrace was expressly included in the shares allotted to that apartment, and that the corresponding roof area that abuts the apartment on the north end of the building is undisputedly a public area, the only reasonable conclusion is that the parties did not intend the south roof to be included in the leased premises.

The south roof is not an appurtenance to defendants' apartment that may be revoked only at the termination of the lease, since its use is neither essential nor reasonably necessary to defendants' full beneficial use and enjoyment of the apartment (see *Blenheim LLC v Il Posto LLC*, 14 Misc 3d 735, 740 [2006] [citing 1 Dolan, *Rasch's Landlord & Tenant - Summary Proceedings* § 7:5]). Defendants use the south roof primarily for

recreational and storage purposes, for which there exist alternative premises (see *id.* at 741; *Oberfest v 300 W. End Ave. Assoc.*, 34 Misc 2d 963, 965 [1962]; *Mammy's Inc. & Pappy's Inc. v All Continent Corp.*, 106 NYS 2d 635 [1951]).

Nor have defendants acquired the right to exclusive use of the south roof through adverse possession, since they have had an ongoing landlord-tenant relationship with plaintiff or its predecessors since 1952 (see RPAPL 531; CPLR 212[a]; *Ley v Innis*, 149 AD2d 366 [1989], *lv dismissed* 74 NY2d 841 [1989]). In any event, it was established that defendants' possession of the south roof has not been exclusive, and the evidence on which defendants rely to support their argument that plaintiff acquiesced in their use and possession of the south roof defeats any claim that their possession was hostile, adverse, or under a claim of right (see *Ray v Beacon Hudson Mtn. Corp.*, 88 NY2d 154, 159 [1996]; *10 E. 70th St. v Gimbel*, 309 AD2d 644, 645 [2003]).

Finally, we note that, to the extent defendants seek to claim a rent reduction based on plaintiff's failure to maintain the south roof as a "required service" under their lease (see Rent Stabilization Code [9 NYCRR] § 2520.6[r][3]; §§ 2523.4[a][1], [e][19]), the proper forum for such a claim in the first instance is the Division of Housing and Community Renewal

(see e.g. *Meirowitz v New York State Div. of Hous. & Community Renewal*, 28 AD3d 350 [2006], *lv denied* 7 NY3d 718 [2006]; *Matter of Llorente v New York State Div. of Hous. & Community Renewal*, 16 AD3d 105 [2005]).

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

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

ENTERED: MAY 26, 2009

CLERK

Gonzalez, P.J., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

4504 Security Mutual Life Insurance Index 603545/05
Company of New York,
Plaintiff-Respondent,

-against-

Lucy Rodriguez, et al.,
Defendants-Appellants.

Kramer Levin Naftalis & Frankel LLP, New York (Stephen M. Sinaiko
of counsel), for appellants.

Clifford Chance US LLP, New York (Anthony M. Candido of counsel),
for respondent.

Order, Supreme Court, New York County (Charles E. Ramos,
J.), entered December 7, 2007, modified, on the law, to grant
that aspect of defendants' motion seeking dismissal of the
rescission claim, and otherwise affirmed, without costs.

Opinion by McGuire, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
MAY 26, 2009

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

M-2317X George V Restauration S.A. v Little Rest Twelve, Inc.
Appeal withdrawn.

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

M-2293 People v Collazo, Miguel
Appeal deemed withdrawn.

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-1511 Melcher v Apollo Medical Fund Management L.L.C. - Fradd
Appeal dismissed, without prejudice, as indicated.

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-2048 Tompkins v Jackson
Appeals dismissed unless perfected for the November
2009 Term, as indicated.

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

M-2008 People v Harmon, Joseph

M-2020 People v White, Donnella, also known as
White, Donnella D.

M-2033 People v Martorell, Larry

M-2079 People v Bedford, Curtis

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

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

M-1547 In the Matter of F., Janiyha Geraldine - McMahon
Services for Children, a program of Good Samaritan
Shepherd Services

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

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-1936 People v Rosado, Vincent

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

Gonzalez, P.J., Mazzarelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-1950 People v Pearson, Terry

Notice of appeal deemed timely filed; leave to
prosecute appeal as a poor person denied, with leave to renew, as
indicated.

Gonzalez, P.J., Mazzairelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-1959 People v Thomas, Herman

Leave to file pro se supplemental brief granted to the November 2009 Term, to which Term appeal adjourned, as indicated.

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

M-2275 People v Howard, Michael

Upon the Court's own motion, counsel substituted; poor person relief previously granted continued.

Gonzalez, P.J., Mazzairelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-1781 Zachariou v Manios

Stay denied.

Gonzalez, P.J., Mazzairelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-1883 Dickerson v Dickerson

Stay denied.

Gonzalez, P.J., Mazzairelli, Buckley, Renwick, Abdus-Salaam, JJ.

M-2182 In the Matter of Fermin v New York City Housing Authority

Time to perfect proceeding enlarged to the September 2009 Term.

Gonzalez, P.J., Tom, Friedman, McGuire, Acosta, JJ.

M-426 Allannic v Levin

Reargument or other relief denied.

Tom, J.P., Friedman, Catterson, Moskowitz, Renwick, JJ.

M-1110 Oxford Health Plans (NY), Inc. v Scheiner

Appeal dismissed.

Tom, J.P., Friedman, Catterson, Moskowitz, Renwick, JJ.

M-1859 Rabinowich v Kislevich

Motion dismissed, as indicated.

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

M-1098 People v Syville, Nathaniel

Writ of error coram nobis and related relief denied.

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

M-1589 People v Council, Tony

Writ of error coram nobis and related relief denied.

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

M-2104 CVL Real Estate Holding Co., LLC v Weinstein
Vacatur and/or quashing of Supreme Court order denied.

Mazzarelli, J.P., Saxe, Nardelli, Freedman, JJ.

M-1702 People v Duarte, Carlos
Time to perfect appeal enlarged to the October 2009
Term.

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

M-2106 In the Matter of Jefferies & Company, Inc. v Infinity
Equities I, LLC.

Stay granted on condition appeal perfected for the
September 2009 Term, as indicated.

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

M-2232 Ford Models, Inc. v Spears
Vacatur of temporary restraining order granted without
prejudice to further proceedings in Supreme Court. (See M-2233,
decided simultaneously herewith.)

Mazzarelli, J.P., Andrias, Friedman, Renwick, Freedman, JJ.

M-2233 Ford Models, Inc. v Next Management, LLC
Vacatur of temporary restraining order granted without
prejudice to further proceedings in Supreme Court. (See M-2232,
decided simultaneously herewith.)

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

M-1539 Telford v 385 Third Avenue Associates, L.P.

Motion deemed withdrawn.

Andrias, J.P., Saxe, Sweeny, Nardelli, Freedman, JJ.

M-1953 Euroway Contracting Corp. v Mastermind Estate
Development Corp.

Stay of trial denied, as indicated.

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

M-2180 Powell v Pirrotti and Law Offices of Anthony J.
Pirrotti

Stay denied.

Andrias, J.P., Saxe, Acosta, Renwick, JJ.

M-1579A People v Williams, Rasheem

Leave to prosecute appeal as a poor person granted, as
indicated. The order of this Court entered May 14, 2009 (M-1579)
recalled and vacated.

Saxe, J.P., Buckley, McGuire, Moskowitz, Acosta, JJ.

M-2385 E.M. Rinehart Inc. v Zawacki, Everett, Gray &
McLaughlin

Stay granted on condition appeal and cross appeal
perfected for the December 2009 Term.

Saxe, J.P., Friedman, Sweeny, Acosta, Freedman, JJ.

M-1795 People ex rel. Rodriguez, Jose v Warden
Leave to appeal to the Court of Appeals denied.

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

M-2027 Global Reinsurance Corporation v Equitas Ltd. - Equitas
Reinsurance Ltd. - Equitas Policyholders Trustee Ltd.
Appeal deemed withdrawn, as indicated.

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

M-1738 People v Cordero, Angel
Leave to prosecute appeal as a poor person granted, as
indicated.

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

M-1791 Maldonado v South Bronx Development Corp. -
CP Associates
Time to perfect appeal enlarged to the September 2009
Term.

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

M-1822 Williams v Pyramid Reception Center
Time to perfect appeal enlarged to the October 2009
Term.

Friedman, J.P., Sweeny, Nardelli, Acosta, Richter, JJ.

M-1965 In the Matter of Gitis v The City of New York

Time to perfect appeal enlarged to the October 2009
Term.

Catterson, J.P., McGuire, Moskowitz, DeGrasse, Freedman, JJ.

M-1836 Lentini v New York City Transit Authority - Lugo

Appeal dismissed unless perfected for the October 2009
Term, as indicated.

McGuire, J.P., Acosta, DeGrasse, Richter, Abdus-Salaam, JJ.

M-1504 People ex rel. Seckler, Marcia v Horn - Tarangelo

Leave to prosecute appeal as a poor person granted;
counsel directed to perfect appeal, as indicated.

Tom, J.

M-372 People v Muir, Ricardo

Leave to appeal to this Court denied.

DeGrasse, J.

M-1775 People v Dunbar, Kelvin

Leave to appeal to this Court denied.

DeGrasse, J.

M-2085 People v Simpson, Theodore
Leave to appeal to this Court denied.

DeGrasse, J.

M-2220 People v Gruyair, Alexis
Leave to appeal to this Court denied.

Mazzarelli, J.P., Saxe, Catterson, Acosta, Richter, JJ.

M-1639 In the Matter of Jeffrey M. Spiegel
(admitted as Jeffrey Marc Spiegel)
a disbarred attorney:

Report and recommendation of the Hearing Panel confirmed, and petitioner's application for reinstatement as an attorney and counselor-at-law in the State of New York is held in abeyance until the further order of this Court, as indicated. No opinion. All concur.

The Following Orders Were Entered And Filed On May 21, 2009:

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

M-2223 Dimitri Nurseries, Inc. v GLS Real Estate Co., LLC
Reinstatement of temporary restraining order dismissed.

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

M-2376 Klenfner v Klenfner

CPLR 5704(a) relief denied.

Mazzarelli, J.P., Sweeny, DeGrasse, Freedman, Abdus-Salaam, JJ.

M-2366 Shachaf v O'Flynn

Stay of trial granted to the extent indicated.

Andrias, J.P., Buckley, Moskowitz, DeGrasse, Richter, JJ.

M-2065 National Fire Insurance Company of Hartford v
Travelers Casualty and Surety Company, formerly
The Aetna Casualty and Surety Company;
Metex Mfg. Corporation v Liberty Mutual Insurance
Company

Stay denied.

The Following Order Was Entered And Filed On May 22, 2009:

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

M-1891A Big Apple Visual Group, doing business as

M-2351A Big Apple Sign Corp v St. Paul Travelers

Motion (M-1891A) and appeal (M-2351A) deemed withdrawn.
The order of this Court entered on May 21, 2009 (M-1891/M-2351)
recalled and vacated.