

crimes, and imposing sentence, unanimously affirmed.

The trial prosecutor failed to disclose notes from her interviews with two witnesses who possessed potentially exculpatory information. The prosecutor also failed to disclose the fact that she assisted in the relocation of a prosecution witness's grandparents. Insofar as the relocation constituted an additional benefit to the witness, the prosecutor improperly failed to correct the witness's testimony that, other than a guilty plea to disorderly conduct, he had not been promised any other benefit, and, in her summation, the prosecutor misstated the benefits the witness received. Each of these acts or omissions was improper (*see Giglio v United States*, 405 US 150 [1972]; *Brady v Maryland*, 373 US 83 [1963]; *People v Novoa*, 70 NY2d 490, 498 [1987]).

Nevertheless, while we conclude the reasonable possibility standard applies (*see People v Vilardi*, 76 NY2d 67, 77 [1990]), we find no reasonable possibility that the undisclosed information, the incorrect testimony and the prosecutor's comments during summation affected the verdict. The exculpatory documents contained layers of hearsay, not apparently admissible under any hearsay exceptions (*see People v Burns*, 6 NY3d 793, 794 [2006]; *People v Alvarez*, 44 AD3d 562, 564 [2007], *lv denied* 9 NY3d 1030 [2008]), and there is no basis other than speculation

upon which to conclude that, if disclosed, they might have led to admissible exculpatory evidence. There is no evidence that the witnesses, or the sources of their statements, would have been willing or able to testify at trial. As for the relocation of the witness's grandparents, its impeachment value would have been cumulative because the jury's awareness that the witness was receiving a favorable plea agreement in exchange for his testimony "was far more crucial in assessing his credibility" (*People v Sibadan*, 240 AD2d 30, 35 [1998], *lv denied* 92 NY2d 861 [1998]). Moreover, there was other evidence against defendants, including the testimony of another witness who identified them as the perpetrators of the crimes.

Except as indicated, we find no other violations of the People's obligations to disclose information or correct inaccurate testimony, and we reject defendants' arguments to the contrary. In the alternative, we find no reasonable possibility that any such violations affected the outcome of the case.

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

ENTERED: OCTOBER 28, 2008

CLERK

and was granted summary judgment on the issue of liability on his Labor Law § 240(1) cause of action.

Supreme Court correctly denied Sharon Baptist summary judgment against SMC based in its indemnification claim. The contract between these two parties specifically provides that SMC is obligated to indemnify Sharon Baptist for losses only to the extent that they were caused in whole or in part by the negligent acts or omissions of SMC, its agent, or anyone else for whom SMC was responsible. In its papers in support of its cross motion, Sharon Baptist relied exclusively on plaintiff's allegations of a Labor Law § 240 violation, that is, that the lack of safety devices caused his accident. However, a determination of liability against the owner under Labor Law §240 was not the equivalent of a finding of negligence. Liability under section 240 is not predicated on fault but "imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence" (*Brown v Two Exch. Partners*, 76 NY2d 172, 179 [1990]). Thus far there has been no finding that either SMC or its agents were negligent let alone that such negligence proximately caused plaintiff's injuries. Accordingly, summary judgment on the contractual indemnification claim is premature

(see *Di Perna v American Broadcasting Companies, Inc.*, 200 AD2d 267, 270 [1994]; *Cichon v Brista Estates Associates*, 193 AD2d 926, 927-928 [1993]).

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

4258-

4259N Eileen Singleton,
Plaintiff-Respondent,

Index 18867/06

-against-

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

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

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, appellants.

James M. Lane, New York, for respondent.

Order, Supreme Court, Bronx County (Janice L. Bowman, J.), entered June 7, 2007, which, in an action for personal injuries, denied defendant City of New York's motion to dismiss the complaint for failure to file a timely notice of claim, and granted plaintiff's cross motion to deem the notice of claim timely filed, and order, same court and Justice, entered June 12, 2007, which denied the motion of defendants New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority to dismiss the complaint for failure to file a timely notice of claim, unanimously reversed, on the law, without costs, defendants' motions granted, plaintiff's cross motion denied, and the complaint dismissed. The Clerk is directed to enter judgment

accordingly.

Dismissal of the complaint is warranted, since plaintiff's notice of claim was not served within 90 days of the date on which her claim arose (General Municipal Law § 50-e[1][a]), and she failed to timely move for leave to serve a late notice of claim within one year and 90 days after the claim arose (General Municipal Law § 50-e[5]; *Pierson v City of New York*, 56 NY2d 950, 954 [1982]). Defendants were not required to raise the late filing as an affirmative defense (see *Maxwell v City of New York*, 29 AD3d 540 [2006]), nor were they estopped from seeking dismissal of the complaint on this ground (see *Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509 [2007]; *Rodriguez v City of New York*, 169 AD2d 532 [1991]).

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

ENTERED: OCTOBER 28, 2008

CLERK

impairment and presented evidence sufficient to raise a triable issue as to whether she was able to perform her job in a reasonable manner before she was terminated from her employment. However, she offered no evidence that she was terminated because of her disability or behavior caused by her disability, and thus failed to establish a prima facie case of discrimination (see *Matter of McEniry v Landi*, 84 NY2d 554, 558 [1994]; Executive Law § 292[21]). Nor did plaintiff either allege or show that she proposed a reasonable accommodation that defendant refused to make (see *Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 [2006], *lv denied* 7 NY3d 707 [2006]). To the contrary, the evidence established that she requested a four-day work week and a 10 A.M. start time to accommodate her disability and that defendant granted that request, as well as her requests for medical leave. Even if plaintiff had met her burden of establishing a prima facie case of discrimination, defendant demonstrated by admissible evidence that its action was motivated by legitimate nondiscriminatory reasons, and plaintiff presented no basis for inferring that those reasons were pretextual (see *Matter of McEniry* at 558).

Plaintiff's claim of retaliation similarly fails. In order

to make out a retaliation claim, plaintiff must show that (1) she was engaged in a protected activity; (2) her employer was aware that she participated in that activity; (3) she suffered adverse employment action based on her activity; and (4) there is a causal connection between the protected activity and the adverse action (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]). Although she made a complaint of discrimination based on disability or race through defendant's hotline shortly before she was terminated, there is no basis for finding a causal connection between that protected activity and the termination (*id.* at 313). The termination followed more than a year of progressive disciplinary complaints from plaintiff's supervisors concerning her repeated unapproved absences and failure to notify supervisors that she would be late, instances of poor performance, breach of company policies, and unprofessional behavior. Under the circumstances, the temporal proximity between plaintiff's hotline complaint and defendant's adverse action is alone insufficient to support a claim of retaliatory discharge (see *Hunts Point Multi-Serv. Ctr., Inc. v Bizardi*, 45 AD3d 481, 481-482 [2007], *lv dismissed* 10 NY3d 909 [2008]; *Slattery v Swiss Reins. Am. Corp.*, 248 F3d 87, 95 [2d Cir 2001], *cert denied* 534 US 951 [2001]).

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: OCTOBER 28, 2008

CLERK

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

4343 Cheryl Lattan, et al., Index 108071/04
Plaintiffs-Respondents,

-against-

Gretz Transit Inc., et al.,
Defendants-Appellants.

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

Victor Tsai, New York, for respondents.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered January 28, 2008, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to dismiss the claims based on cervical, lumbar and right knee injuries, and otherwise affirmed, without costs.

Defendants demonstrated prima facie that plaintiff did not sustain a serious injury to her cervical or lumbar spine or right knee, by submitting the affirmed reports of an orthopedic surgeon and a neurologist finding normal cervical and lumbosacral ranges of motion and no evidence of disability and a radiologist's affirmed report finding a preexisting degenerative condition of

the cervical spine and no evidence of recent trauma to the right knee. Thus, the burden shifted to plaintiff (*Franchini v Palmieri*, 1 NY3d 536 [2003]; *Smith v Brito*, 23 AD3d 273 [2005]). In opposition, plaintiff's doctor addressed the cervical injury only and failed to raise a triable issue of fact, since he failed to quantify his findings at each plane of motion, to identify any objective tests, to compare his findings to normal ranges, and to address the degenerative changes found (see *Rodriguez v Abdallah*, 51 AD3d 590, 592 [2008]; *Smith v Cherubini*, 44 AD3d 520 [2007]).

Plaintiff's testimony that she was confined to bed and out of work for four months was insufficient to establish a serious injury, in the absence of "competent medical proof" of an injury or impairment that prevented her from performing substantially all her daily activities for at least 90 of the first 180 days following the occurrence of the injury (see *Rossi v Alhassan*, 48 AD3d 270 [2008]).

Defendants' failure to make a prima facie showing as to plaintiff's jaw injuries, including temporomandibular dysfunction, required the denial of that aspect of their motion, regardless of the claimed insufficiency of plaintiff's opposition

(see *Winegrad v New York University Medical Center*, 64 NY2d 851,
853 [1985]).

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

ENTERED: OCTOBER 28, 2008

CLERK

and had no reason to detain defendant, the officer permitted him to leave, and did not recover any of the items. However, when the victim reported the burglary the following day and described the items stolen, the officer remembered having seen defendant in possession of the same group of items. There was also evidence that defendant was known to have occasionally received food in the basement of the church-owned building where the burglary occurred.

The crime of burglary may be established by way of the presumption of guilt that flows from recent, exclusive, and unexplained or falsely explained possession of the fruits of a crime (see *People v Galbo*, 218 NY 283, 290 [1916]; *People v Costello*, 162 AD2d 276 [1990], *lv denied* 76 NY2d 854 [1990]). Even assuming that a trier of fact could reasonably conclude that the items the officer saw in defendant's possession and proximity constituted the same group of items stolen from the victim, the difficulty here is that defendant's possession has a reasonable innocent explanation. These objects were of very little value, and some of them were on the dumpster. Thus, the evidence supports a reasonable inference that defendant rummaged in the dumpster and found items that the actual burglar discarded after realizing they were unmarketable. Given this inference, the trier of fact lacked any basis for concluding, beyond a

reasonable doubt, that defendant stole the property as opposed to finding property stolen by someone else (*compare People v Moore*, 291 AD2d 336 [2002], *with People v Scurlock*, 33 AD3d 366 [2006], *lv denied* 7 NY3d 928 [2006]). Defendant's connection with the building where the burglary occurred is too equivocal to warrant a different conclusion.

Were we not reversing on the law, we would find that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

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

ENTERED: OCTOBER 28, 2008

CLERK

experience as to the time required to perform the legal services (*David Realty & Funding, LLC v Second Ave. Realty Co.*, 26 AD3d 257, 258 [2006], *lv denied* 7 NY3d 705 [2006]) in determining the amount of fees for the vacatur. Upon our own review (see *Park Regis Apt. Corp. v Zang*, 237 AD2d 150 [1997]), we agree with the determination. Amounts with respect to the appeal from the vacatur (see *Roberts v White*, 73 NY 375, 381 [1878]) and billings redacted on the ground of privilege (see *Soiefer v Soiefer*, 17 AD3d 268, 269 [2005]) were properly included. The court properly declined to allow evidence regarding the propriety of the vacatur as beyond the scope of the reference (see *Matter of AMC Computer Corp. v Geron*, 38 AD3d 402, 403 [2007]). Fees and costs for the damages application were properly denied based on the amount and type of legal work performed and the Special Referee's apt recognition that such ruling would appropriately offset any excessiveness in the legal fees and costs sought for the vacatur.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4395 In re Edwin Torres,
Petitioner,

Index 119071/06

-against-

Tino Hernandez, as Chairperson of
the New York City Housing Authority,
Respondent.

William E. Leavitt, New York, for petitioner.

Ricardo Elias Morales, New York (Corina Leske of counsel), for
respondent.

Determination of respondent New York City Housing Authority,
dated October 25, 2006, after hearing, denying petitioner's
grievance to succeed to his mother's public housing tenancy as a
remaining family member, unanimously confirmed, the petition
denied and the proceeding brought pursuant to CPLR article 78
(transferred to this Court by order of the Supreme Court, New
York County [Carol Edmead, J.], entered March 30, 2007),
dismissed, without costs.

No basis exists to disturb the Hearing Officer's finding
crediting the testimony of respondent's employees that respondent
did not receive any requests from petitioner to be added to his
mother's household prior to the one received two days before his
mother's death (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-
444 [1987]). Lacking respondent's written consent to his

permanently joining his mother's household, and thus unable to show that he thereafter remained in occupancy of the subject apartment for a continuous period of at least one year prior to his mother's death, petitioner's grievance was properly denied (New York City Hous. Auth. Mgt. Manual, ch IV, § J[1]; ch VII, § E[1][a], as amended by GM-3692 Amended, ch IV, §§ A, B [July 11, 2003]; see *Matter of Lancaster v Martinez*, 298 AD2d 585, 585 [2002]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4396 In re Davione Rashaun H.,

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

 Sharon H., etc.,
 Respondent-Appellant,

 Leake & Watts Services, Inc.
 Petitioner-Respondent.

Dora M. Lassinger, East Rockaway, for appellant.

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

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

Order of disposition, Family Court, Bronx County (Douglas E.
Hoffman, J.), entered on or about May 8, 2007, which, upon a
finding of permanent neglect, terminated respondent mother's
parental rights to the subject child and 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 affirmed, without costs.

The finding of permanent neglect is supported by clear and
convincing evidence (Social Services Law § 384-b[7][a]). The
record shows that the agency made diligent efforts to encourage

and strengthen the parental relationship by providing referrals for individual counseling and parenting skills training, scheduling regular supervised visitation and monitoring the treatment programs in which respondent stated she was enrolled (see *Matter of Kimberly C.*, 37 AD3d 192 [2007], *lv denied* 8 NY3d 813 [2007]; *Matter of Israel Zacarias G.*, 306 AD2d 106 [2003]; Social Services Law 384-b[7][f]). Despite these diligent efforts, respondent was incarcerated on several occasions, inconsistent in her visitation, failed to complete the substance abuse program during the statutorily relevant time period and otherwise failed to meaningfully address the problems that led to the placement of her child (see *Matter of Lady Justice I.*, 50 AD3d 425 [2008]; *Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]).

A preponderance of the evidence demonstrated that termination of respondent's parental rights was in the child's best interests. The child has been the same stable and caring pre-adoptive home for several years where he has bonded with his foster family (see *Matter of Racquel Olivia M.*, 37 AD3d 279 [2007], *lv denied* 8 NY3d 812 [2007]). Contrary to respondent's

contention, the circumstances presented do not warrant a suspended judgment.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4397-

4397A NYCTL 1999-1 Trust, et al.,
Plaintiffs-Respondents,

Index 27686/02

-against-

573 Jackson Avenue Realty Corp.,
Defendant-Appellant,

City of New York Bureau of
Highway Operations, et al.,
Defendants.

Joseph A. Altman, Bronx, for appellant.

Rosicki, Rosicki & Associates, P.C., Plainview (Owen M. Robinson
of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Dianne T. Renwick,
J.), entered May 24, 2007, granting foreclosure of a tax lien and
directing sale of real property, and order, same court and
Justice, entered on or about December 7, 2007, which denied
defendant 573 Jackson Avenue Realty's motion to vacate the
foreclosure sale, unanimously affirmed, without costs.

After much litigation, Jackson Avenue Realty deposited with
the court the payoff amount demanded by plaintiffs a few days
before the scheduled foreclosure sale, and then notified
plaintiffs of the payment and asserted that the sale was stayed
"per statute." The sale proceeded nonetheless, and the property

was sold to a third party.

In a foreclosure action where the defendant pays into court the amount due for principal, interest and costs of the action, together with the expenses of the proceeding to sell, the court is required to dismiss the complaint and stay all proceedings on the judgment (RPAPL 1341), without regard to discretionary interpretation or application (*Gabriel v 351 St. Nicholas Equities*, 168 AD2d 338, 339 [1990]). However, a stay of proceedings under this statute is not self-executing; it requires a motion (see *Green Point Sav. Bank v Oppenheim*, 237 AD2d 409, 410 [1997], *lv denied* 90 NY2d 806 [1997]). Jackson Avenue Realty failed to make such a motion, and its deposit of the amount demanded by plaintiffs did not qualify as an undertaking since it was not reviewed or fixed by the court (CPLR 5519[a][4],[6]).

There is no evidence of fraud or other misconduct on plaintiffs' part in failing to advise Jackson Avenue Realty that the sale would proceed despite the latter's payment into court. Absent a confidential or fiduciary relationship, there is no duty to disclose, and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud

(see *Mobil Oil Corp. v Joshi*, 202 AD2d 318 [1994]).

The attorneys' fee award had ample support in the record.

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

ENTERED: OCTOBER 28, 2008

CLERK

stock, they could not maintain an action for its conversion (see *Soviero v Carroll Group Intl., Inc.*, 27 AD3d 276, 277 [2006]).

In any event, such a claim is untimely (CPLR 214[3]; see *Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 44 [1995]).

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

ENTERED: OCTOBER 28, 2008

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: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4401 Nancy Patricia Espinosa, et al., Index 110983/07
Plaintiffs-Appellants,

-against-

The Delgado Travel Agency, Inc.,
Defendant-Respondent.

Peter G. Eikenberry, New York, for appellants.

Farrell Fritz, P.C., Uniondale (Domenique C. Moran of counsel),
for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered November 16, 2007, which denied plaintiffs' motion for a preliminary injunction requiring defendant to circulate to its employees certain provisions of a pretrial settlement agreement, and granted defendant's cross motion to dismiss the action without prejudice to plaintiffs to renew in the event defendant failed to comply with the terms of the agreement, unanimously modified, on the law, the cross motion denied and the amended complaint reinstated, and otherwise affirmed, without costs.

The court correctly denied plaintiffs' motion for a preliminary injunction requiring defendant to include in its antidiscrimination policy ¶¶ 7(c)-(e) of the settlement agreement, since a plain reading of ¶¶ 7(a)-(e) establishes that

only the document containing antidiscrimination policies and procedures as described in ¶ 7(a) was to be circulated to defendant's employees.

In view of the inclusion of the amended complaint in the order's recitation of the papers considered on the motions, the motion to dismiss for failure to state a cause of action should have been denied. The amended complaint alleges that, at a meeting held shortly after the agreement was executed, defendant's president warned employees against bringing complaints of sexual harassment and told them he would prevail in any such action as he had prevailed in plaintiffs' federal action - which in fact was discontinued pursuant to the agreement. Since the agreement requires defendant to draft, disseminate and enforce a written policy prohibiting discrimination, including sexual harassment and discrimination based on gender or pregnancy, and to provide its representatives with appropriate training concerning the policy, the amended complaint adequately

pleads a cause of action for breach of the agreement (see *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Morrison v Filmways, Inc.*, 25 AD2d 837 [1966]).

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4402-

4402A Wioleta Kielar, etc., et al.,
 Plaintiffs-Respondents,

Index 115524/04
591277/04

-against-

The Metropolitan Museum of Art, et al.,
Defendants-Appellants,

Total Safety Consulting, L.L.C.,
Defendant.

- - - - -

The Metropolitan Museum of Art,
Third-Party Plaintiff-Appellant-Respondent,

-against-

R. Smith Restoration, Inc.,
Third-Party Defendant-Respondent-Appellant.

Bivona & Cohen, P.C., New York (Curtis B. Gilfillan of counsel),
for appellants and appellant-respondent.

Petrocelli & Christy, New York (Peter Basil N. Christy of
counsel), for respondent-appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of
counsel), for respondents.

Order, Supreme Court, New York County (Leland G. DeGrasse,
J.), entered January 3, 2008, which, in an action for personal
injuries and wrongful death arising out of plaintiff's decedent's
fall through a tempered glass skylight while working on the roof
of a building owned by defendant City and leased by defendant
museum, inter alia, awarded plaintiff summary judgment on her

Labor Law § 240(1) claim; dismissed plaintiff's Labor Law § 200 and common-law negligence claims against the museum and the City; awarded third-party defendant, plaintiff's employer, summary judgment dismissing the museum's and the City's claims for indemnification against it "to the extent of coverage provided for them as additional insureds under the [employer's primary] policy"; and awarded the museum and the City summary judgment "to the extent that liability is determined in their favor with respect to their respective contractual indemnification [claims] against [the employer] only insofar as their additional insured coverage under the [employer's primary] policy is exhausted, unanimously modified, on the law, to the extent of (1) denying the employer's motion to dismiss the museum's and the City's indemnification claims against it in its entirety pending the outcome of a separate declaratory judgment action bearing New York County index number 102177/08, with leave to re-submit the motion at the conclusion of such action, (2) granting the museum and the City summary judgment on their claims for contractual indemnification to the extent coverage under the employer's primary and excess insurance policies are exhausted, (3) awarding the museum and the City summary judgment on their claims for common-law indemnification to the extent of finding liability in

their favor, and otherwise affirmed, without costs. Appeals from order, Supreme Court, New York County (Walter B. Tolub, J.), entered June 2, 2008, unanimously dismissed, without costs, as taken from a nonappealable insofar as it denied reargument, and as academic insofar as it denied renewal.

Evidence entitling plaintiffs to summary judgment on the Labor Law § 240(1) claim establishes that her decedent, pursuant to the employer's contract with the museum to, among other things, re-caulk and seal glass skylights on the museum roof, was working on the roof 60 feet above the ground; that he and his co-workers had to move counterweights across the roof in order to utilize the swing-stage scaffolding; that the safety lines on the roof could not reach the area of the skylights; that the decedent's foreman decided that they should move the counterweights over the skylights and not over the area near the edge of the roof because that area was wet and it was awkward to move the counterweights there; that when the employer's workers were caulking the skylights they were tied off to cables that the employer had installed and stretched along the skylights, but that such safety cables were not in place at the time of the accident; and that foam and plywood should have been placed down over the skylights on the roof for the transfer of counterweights

and that a manlift could have been used for the work, as was done following the accident; and that OSHA concluded that serious violations had taken place at the work site, including that employees on the roof did not have protection while moving counterweights over skylights (see *Carpio v Tishman Constr. Corp. of N.Y.*, 240 AD2d 234, 236 [1997]). No issues of fact are raised as to whether the decedent's actions were the sole proximate cause of the accident. In moving the counterweights over the skylights he was following the directions of his foreman and could not utilize the safety rope system since the rope did not reach to the area of the skylights. "[T]he Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'" (*Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [2008], quoting *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]).

The motion court erred in finding that American International Specialty Lines Insurance Company (AISLIC), the employer's excess insurance carrier, was not required to extend coverage to the museum and the City. Indeed, as a result of a separate declaratory judgment action, the parties had entered

into a confidential agreement in which AISLIC agreed to extend coverage to the museum and the City.

The employer seeks to dismiss the museum's and the City's claims for indemnification, as violative of the anti-subrogation rule, to the extent of the full coverage provided by its primary and excess insurance policies (see *Washington v New York City Indus. Dev. Agency*, 215 AD2d 297 [1995]). The motion court improperly granted the employer's motion in part. Indeed, since both Admiral Insurance Company, the employer's primary insurance carrier, and AISLIC are denying coverage to the employer, and since the employer has commenced a separate declaratory judgment action to determine the issue of coverage, it is premature to determine whether the anti-subrogation rule bars the City's and the museum's claims. Accordingly, the employer's summary judgment motion is denied in its entirety pending the outcome of the separate declaratory judgment action, with leave to re-submit the motion at that time.

The motion court properly granted the museum and the City summary judgment on their contractual indemnity claims in view of the employer's indemnification agreement with the museum and the City. Contrary to the employer's assertions on appeal, the

record establishes that the museum did not have actual or constructive notice of any unsafe practices, and no issues of fact as to whether the museum was affirmatively negligent are otherwise raised (see *Correia v Professional Data Mgt.*, 259 AD2d 60 [1999]; *Rizzuto v L.A. Wenger Contr. Corp.*, 91 NY2d 343, 352 [1998]).

However, in light of the fact that AISLIC agreed to cover the museum, we modify the order to grant summary judgment on the contractual indemnity claim only insofar as both the Admiral and the AISLIC policies are exhausted.

The motion court failed to address the museum's and the City's common-law indemnification claims. As noted, since there was no evidence of affirmative negligence on the part of the museum and the City, they, as property owners liable vicariously under the Labor Law, are entitled to common-law indemnification from the employer (*Aragon v 233 W. 21st St.*, 201 AD2d 353 [1994]). Accordingly, we modify to grant summary judgment to the museum and the City on their common-law indemnification claims against the employer to the extent of determining liability in their favor.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 28, 2008

CLERK

"wrongful means" (see *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999]). Plaintiff's contention that her employment was terminated because NYLS threatened not to renew its contract with Collegis is unsupported by the evidence, and, in any event, is an insufficient basis for the tortious interference claim (see *Sumitomo Bank of N.Y. Trust Co. v DiBenedetto*, 256 AD2d 89 [1998], *lv denied* 93 NY2d 804 [1999]).

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

ENTERED: OCTOBER 28, 2008

CLERK

Defendant's plea of guilty to the "entire indictment" clearly covered the felony DWI charges, and there was nothing in the plea allocution that cast significant doubt on her guilt (see *People v Toxey*, 86 NY2d 725 [1995]). As for her claim that the People failed to file a special information pursuant to CPL 200.60 charging that she had previously been convicted of driving while intoxicated, that procedural defect was waived by defendant's guilty plea (*People v Gill*, 109 AD2d 419, 420 [1985]; *People v Guiliano*, 52 AD2d 240, 243-244 [1976]; see also *Wright v Davies*, 41 AD2d 879, 880 [1973]). Furthermore, since the felony complaint specified the prior conviction that was the basis for the elevated felony charge, and the indictment specified that two counts were felony offenses, defendant was apprised that she was being charged with felonies.

We perceive no basis for reducing the fine.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4405-

Index 105554/04

4405A

Richard Conrad,
Plaintiff,

590118/05

-against-

105 Street Associates, LLC,
Defendant-Appellant,

BFC Construction Corp., et al.,
Defendants.

- - - - -

105 Street Associates, LLC,
Third-Party Plaintiff-Appellant,

BFC Construction Corp., et al.,
Third-Party Plaintiffs,

-against-

Larry E. Knight, Inc., et al.,
Third-Party Defendants,

JEM Erectors, Inc.,
Third-Party Defendant-Respondent.

Schneider Goldstein Bloomfield LLP, New York (Donald F. Schneider of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for respondent.

Order, Supreme Court, New York County (Jane S. Solomon, J.), entered October 19, 2007, which, in an action for personal injuries sustained at a construction site by a worker employed by third-party defendant subcontractor JEM, insofar as appealed from as limited by the briefs, denied defendant site owner 105

Street's motion for summary judgment, or conditional summary judgment, on its claim for contractual indemnification against JEM, unanimously reversed, on the law, without costs, to grant 105 Street's motion to the extent of awarding it conditional summary judgment on its contractual indemnification claim against JEM. Appeal from order, same court and Justice, entered April 22, 2008, which denied 105 Street's motion to reargue its motion for summary judgment, unanimously dismissed, without costs, as taken from a nonappealable order.

The indemnification clause of JEM's subcontract requires JEM to indemnify 105 Street against claims and damages arising from the performance of JEM's work under the subcontract and attributable to its negligent acts or omissions. Further, under the subcontract, JEM was solely responsible for directing and supervising the subcontract work and obligated to take reasonable safety precautions with respect to its performance of the subcontract work. The record shows that plaintiff fell into an unguarded opening in the floor near where he was working after tripping over debris, and evidence that defendant general contractor undertook to erect a barrier around the opening raises issues of fact as to whether a barrier was removed, and, if so, who removed it and whether JEM had timely notice of the unsafe

opening. Given JEM's contractual obligation and failure to implement safety measures adequate to guard against a fall of one of its workers into the opening, the clear causal connection between plaintiff's injury and the absence of a barricade or other appropriate safety measure guarding against falls into the opening, and the absence of any evidence of negligence on the part of 105 Street, the latter is entitled to conditional summary judgment on its claim for contractual indemnification against JEM in advance of any factual determination of the extent of JEM's negligence for the accident (see *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 300 [2007], citing *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200 [1998]). That the general contractor may have assumed responsibility for erecting a barricade around the opening did not, absent contractual provision to the contrary, absolve JEM of its contractual obligation to implement adequate safety measures itself. We reject 105 Street's additional argument for summary judgment on its contractual indemnification claim against JEM based on the latter's failure to remove debris near the opening. The subcontract expressly limits JEM's liability for injury caused by debris it had created, and issues

of fact exist as to whether the debris over which plaintiff tripped was created by other contractors.

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

ENTERED: OCTOBER 28, 2008

CLERK

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

4406 Matt Egnotovitch, et al., Index 604101/06
Plaintiffs-Appellants,

-against-

Katten Muchin Zavis & Roseman LLP,
Defendant-Respondent.

Menaker & Herrmann LLP, New York (Richard G. Menaker of counsel),
for appellants.

Ellenoff Grossman & Schole LLP, New York (Ted Poretz of counsel),
for respondent.

Order, Supreme Court, New York County (Bernard J. Fried,
J.), entered January 24, 2008, which granted defendant law firm,
the escrow agent for a real estate venture, summary judgment
dismissing the complaint, unanimously affirmed, with costs.

Plaintiffs each invested \$150,000 as "membership dues" in a
business venture to acquire vacation properties for plaintiffs'
use. A portion of plaintiffs' dues were held as a deposit in an
escrow account for which defendant acted as escrow agent. In
2006, the venture failed as a going concern and lacks funds to
pay plaintiffs' damages.

Thereafter plaintiffs brought this action against the escrow
agent, claiming that it wrongfully released their escrowed funds
in furtherance of fraud by the venture's sponsors. An escrow
agent, who acts a trustee for both parties, is obliged to release

escrow funds only in compliance with the conditions in the escrow agreement (*Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 349 [1986]). Defendant complied with the terms of the operative escrow agreement by disbursing funds only for authorized purposes and upon being presented with the required documentation.

Contrary to plaintiffs' contentions, the "Punta Esmeralda" development agreement was an authorized purpose because it constituted a binding contract. It contained an exchange of promises and "all of the essential terms of the contract" (*Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587, 588 [1993]). Accordingly, the escrow agreement authorized those disbursements. Moreover, the escrow agent properly disbursed some escrowed funds before the parties had fully satisfied their obligations under the Punta Esmeralda agreement or other payment triggers had occurred (*see, e.g., Roan/Meyers Assocs. L.P. v. CT Holdings*, 26 AD3d 295, 296 [2006]), since the escrow agreement required that defendant disburse "the amount evidenced by such agreements" for "contractually committed expenditures."

Plaintiffs' contention that defendant improperly released the entire rent amounts for residences that the sponsors had leased in Punta Esmeralda and in the Time Warner Center in New York is equally unavailing, as the leases obligated the sponsors

to pay the full amount due on them, even if installment payments were permissible (see *Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995]).

The invoices for furnishings and related expenses constituted enforceable agreements between the sellers and the sponsors (see *Battista v Radesi*, 112 AD2d 42, 42 [1985]), and accordingly constituted proper documentation for authorized expenditures under the escrow agreement. Although some of the invoices were unsigned, the sponsors' transfer instructions, which accompanied each and every invoice to defendant, provided sufficient evidence of the venture's intent to be bound by them (*Liberty Mgt. & Constr. Ltd. v Fifth Ave. & Sixty-Sixth St. Corp.*, 208 AD2d 73, 77 [1995]).

With respect to the escrow agent's disbursement for legal services rendered by a Mexican law firm, that firm's failure to provide a retainer agreement does not preclude it from recovering legal fees for its services (*Seth Rubenstein, P.C. v Ganea*, 41 AD3d 54, 62-64 [2007]).

The court properly dismissed plaintiffs' alternative causes of action, including breach of fiduciary duty, aiding and abetting fraud, and conversion. Although defendant, as designated escrow holder, had a fiduciary relationship with

plaintiffs (see *Bardach v Chain Bakers*, 265 App Div 24, 27 [1942], *affd* 290 NY 813 [1943]), plaintiffs have failed to identify any action by defendant that breaches that fiduciary relationship or conflicts with the escrow agreement. Nor is there any evidence of defendant's awareness of, or complicity with, the sponsors' purported fraud. On this basis, plaintiffs' claims for conversion and aiding and abetting fraud also fail. An action for money had and received does not lie where there is an express contract between the parties such as here (*Phoenix Garden Rest. v Chu*, 245 AD2d 164, 166 [1997]).

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

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

ENTERED: OCTOBER 28, 2008

CLERK

evidence, that claim is likewise unpreserved and without merit. The victim's testimony, coupled with circumstantial evidence (see e.g. *People v Torres*, 33 AD3d 318 [2006], *lv denied* 7 NY3d 929 [2006]), clearly established that defendant entered the apartment without anyone's permission and with the contemporaneous intent to commit a crime.

The court properly declined to submit criminal trespass as a lesser included offense, since there was no reasonable view of the evidence that defendant entered the apartment unlawfully, but without the intent to commit a crime. Although defendant now asserts there was a reasonable view that he entered as a guest of a nontestifying occupant, but then remained unlawfully, he did not preserve that argument (see *People v Liner*, 262 AD2d 250 [1999], *lv denied* 93 NY2d 1021 [1999]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits, as being based entirely on speculation.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 28, 2008

CLERK

all the requisite factors (see *Matter of Freeman*, 34 NY2d 1, 9 [1974]). The Referee's report was properly confirmed as supported by the record (see *1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [2008]). The recommended fees were reasonable and fully documented, and did not constitute compensation of plaintiff and the tenants corporation for aspects of this litigation outside the scope of the reference. We have considered and rejected the Lapidus defendants' remaining arguments.

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

ENTERED: OCTOBER 28, 2008

CLERK

and that both parents had similar abilities to provide for the emotional and intellectual development of the child, who has special needs (see *Eschbach v Eschbach*, 56 NY2d 167, 172 [1982]). However, the mother's negative attitude and hostility toward the father, as evidenced by her maligning of the father in the child's presence, the filing of unsubstantiated reports of abuse and neglect against him, and encouraging the child to lie to support her false claims, failed to demonstrate a willingness or ability on her part to facilitate and encourage a close and optimum relationship between the child and his father (see *Janecka v Franklin*, 150 AD2d 755, 757 [1989]). The court's decision was also in accord with the Law Guardian's recommendation that the child be placed in the custody of the father (see *Matter of Krebsbach v Gallagher*, 181 AD2d 363, 368 [1992], *lv denied* 81 NY2d 701 [1992]). Furthermore, the granting of liberal visitation to the mother ensures that she will remain an integral part of the child's life and furthers the goal of allowing the child to be nurtured and guided by both of his natural parents (see *Weiss v Weiss*, 52 NY2d 170, 175 [1981]; *Courten v Courten*, 92 AD2d 579, 580 [1983]).

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

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

ENTERED: OCTOBER 28, 2008

CLERK

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

4416 Carmen D. Acosta, Index 24327/05
Plaintiff-Respondent,

-against-

Blatt Plumbing Inc., et al.,
Defendants-Appellants.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel),
for appellants.

Helen F. Dalton & Associates, P.C., Forest Hills (Helen F. Dalton
of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),
entered on or about February 13, 2008, which, in an action for
personal injuries resulting from a car accident, denied
defendants' motion for summary judgment dismissing the complaint,
unanimously affirmed, without costs.

It cannot be said, as a matter of law, that plaintiff's
conduct was the sole proximate cause of the accident. The
evidence shows that both plaintiff and defendant driver had stop
signs before them, and each claims to be the first to enter the
intersection where the collision occurred. Accordingly, there
are triable issues of fact as to the events surrounding the
accident, including which driver had the right of

way (see e.g. *Pappalardi v Jones*, 29 AD3d 391 [2006]; *Hernandez v Bestway Beer & Soda Distrib.*, 301 AD2d 381 [2003]).

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

ENTERED: OCTOBER 28, 2008

CLERK

hand to disconnect the crane's hook from the cables affixed to the box, the crane operator, without warning, started reeling in the cable. Claimant's right hand was pulled into the cable block and crushed.

The State moved for summary judgment on the ground that § 23-8.1(f)(5) was inapplicable because the concrete box or load was not in motion at the time of the accident. However, the language of the regulation is not limited to situations where a person is on the load while the load itself is being moved. The regulation also prohibits using the crane while a person is physically on the load. As claimant was injured when the crane was operated while he was on the load, § 23-8.1(f)(5) is clearly implicated.

The State also argues that the court erred in granting partial summary judgment on liability to claimant because there are triable issues of fact concerning proximate cause, comparative negligence, and whether reasonable safety measures were employed by the contractor. Violation of an administrative regulation promulgated pursuant to statute is simply some evidence of negligence. The owner or contractor may raise any valid defense to the imposition of vicarious liability under Labor Law § 241(6), including contributory and comparative

negligence (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 350 [1998]). Although the defenses of reasonable safety measures, proximate cause and comparative negligence were raised, the State failed to present evidentiary proof sufficient to present a triable issue of fact in response to claimant's prima facie demonstration of entitlement to judgment as a matter of law.

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

ENTERED: OCTOBER 28, 2008

CLERK

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

4420-

4420A-

4420B In re Kevin J., and Others,

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

Tanisha J.,
Respondent-Appellant,

Family Support Systems Unlimited, Inc.,
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 (John Newbery
of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Douglas
E. Hoffman, J.), entered on or about June 15, 2007, which, to the
extent appealed from, upon findings of permanent neglect,
terminated respondent mother's parental rights to the subject
children and committed custody and guardianship of the children
to petitioner agency and the Commissioner of Social Services for
the purpose adoption, unanimously affirmed, without costs.

Respondent's contention that the petitions were pled with
insufficient particularity to satisfy the requirements of Family
Court Act § 614(1)(c) is unpreserved as it is raised for the

first time on appeal (see *Matter of Gina Rachel L.*, 44 AD3d 367 [2007]). Were we to review this argument, we would find that the petitions set forth in sufficient detail the diligent efforts made by the agency to encourage and strengthen the parental relationship.

Clear and convincing evidence supports the findings of permanent neglect (Social Services Law § 384-b[7][a]). Despite the diligent efforts by the agency, which included providing respondent with referrals to drug abuse treatment centers, assisting her to obtain housing, monitoring her drug abuse problems, and scheduling regular visitation, respondent failed, during the statutorily relevant time period, to satisfactorily complete the requisite programs and remain drug free (see *Matter of Tiffany R.*, 7 AD3d 297 [2004]). While respondent apparently did complete one treatment program, a continuing series of relapses began immediately thereafter, demonstrating that the primary problem that led to the children's placement has not been ameliorated (see *Matter of Jah'lil Dale Emanuel McC.*, 44 AD3d 547 [2007]). Furthermore, the record demonstrates that respondent's

visitation with the children was sporadic at best (see *Matter of Angel P.*, 44 AD3d 448 [2007]).

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

ENTERED: OCTOBER 28, 2008

CLERK

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

4421 Carlos Corrales, et al., Index 106510/05
Plaintiffs-Respondents,

-against-

Reckson Associates Realty Corp., et al.,
Defendants-Appellants-Respondents,

One Source Facility Services, Inc.,
Defendant-Respondent-Appellant,

American Christmas Decorations, Inc., et al.,
Defendants.

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for
appellants-respondents.

Gallo Vitucci Klar Pinter & Cogan, New York (Kimberly A.
Ricciardi of counsel), for respondent-appellant.

Tedd Kessler, New York, for respondents.

Order, Supreme Court, New York County (Doris Ling-Cohan,
J.), entered December 31, 2007, which denied the motion of
defendants Reckson Associates Realty Corp., Reckson Management
Group, Inc., Metropolitan 919 3rd Avenue LLC, H. Grant Limited
Partnership and Rany Management Group, Inc. (collectively Reckson
defendants) for summary judgment dismissing the complaint or, in
the alternative, for conditional summary judgment on their cross
claims for indemnification against defendant One Source Facility
Services, Inc. (One Source), and denied One Source's motion for
summary judgment dismissing the complaint and all cross claims as

against it, unanimously modified, on the law, One Source's motion granted to the extent of dismissing the complaint as against it, and otherwise affirmed, without costs.

Plaintiff slipped and fell on an oily substance on the plaza outside of an office building owned or managed by the Reckson defendants, which had retained One Source to provide cleaning services for the interior and exterior of the building. Dismissal of the complaint on the basis that defendants lacked either actual or constructive notice of the hazardous condition, or that there was a lack of evidence that an oily spot caused plaintiff to slip, was properly denied (*see e.g. Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]). Triable issues of fact regarding notice and causation were raised by the deposition testimony of a nonparty witness to plaintiff's fall, who stated that she had seen the oily spot and reported it to an agent of the building one or two days prior to the accident (*see Lorenzo v Plitt Theatres*, 267 AD2d 54, 55-56 [1999]).

However, dismissal of the complaint as against One Source is warranted, since none of the exceptions to the general rule that a contractor does not owe a duty of care to a noncontracting third party are applicable (*see e.g. Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). The record demonstrates that One Source's service contract with the Reckson defendants was not

"comprehensive and exclusive" (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994]) as to preventative maintenance, inspection and repair, and that the Reckson defendants' on-site property manager retained responsibility for and control over maintenance and safety of the premises (see *Lawson v OneSource Facility Servs., Inc.*, 51 AD3d 983, 984 [2008]; *Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 65-66 [2006]).

The court properly determined that issues of fact as to whether the Reckson defendants were negligent precluded granting them conditional summary judgment against One Source (see *Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 338 [2004]). Nor was One Source entitled to summary judgment dismissing the indemnification cross claims, because, as noted, the record presents questions regarding whether it had notice of the alleged oily condition and failed to remedy it.

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

ENTERED: OCTOBER 28, 2008

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: OCTOBER 28, 2008

CLERK

Tom, J.P., Williams, Catterson, Moskowitz, JJ.

4425 Nella Manko,
Plaintiff-Appellant,

Index 113306/06

-against-

Dana Mannor, et al.,
Defendants-Respondents,

"Anesthesiologist" (a fictitious
name), et al.,
Defendants.

Nella Manko, appellant pro se.

Aaronson Rappaport Feinstein & Deutsch, LLP, New York (Elliot J. Zucker of counsel), for Dana Mannor, Alan Tikotsky, L.H. Radiologists, P.C. and Matthew Lubin, respondents.

Garson DeCorato & Cohen, LLP, New York (Anna R. Schwartz of counsel), for Lenox Hill Hospital, respondent.

Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered March 22, 2007, which, in an action for medical malpractice, granted defendants' motions to dismiss the complaint as time barred, and dismissed as moot plaintiff's cross motions for, inter alia, further discovery and a stay of the action, unanimously affirmed, without costs.

Dismissal of the complaint was properly granted since the alleged malpractice occurred in 2002 and the action was not commenced until September 2006, which was well beyond the 2½-year statute of limitations (see CPLR 214-a).

We have considered plaintiff's remaining arguments, including that the relation back and continuous treatment doctrines preclude dismissal of the complaint, and find them unavailing.

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

ENTERED: OCTOBER 28, 2008

CLERK

appropriately considered (see *Matter of Servedio v Bratton*, 268 AD2d 356 [2000]). Furthermore, the record shows that petitioner failed to report any of these incidents immediately to the License Division (see 38 RCNY 5-22[c][1]; 38 RCNY 5-30[c][1], [5]; 38 RCNY 3-05), and his alleged unawareness of the responsibility to do so is no excuse (see *Matter of Cohen v Kelly*, 30 AD3d 170 [2006]).

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

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

ENTERED: OCTOBER 28, 2008

CLERK

Tom, J.P., Saxe, Williams, Catterson, JJ.

4428N Matthew Serino, et al.,
Plaintiffs-Appellants,

Index 604396/02

-against-

Kenneth Lipper,
Defendant-Respondent,

Lipper Holdings, LLC, et al.,
Defendants.

Kirby McInerney LLP, New York (Mark A. Strauss of counsel), for appellants.

Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, P.C., New York (Jeremy H. Temkin of counsel), for respondent.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered May 7, 2007, which granted the motion of defendant Kenneth Lipper to compel arbitration of plaintiffs' putative class action suit before the American Arbitration Association (AAA), unanimously affirmed, without costs.

The court properly granted Lipper's motion to compel arbitration before the AAA, where the parties' partnership agreement contained a broad arbitration clause, requiring, among other things, that "[a]ll disputes and questions whatsoever" arising under the agreement should be submitted to arbitration, either before the National Association of Securities Dealers (NASD) or the AAA. The question of whether NASD rules prohibit

class arbitration even before the AAA is a question for the arbitrator (see *Matter of Smith Barney Shearson v Sacharow*, 91 NY2d 39 [1997]; *Green Tree Fin. Corp. v Bazzle*, 539 US 444 [2003]; *Vaughn v Leeds, Morelli & Brown, P.C.*, 2005 WL 1949468, 2005 US Dist LEXIS 16792 [SD NY 2005]).

Plaintiffs have failed to demonstrate that Lipper's involvement in other cases related to the factual circumstances of this case constituted a waiver of his right to seek to compel arbitration (see *Stark v Molod Spitz DeSantis & Stark, P.C.*, 9 NY3d 59, 66-67 [2007] [court action must be clearly inconsistent with later claim that the parties must arbitrate claims]; *Flynn v Labor Ready*, 6 AD3d 492 [2004]). Conversely, plaintiffs are not judicially estopped from opposing the motion to compel arbitration merely because they chose not to oppose such motion made by other defendants whom plaintiffs believed were judgment proof (see e.g. *Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [1995]).

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

ENTERED: OCTOBER 28, 2008

CLERK

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

4429N Halina Avery,
Plaintiff-Appellant,

Index 109295/06

-against-

Molly Caldwell,
Defendant-Respondent.

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

Gibson, Dunn & Crutcher LLP, New York (D. Cameron Moxley of counsel), for respondent.

Order, Supreme Court, New York County (Leland G. DeGrasse, J.), entered June 13, 2007, which granted defendant's motion to vacate a default judgment, unanimously affirmed, without costs.

A reasonable excuse for the default is demonstrated by the affirmations of defendant's attorney and his physician, which together are adequate to show that illness prevented the attorney from preparing an answer over the period of delay (see *Embraer Fin. Ltd. v Servicios Aereos Profesionales, S.A.*, 42 AD3d 380 [2007]). Defendant has put forward a meritorious defense in its proposed verified answer and accompanying documents (see *Chase Manhattan Automotive Fin. Corp. v Allstate Ins. Co.*, 272 AD2d 772, 774 [2000]). We reject plaintiff's alternative argument that the defendant's attorney's performance of various legal services, including contacting the court's Clerk to request additional time

to submit a proposed counter-default judgment, constituted opposition to the motion for a default judgment requiring an appeal therefrom rather than a motion to vacate (*cf. Achampong v Weigelt*, 240 AD2d 247 [1997]).

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

ENTERED: OCTOBER 28, 2008

CLERK

Saxe, J.P., Sweeny, McGuire, Acosta, JJ.

3258-

3259 Clarence Jones,
Plaintiff-Appellant,

Index 100477/05

-against-

414 Equities LLC, et al.,
Defendants-Respondents.

[And a Third-Party Action]

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

Rubin, Fiorella & Friedman, LLP, New York (Shelley R. Halber of
counsel), for respondents.

Orders, Supreme Court, New York County (Karen S. Smith, J.),
entered November 1, 2006, and December 13, 2006, affirmed,
without costs.

Opinion by McGuire, J. All concur.

Order filed.

THE FOLLOWING MOTION ORDERS
WERE ENTERED AND FILED ON
OCTOBER 28, 2008

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

M-4831X Advance Magazine Publishers Inc., doing business
as The Conde Nast Publications v Four Times Square
Associates LLC

Appeal and cross appeal withdrawn.

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

M-4847 Perry v The Mount Sinai Hospital - Aramark Management
Services Limited Partnership

Appeal, previously perfected for the October 2008 Term,
withdrawn.

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

M-4835X Fabrikant v Fabrikant

M-4848 In the Matter of G., Alexis

M-4850 People v Velez, Julio

M-4867X Meade v Gotey

Appeals withdrawn.

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

M-4868X Ditmars v Mount Sinai Hospital - 1200 Fifth Associates,
 LLC

M-4869X Ochoa v Walton Management LLC.

M-4870X Tamboni v Marsta Taxi Inc.

 Appeals withdrawn.

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

M-4899 People v Perkins, Anthony

 Counsel substituted.

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

M-4900 People v McKelvey, Phillip

 Counsel substituted.

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

M-4531 In the Matter of F., Margaret v D., Irwin

 Time to perfect appeal enlarged to the February 2009
Term, as indicated.

Lippman, P.J., Andrias, Buckley, Sweeny, Renwick, JJ.

M-4405 Hunts Point Terminal Produce Cooperative Association,
Inc. v New York City Economic Development Corporation
- New York City Business Integrity Commission

Time to perfect appeal enlarged to the February 2009
Term, without prejudice to petitioner moving on notice for an
order vacating the stay, as indicated.

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

M-4633 Brown v The City of New York

Time to perfect appeal enlarged to the February 2009
Term.

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

M-4572 In the Matter of D., Grace v D., Ralph - DeMattio
M-4512

Time to perfect respondent-appellant's appeal enlarged
to the February 2009 Term; law guardian directed to file
statement in this Court indicating whether he is representing
subject children on this appeal. Dismissal of appeal denied.

Lippman, P.J., Sweeny, Catterson, Acosta, Renwick, JJ.

M-4638 In the Matter of Rivera v New York City Department of
Housing Preservation and Development

Stay denied.

Lippman, P.J., Andrias, Saxe, Sweeny, DeGrasse, JJ.

M-4562 Prensky v Prensky

Time to perfect appeal enlarged to the March 2009 Term,
as indicated.

Tom, J.P., Gonzalez, Williams, Moskowitz, Freedman, JJ.

M-4658 In the Matter of the Application of Luna v New York
City Department of Housing Preservation and Development

Stay vacated unless petitioner perfects proceeding
for February 2009 Term and remains current on tenant's former
share of monthly rent, as indicated.

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

M-4615 Alvarez v Upadhyay

M-4816

Motion for stay of trial deemed withdrawn; appeal
deemed withdrawn, as indicated.

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

M-4500 In the Matter of L., Bruce v C., Patricia

Vacatur of stay denied.

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

M-4539 De Los Santos v 4915 Broadway Realty LLC

Stay of trial granted.

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

M-4654 In the Matter of Perez-Frangie v Donovan

Interim stay granted by order of a Justice of this Court, dated September 25, 2008, continued, as indicated.

Mazzarelli, J.P., Friedman, Nardelli, Williams, Freedman, JJ.

M-4193 In the Matter of Lezzieri v Zadrina

Leave to prosecute appeal as a poor person denied; purported appeal dismissed, as indicated.

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

M-4554 Smith v The City of New York

Leave to prosecute appeal as a poor person denied.

Mazzarelli, J.P., Andrias, Nardelli, Buckley, Freedman, JJ.

M-4627 Devonish v Riverbay Corporation

Motion deemed withdrawn, as indicated.

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

M-4602 Yuen v The City of New York

Time to perfect appeal enlarged to the February 2009 Term.

Mazzarelli, J.P., Catterson, McGuire, Acosta, Renwick, JJ.

M-4552 Prospect Owners Corp. v Sandmeyer

Time to perfect appeal enlarged to the March 2009 Term.

Andrias, J.P., Nardelli, McGuire, Moskowitz, JJ.

M-4409 People ex rel. Gannaway, Quintel v Warden

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

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

M-4450 People v Peralta, Emilio

Reargument/reinstatement denied.

Saxe, J.P., Catterson, McGuire, Acosta, DeGrasse, JJ.

M-4433 Berkowitz v Fifth Ave Courier Corp.

Time to perfect appeal enlarged to the March 2009 Term, as indicated.

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

M-4990 NYCHA v Bradley
CPLR 5704(a) relief denied.

Saxe, J.

M-4334 People v Coleman, William
Leave to appeal to this Court and other relief denied.

Saxe, J.

M-4655 People v Cross, Thomas
Leave to appeal to this Court denied.

Moskowitz, J.

M-4031 People v Chambers, Vincent
Leave to appeal to this Court denied.

Moskowitz, J.

M-4253 People v Baskerville, Martin
Leave to appeal to this Court denied.

Moskowitz, J.

M-4367 People v Sable, Oscar

Reargument denied.

Acosta, J.

M-4749 People v Verdugo, Celio

Leave to appeal to this Court granted, as indicated.

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

M-3173 In the Matter of Laurence T. Lewitas,
(admitted as Laurence Tod Lewitas),
an attorney and counselor-at-law:

Respondent's name stricken from the roll of attorneys
and counselors-at-law in the State of New York, effective nunc
pro tunc to June 12, 2008. Opinion Per Curiam. All concur.

The following orders were entered and filed on October 23, 2008:

Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

M-4735 Randell v The City of New York

Stay of trial granted.

Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

M-4832 Moore v The City of New York - New York College
M-4934 of Podiatric Medicine - China Construction America,
Inc.

Stay of trial granted; appeal(s) adjourned to the
January 2009 Term.

Andrias, J.P., Saxe, Gonzalez, Catterson, Acosta, JJ.

M-4834 Reyes v Brito

Stay of trial granted.