SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 19, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, DeGrasse, Richter, Abdus-Salaam, JJ.

6439 The People of the State of New York, Ind. 4802/03
Respondent,

-against-

David Spralling,
Defendant-Appellant.

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Mischel & Horn, P.C., New York (Richard E. Mischel of counsel), for appellant.

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

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Judgment, Supreme Court, Bronx County (Robert E. Torres, J.), rendered June 21, 2006, convicting defendant, following a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations of credibility and

identification. The fact that the jury acquitted defendant of homicide charges involving the same weapon does not warrant a different conclusion in this case (*see People v Rayam*, 94 NY2d 557 [2000]).

The verdict was not repugnant, and the court properly denied defendant's application to resubmit the case to the jury. Defendant's acquittal of second-degree murder and first-degree manslaughter did not negate any essential element of second-degree criminal possession of a weapon (*see People v Muhammad*, 17 NY3d 532 [2011]; *People v Tucker*, 55 NY2d 1, 7 [1981]). Because a repugnancy analysis requires that "we review the elements of the offenses as charged to the jury without regard to the proof that was actually presented at trial," no basis exists to hold the verdict was repugnant (*People v Muhammad*, at 542). Here, based on the instructions to the jury, they could have found that defendant possessed the gun with the intent to use it unlawfully even though they acquitted on the murder and manslaughter counts, crimes that require a different intent.

The prosecutor's summation did not deprive defendant of a fair trial. The only one of defendant's challenges to the summation that is arguably preserved is his claim that the

prosecutor shifted the burden of proof when he commented on defendant's introduction of a document, instead of calling the declarant himself, as part of the defense case. We conclude that the prosecutor's brief remark was directly responsive to a portion of defendant's summation, and constituted permissible comment on an alleged weakness in the defense case. Defendant's remaining arguments concerning the prosecutor's summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

The court properly exercised its discretion in denying defendant's application for a mistrial, the only remedy requested, when one of the People's witnesses testified that he received threats from a close friend of defendant. The court sustained defendant's objection and struck a portion of the

witness's testimony. Under the circumstances, this was sufficient to prevent any prejudice (*see People v Davis*, 58 NY2d 1102 [1983]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 19, 2012

CLERK

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

2731 The People of the State of New York, Respondent, Ind. 6148/06

-against-

Fayola McIntosh, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Lily Goetz of counsel), for appellant.

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

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Upon remittitur from the Court of Appeals (17 NY3d 633 [2011]), judgment, Supreme Court, New York County (Michael J. Obus, J. at dismissal motion; Laura A. Ward, J. at jury trial and sentencing), rendered October 16, 2008, convicting defendant of assault in the second degree, and sentencing her, as a second felony offender, to a term of 5 years, unanimously affirmed.

When this case was originally before us, we held among other things that the trial court had erred in denying defendant's motion to dismiss the indictment. Relying on our rationale in *People v Davis* (72 AD3d 53 [2010]), we found that the indictment was unauthorized because the People, after withdrawing the presentation of the case to the grand jury, failed to obtain court authorization pursuant to CPL 190.75(3) before re-

presenting the case to a second grand jury. We dismissed the indictment but granted the People leave to apply for a court order permitting them to resubmit the charges to a third grand jury.

The Court of Appeals reversed, finding that under the circumstances of this case the People did not need court authorization before re-presenting it and remitted the case for our determination of the unresolved issues that defendant raised on the appeal to this Court (*People v Davis*, 17 NY3d 633 [2011]).

Defendant's remaining claims are unavailing. She argues that, to counter the victim's testimony about how much her injuries incapacitated her, the trial court should have allowed defendant to introduce prison records showing that after the victim was attacked she regularly visited an inmate. However, the evidence was collateral to the issues presented at trial and was properly excluded (*see People v Boatwright*, 297 AD2d 603 [2002], *lv denied* 99 NY2d 533 [2002]). The records would not have shown that the victim testified falsely about an attack on her face with a sharp object, which necessitated over 40 stitches, and defendant's participation in the attack.

Defendant did not preserve her claim regarding the *Sandoval* ruling, and we decline to renew it in the interest of justice.

As an alternative holding, we find that contrary to defendant's contention, the trial court did not err in modifying a prior *Sandoval* ruling by allowing the jury to learn during defendant's cross-examination that, when the attack occurred, defendant was on parole for a prior felony conviction. The court properly permitted the People to elicit that information to clarify confusing testimony defendant gave on direct examination as to why she admittedly lied to the police about knowing the co-defendant (*see People v Baez*, 290 AD2d 372 [2002], *lv denied* 98 NY2d 635 [2002]). In any event, the court's curative instruction ameliorated any prejudice (*see People v Davis*, 58 NY2d 1102, 1104 [1984]).

Defendant's objection to the admission of evidence of a prior fight between defendant and the victim is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, the evidence was admitted not to improperly establish defendant's propensity for violence, but instead to demonstrate that, contrary to defendant's testimony, she had a prior relationship with the victim (*see People v Alvino*, 71 NY2d 233, 241-242 [1987]).

The verdict was not against the weight of the evidence.

Finally, the sentence was not excessive, given the violence of the attack, the victim's injuries, and defendant's criminal history.

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

ENTERED: JANUARY 19, 2012

CLERK

Mazzarelli, J.P., Saxe, Acosta, DeGrasse, Manzanet-Daniels, JJ.

5923 Moussa Sangare, Index 106554/08
Plaintiff-Respondent,

-against-

Nancy M. Edwards, etc.,
Defendant,

Dermer Management Company,
Defendant-Appellant.

_____

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), for appellant.

Steven Alan Hoffner, New York, for respondent.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered May 25, 2011, which denied defendant Dermer Management Company's motion to refer the matter to the Workers' Compensation Board to determine whether plaintiff was Dermer's special employee at the time of his injury, and to stay the trial pending that determination, unanimously affirmed, without costs.

Plaintiff Sangare is the superintendent of a residential building located at 514 Broadway and owned by Soho Plaza Corporation (Soho). Defendant Dermer is the managing agent of the property. On September 19, 2007, plaintiff was injured when defendant Edwards, owner of a cooperative unit in the building, allegedly ran toward him and hit him in his back with a box of

magazines while plaintiff was mopping the floor of the lobby. Plaintiff was hospitalized and ultimately required back surgery. Although plaintiff was injured on the job, he never applied for workers' compensation since his employer, Soho, continued to pay his full salary while providing him with an assistant to handle his more strenuous duties.

Plaintiff commenced an action alleging assault and battery against Edwards, and negligence against Dermer, contending that Dermer knew or should have known of Edwards's violent tendencies. Dermer amended its answer to include a workers' compensation defense, asserting that as a special employee of Dermer, plaintiff's sole and exclusive remedy was workers' compensation. Dermer did not otherwise raise or pursue the workers' compensation issue during the course of the litigation.

Following discovery, by order to show cause, Dermer moved to refer the matter to the Workers' Compensation Board (WCB) for a determination as to whether plaintiff was the special employee of Dermer, and to stay the proceedings pending such determination. Plaintiff opposed the motion, arguing, inter alia, that the motion was untimely, and, in any event, that plaintiff was the employee of Soho, not Dermer.

The court denied the motion, noting that it was "not

obligated in all cases to defer to the WCB's primary jurisdiction by referring employment issues to the WCB." The court declined to reach the merits of Dermer's status as a special employer, since the issue was not before it, and the time to make a summary judgment motion had expired. The court stated that it was unwilling to further delay this case "on the eve of trial" by referring the matter to the WCB so that Dermer could obtain what it had failed to timely seek before the court, namely, a summary determination of its fourth affirmative defense.

We agree that under the particular circumstances of this case, referral was not indicated, and now affirm. We note, as an initial matter, that the compensation issue was never litigated before the Board because plaintiff, while working a reduced schedule following the incident, continued to receive his full salary and benefits from Soho. Dermer, other than asserting the workers' compensation statute as an affirmative defense in its answer, failed to raise the issue during the entire course of the litigation, and indeed, only raised the issue on the eve of trial, when discovery was complete and the time for making summary judgment motions had expired. The court aptly noted that Dermer was attempting to obtain via this motion relief it could no longer obtain by motion for summary judgment. Dermer may not,

at this belated juncture, invoke the primary jurisdiction of the WCB as a means of further delaying the litigation (*see Bastidas v Epic Realty, LLC*, 58 AD3d 776 [2009]).

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

ENTERED: JANUARY 19, 2012

CLERK

Tom, J.P., Moskowitz, Richter, Abdus-Salaam, Román, JJ.

6249 Jane Owens, Index 106907/08
Plaintiff-Respondent,

-against-

Cooper Square Realty,
Defendant-Appellant,

Classic Realty,
Defendant.

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Margaret G. Klein & Associates, New York (Eugene Guarneri of counsel), for appellant.

Edward T. Chase, Mt. Vernon, for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 28, 2011, which, in this action to recover for personal injuries sustained when plaintiff allegedly slipped and fell on a floor in a building managed by defendant Cooper Square Realty (Cooper Square), denied Cooper Square's motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed as against Cooper Square. The Clerk is directed to enter judgment accordingly.

Defendant made a prima facie showing that it did not create or have notice of the alleged slippery condition of the floor (*see Katz v New York Hosp.*, 170 AD2d 345 [1991]). Indeed,

defendant's porter testified that he swept and mopped the area three times a week, including on the morning of the accident, and waited for the floor to dry before proceeding to another floor. Defendant's handyman testified that he inspected the area immediately after the accident and found that it was dry. Both the porter and handyman testified that there had been no complaints concerning the area before the accident.

Plaintiff, however, failed to raise a triable issue of fact. She testified that the floor was shiny, slippery, and overwaxed or overbuffed. Yet, in opposition to the summary judgment motion, plaintiff relies on her expert's affidavit that states the accident was caused by a soapy water residue on the floor, left after the porters' mopping. The expert's opinion contradicts plaintiff's testimony regarding the condition of the floor at the time of her accident. Moreover, the affidavit is

speculative (*DeLeon v New York City Hous. Auth.*, 65 AD3d 930 [2009]; *Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305, 307-08 [2000]; *Lindeman v Vecchione Constr. Corp.*, 275 AD2d 392 [2000]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6573 The People of the State of New York, Ind. 1413/08
Respondent,

-against-

Koran McDonald,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered March 20, 2009, convicting defendant, after a jury trial, of grand larceny in the fourth degree and possession of burglar's tools, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

Defendant did not preserve his claim that the court should have given the jury full statutory definitions of the terms "deprive" and "appropriate" set forth in subdivisions (3) and (4) of Penal Law § 155.00, and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal. The concept that a deprivation or appropriation must be intended to be permanent or virtually permanent is an

essential part of the definition of larcenous intent (*see People v Medina*, __ NY3d __, 2011 NY Slip Op 08224, *5 [Nov 17, 2011]). Nevertheless, any error in omitting the full definitions was harmless in light of the evidence and issues at trial.

Defendant and an accomplice entered a store, placed numerous video games in their backpacks, went past cash registers and approached the exit. In addition, defendant was equipped with tools suited to foiling store security devices. At the time the larceny was complete (*see People v Olivo*, 52 NY2d 309, 318 [1981]), defendant clearly intended to remove the video games from the store permanently. There was no reasonable view of the evidence that defendant only intended a temporary taking. Moreover, defendant, who pursued other lines of defense not at issue on appeal, made no such argument at trial. There was evidence that, after the taking was complete, defendant attempted to abandon the larcenous enterprise when he realized he would not be able to escape with the property. However, this had no bearing on defendant's intent, at the time of the taking, to permanently acquire the video games.

Accordingly, there was no reasonable possibility that the lack of full definitions of deprive and appropriate had any effect on the verdict. For similar reasons, we reject

defendant's claim that his counsel rendered ineffective assistance by failing to request these instructions. Regardless of whether counsel should have made the requests, the omission could not have caused defendant any prejudice (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668, 694 [1984]).

The court properly denied defendant's motion to preclude his postarrest written statement, made on the ground of allegedly insufficient notice under CPL 710.30(1)(a). The notice supplied by the People was a short summary of the written statement. This notice essentially conveyed the incriminating content of the statement, and it gave defendant enough information to identify the statement and challenge its admissibility by way of a motion to suppress (*see People v Lopez*, 84 NY2d 425, 428 [1994]; *People v Cooper*, 158 AD2d 743, 744 [1990], *revd on other grounds* 78 NY2d

476 [1991]). In any event, any error with respect to the statement is harmless (*see People v Crimmins*, 36 NY2d 230, 241-242 [1975]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6574 Rosa Bojovic, Index 17604/07
Plaintiff-Respondent,

-against-

Lydig Bejing Kitchen, Inc., et al.,
Defendants-Appellants.

_____

Thomas M. Bona, P.C., White Plains (Anthony M. Napoli of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 24, 2009, which, insofar as appealed from, denied defendants' motion for summary judgment on the issue of their constructive notice of the snow and ice condition that allegedly caused plaintiff's injury, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing that they did not have constructive notice of the dangerous snow and ice condition on the sidewalk in front of their premises. In support of their motion, defendants point to plaintiff's deposition testimony that the last snowfall prior to her accident (at about 10:00 a.m. on January 31, 2007) occurred the day before, when it snowed "about one inch." Defendants also cite a restaurant

employee's testimony that his practice and procedure was to shovel snow as soon as the restaurant opened for business at 11:00 a.m.; that he would not have arrived at work until that time; and that he did not recall whether he saw snow on the ground upon arrival. Based on the foregoing, defendants contend that they could not have reasonably discovered a dangerous condition that existed at the time of plaintiff's fall. Defendants, however, did not offer any evidence to refute plaintiff's contention that a dangerous snow and ice condition existed at the time of her fall, and that it existed for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it. The deposition testimony of the restaurant employee is not probative, "because he had no personal knowledge of the condition of the sidewalk at the time of the accident or in the hours immediately preceding it" (*Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [2009]).

Even if defendants met their prima facie burden, plaintiff raised a triable issue of fact as to whether defendants had constructive notice of the alleged hazard. Plaintiff pointed to her deposition testimony, and the deposition testimony of a nonparty witness, that the sidewalk where she fell was covered in snow and "bumpy ice." Plaintiff also submitted the affidavit of

a certified meteorologist who opined, based on annexed weather records, that the snow and ice condition predated an overnight snowfall and was caused by repeated freeze-thaw cycles during the days preceding plaintiff's accident. This evidence, concerning the nature and duration of the hazardous condition, is sufficient to raise a triable issue of fact (*see Massey v Newburgh W. Realty, Inc.*, 84 AD3d 564, 567 [2011]; *see also Garcia v Mack-Cali Realty Corp.*, 52 AD3d 420, 421 [2008]).

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: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6575 In re Tayquan T.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

_____

Andrew J. Baer, New York, for appellant.

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

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about December 20, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute attempted assault in the third degree, and placed him with the Office of Children and Family Services for a period of 12 months, unanimously reversed, on the facts, without costs, and the petition is dismissed.

The court's finding was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Acting in our role as a second factfinder (*see People v Delamota*, 18 NY3d 107, *7 [2011]), we are "not convinced that the [court] was justified in finding that guilt was proven beyond a reasonable

doubt" (*id.*).

The complainant's testimony did not incriminate appellant in any way. The only evidence that appellant punched the complainant was the probable cause hearing testimony of another youth from the group that set upon the complainant. This prior testimony was received in evidence because the boy, who was implicated in the assault by another boy in the group, asserted his Fifth Amendment privilege at the fact-finding hearing. As a result, this boy was not cross-examined at the fact-finding hearing, and was only subject to the type of cross-examination appropriate for a probable cause hearing. We find these circumstances relevant to the weight to be accorded the boy's prior testimony.

Furthermore, the boy's testimony was materially inconsistent with the complainant's in a number of ways. Most prominently, he testified that the complainant was struck a total of two or three times by two different boys, while the complainant testified that he was hit once by one boy, whom he could not identify because he was punched from behind. In addition, the presentment agency introduced appellant's statements to the police, which were both exculpatory and generally consistent with the complainant's testimony.

Even after according due deference to the court's credibility determinations, we are unable to find, under the unusual circumstances of this case, that the fact-finding determination comported with the weight of the evidence.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6576 Susan Leary, Index 114242/07
Plaintiff-Appellant,

-against-

Dallas BBQ, et al.,
Defendants-Respondents,

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

_____

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lottie E. Wilkins, J.), entered January 27, 2011, which, to the extent appealed from, granted defendants-respondents' (Dallas BBQ) motion for summary judgment dismissing the complaint and all cross claims against them, unanimously affirmed, without costs.

The motion court properly granted Dallas BBQ's summary judgment motion in this action for personal injuries allegedly sustained after plaintiff tripped and fell over a segment of a wooden police barricade lying on the sidewalk near the northwest intersection of 23rd Street and Eighth Avenue in Manhattan. Dallas BBQ, lessee of the premises near the intersection,

established, prima facie, its entitlement to summary judgment. It was neither abutting owner for purposes of the Administrative Code of City of NY 7-210 nor did it create or have constructive notice of the condition, and it owed no duty to plaintiff for the maintenance of the abutting sidewalk under the alleged circumstances (*see Collado v Cruz*, 81 AD3d 542 [2011]; *Berkowitz v Dayton Constr.*, 2 AD3d 764, 765 [2003]). In opposition, plaintiff failed to raise a triable issue of fact as to any theory of duty on the part of Dallas BBQ.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6577 1766-68 Associates, LP, Index 118222/09
Plaintiff-Appellant,

-against-

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

_____

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

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

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Metropolitan Transit Authority, New York City Transit Authority, MTA Capital Construction and S/3 Tunnel Constructors, respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered September 30, 2010, which granted defendant City of New York's motion to dismiss the complaint as against it, unanimously affirmed, without costs.

The motion court properly dismissed the cause of action alleging that the City failed to enforce Building Code provisions relating to construction, excavation, and blasting by not ordering the Metropolitan Transit Authority (MTA) defendants to perform the work required to stabilize or otherwise protect plaintiff's building. No liability lies against the City for its

discretionary decisions relating to issuing orders, directives, permits, or the like even where the Code allows it to do so (*see City of New York v 17 Vista Assoc.*, 84 NY2d 299, 307 [1994]; *Matter of Church of the Chosen v City of Elmira*, 18 AD3d 978, 979 [2005], *lv denied* 5 NY3d 709 [2005], *cert denied* 547 US 1115 [2006]).

The cause of action alleging a violation of the Takings Clause (US Const, 5th Amend; NY Const art I, § 7), was also properly dismissed. Plaintiff does not allege that the City's issuance of the Emergency Declaration and Vacate Order forever deprived plaintiff of all of the building's economic use (*see Kaufman v City of New York*, 717 F Supp 84, 95 [SD NY 1989], *affd* 891 F2d 446 [1989]), *cert. denied* 493 US 957 [1990]). More critically, the motion court correctly held that no compensation was due under the Takings Clause, as compensation is not required where the government acts to "prevent an impending danger emanating directly from the use or condition of the property" (*Birnbaum v State of New York*, 73 NY2d 638, 646 [1989], *cert denied* 494 US 1078 [1990]; *see also Rochester Poster Adv. Co. v City of Rochester,* 38 AD2d 679 [1971]).

Insofar as the complaint alleges that the City conspired with the MTA to deprive plaintiff of its property rights, such

claim fails to state a cause of action since civil conspiracy has not been properly pleaded. The complaint fails to allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement (*see Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [2010]).

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: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6578 David Gilkarov, Index 302759/03
Plaintiff-Appellant,

-against-

Rachel Gilkarov,
Defendant-Respondent.

_____

Shmuel Agami, New York, for appellant.

Advocate & Lichtenstein, LLP, New York (Jason Advocate of counsel), for respondent.

_____

Order, Supreme Court, New York County (Marian Lewis, Special Referee), entered May 22, 2009, which, insofar as appealed from as limited by the briefs, awarded defendant 25% of the proceeds of the sale of a house purchased during the marriage and child support retroactive to the date on which custody of the children was transferred to her, unanimously affirmed, without costs.

We see no basis in the record for disturbing the special referee's credibility determination as to plaintiff's testimony that a house purchased during the marriage belonged to his sister (*see Cooper v Cooper*, 52 AD3d 429, 430 [2008]; *McManus v McManus*, 298 AD2d 189 [2002]). The house was properly treated as marital property subject to equitable distribution (*see* Domestic Relations Law § 236[B][1][c]; *Seidman v Seidman*, 226 AD2d 1011,

1012 [1996]).

The court properly awarded defendant child support retroactive to the date on which custody of the parties' children was transferred to her (*see Shapiro v Shapiro*, 35 AD3d 585, 587 [2006]; Domestic Relations Law § 236[B][7][a]).

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6579 Malach Henningham, Index 7920/07
Plaintiff-Respondent, 6002/07
83896/10

-against-

Highbridge Community Housing
Development Fund Corporation, et al.,
Defendants-Appellants.

[And Other Action]

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Shawn M. Cestaro of counsel), for appellants.

Rosenberg Minc Falkoff & Wolff, LLP, New York (Gary Silverstein of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered February 9, 2011, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on liability under Labor Law § 240(1) as against defendant Highbridge Community Housing Development Fund Corporation, and denied Highbridge's cross motion for summary judgment dismissing the complaint as against it, unanimously modified, on the law, and upon a search of the record, plaintiff's motion granted as against the remaining defendants, and otherwise affirmed, without costs.

Plaintiff and his coworkers were dropping construction

debris, such as broken cinder blocks, from the roof of a six- or seven-story building into a hard plastic chute in front of the building. When it became clear that the chute was clogged, plaintiff went down to the second floor, leaned slightly outside the window frame, and unclogged the chute by poking the debris. Shortly after telling his coworkers that the chute was clear, plaintiff was struck on the back of the head by a cinder block. He testified that he was facing the chute and still leaning forward slightly when he was struck.

Contrary to Highbridge's claim, Labor Law § 240(1) applies to plaintiff's accident (*see La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1127 [2010]). "'[F]alling object' liability under Labor Law § 240(1) is not limited to cases in which the falling object is in the process of being hoisted or secured" (*Quattrocchi v F.J. Sciame Constr. Corp.*, 11 NY3d 757, 758-759 [2008]).

The motion court properly disregarded the affidavit by defendants' mechanical engineer since the expert's opinion was speculative and unsupported by any evidence (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Even if the court should not have disregarded the affidavit by plaintiff's fellow employee, who claimed to have witnessed the

accident and stated that plaintiff had placed his head and upper body inside the chute, partial summary judgment was correctly granted to plaintiff, because defendants failed to raise an issue of fact whether plaintiff had an adequate safety device available (*see e.g. Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10 [2011]). If the debris chute had been functioning properly, it would not have become clogged, plaintiff would not have been sent to unclog it, and he would not have been injured. Since plaintiff's accident was caused, at least in part, by defendants' failure to provide an adequate safety device, plaintiff's alleged act of placing his head and upper body inside the chute could not have been the sole proximate cause of the accident (*see Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 548 [2010]).

Since we are affirming the grant of partial summary judgment to plaintiff on his Labor Law § 240(1) claim, we need not address his negligence and Labor Law § 241(6) claims (*see e.g. Auriemma*, 82 AD3d at 12). We note that the motion court granted defendants' cross motion for summary judgment dismissing the Labor Law § 200 claim.

Although plaintiff has not cross-appealed, we grant him summary judgment as to liability under Labor Law § 240(1) against the defendants other than Highbridge (*see Merritt Hill Vineyards*

v Windy Hgts. Vineyard, 61 NY2d 106, 110-111 [1984]). By its terms, Labor Law § 240(1) applies to "[a]ll contractors and owners." In their answer, defendant Knickerbocker Construction, LLC admitted that it was the general contractor, and defendant Atlantic Development Group, LLC admitted that it owned the building where plaintiff's accident took place. Defendant Kensington Heights Associates, L.P. admitted that it leased the land where the accident occurred from Highbridge (the owner of the land); the lease between Highbridge and Kensington and the deposition testimony of a Highbridge representative show that Kensington had the right and authority to control the work site and therefore may be held liable under Labor Law § 240(1) (*see Zaher v Shopwell, Inc.*, 18 AD3d 339, 339-340 [2005]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6580 The People of the State of New York, Ind. 7538/89
Respondent,

-against-

Johnathan Padworski, also known as
Gerald Davis,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Johnathan Padworski, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered August 3, 2009, convicting defendant of violation of probation, revoking his prior sentence of probation and resentencing him to a term of 1⅓ to 4 years, to be served consecutively to a term of 2 to 4 years imposed for another conviction (Ind. 2880/06), unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that the sentences run concurrently, and otherwise affirmed.

This Court had previously remitted this matter to the Supreme Court for a violation of probation hearing (63 AD2d 558

[2009]). The court conducted a hearing and correctly determined that defendant had violated probation. However, in light of all the circumstances of the case we find the sentence excessive to the extent indicated.

The arguments in defendant's pro se supplemental brief do not warrant any remedy other than the indicated reduction of sentence.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6581 Mauricio Salazar, Index 101725/05
Plaintiff-Appellant,

-against-

Fives 160th LLC, et al.,
Defendants-Respondents,

Hadia 99¢ or Less, etc., et al.,
Defendants.

_____

Stephen R. Krawitz, LLC, New York (Stephen R. Krawitz of counsel), for appellant.

Downing & Peck P.C., New York (John M. Downing Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about June 24, 2010, which granted the motion of defendants Fives 160th LLC and Beachlane Management for summary judgment dismissing the complaint and cross claims against them, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries sustained when he received an electric shock upon opening the front door of defendant 99¢ store. The store was operated by defendant Daska, pursuant to a lease with the owner, defendant Fives, which employed defendant Beachlane to manage the building.

The owner and managing agent made a prima facie showing of

entitlement to judgment as a matter of law by submitting the lease and deposition testimony. In response, plaintiff failed to raise a triable issue of fact. The record establishes, by the terms of the lease and the conduct of the parties, that the owner was an out-of-possession landlord; thus, it may not be liable to plaintiff in the absence of prior notice of the defect and responsibility for maintenance and repair (*see Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 231 [2002]). Here, there is no evidence that the owner and managing agent had actual or constructive notice of any dangerous or defective electrical condition at the premises. The owner's retention of the right to reenter the premises for repairs does not raise an issue of fact as to constructive notice, given the absence of evidence, or even an allegation, of "a significant structural or design defect that is contrary to a specific statutory safety provision" (*McDonald v Riverbay Corp.*, 308 AD2d 345, 346 [2003] [internal quotation marks omitted]).

The doctrine of res ipsa loquitur is inapplicable; the terms of the lease, which placed responsibility for maintenance of nonstructural conditions of the premises on the tenant, establish that the owner and managing agent did not have exclusive control of the electrical system at the premises (*see Pavon v Rudin*, 254

AD2d 143, 147 [1998]).

We reject plaintiff's claim that he is entitled to damages as a third-party beneficiary of the lease. The record establishes that plaintiff is, at most, an incidental beneficiary of the insurance provision in the lease (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336-337 [1983]; *Green v Fox Is. Park Autobody*, 255 AD2d 417, 418-419 [1998]). That plaintiff was a "business invitee" does not mandate a different result.

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

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6582-
6583 In re Lisa Marie Ann L.,

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

Melissa L.,
Respondent-Appellant,

Saint Dominic's Home,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Patricia W. Jellen, Eastchester, attorney for the child.

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Order, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about March 21, 2011, which denied respondent mother's motion to vacate an order of disposition, same court and Justice, entered on or about December 20, 2010, which, upon the mother's default at a combined fact-finding and dispositional hearing, terminated her parental rights to the subject child upon a finding of permanent neglect, 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.

Appeal from the aforesaid order of disposition, unanimously dismissed, without costs, as taken from a nonappealable paper.

The mother's motion to vacate her default was properly denied because she failed to demonstrate a reasonable excuse for her nonappearance at the hearing and a meritorious defense to the neglect petition (see *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428, 428-429 [2010], *lv dismissed* 15 NY3d 766 [2010]). The mother's claim that she had a fair notice hearing concerning her public assistance benefits that conflicted with the fact-finding and dispositional hearings fails to explain why she made no effort to schedule the fair notice hearing at a different time since she was aware of the date of the fact-finding hearing prior to the time the fair notice hearing was set.

The agency established that it exerted diligent efforts to reunite the mother with the child, including providing the mother with numerous referrals to drug treatment and other programs, mental health evaluations, and visitation. Despite these efforts, the mother failed to complete any portion of the service plan.

To the extent the mother appeals from the order of disposition, no appeal lies from an order entered on default (*see Matter of Anthony M.W.A. [Micah W.A.]*, 80 AD3d 476 [2011]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6584 Michele Kantor, Index 302479/09
Plaintiff-Respondent,

-against-

Met Transport Inc., et al.,
Defendants-Appellants,

Ark Taxi Inc., et al.,
Defendants.

_____

Law Offices of Nancy L. Isserlis, Long Island City (Lawrence R. Miles of counsel), for appellants.

Kramer & Dunleavey, LLP, New York (Denise M. Dunleavy of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered on or about June 9, 2011, which denied defendants-appellants' motion for summary judgment dismissing the complaint and all cross claims as asserted against them, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants-appellants met their initial burden of establishing their entitlement to judgment as a matter of law by presenting evidence that the taxicab owned and operated by them was legally parked at the time of the accident, and that the

moving vehicle's negligence in rear-ending the taxi in front of it was the sole proximate cause (*see Agramonte v City of New York*, 288 AD2d 75 [2001]). Assuming arguendo that plaintiff raised a triable issue of fact as to whether the cab was negligently stopped in violation of 34 RCNY 4-08(a)(3), plaintiff failed to raise a triable issue of fact as to whether this negligence proximately caused the accident (*see White v Diaz*, 49 AD3d 134 [2008]; *Gerrity v Muthana*, 28 AD3d 1063 [2006], *affd* 7 NY3d 834 [2006]). Therefore, the IAS court improperly denied defendants-appellants' motion for summary judgment.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6585 Nancy Singer, Index 106003/07
Plaintiff-Respondent,

-against-

Gae Limo Corp., et al.,
Defendants,

Xiu-Bi Chen,
Defendant-Appellant.

_____

Majorie E. Bornes, New York, for appellant.

Joelson & Rochkind, New York (Geofrey Liu of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered March 24, 2011, which, insofar as appealed from as limited by the briefs, denied defendant Xiu-Bi Chen's motion for summary judgment dismissing the complaint alleging serious injuries under the "permanent consequential limitation of use," "significant limitation of use," and 90/180-day categories of Insurance Law § 5102(d), unanimously affirmed, without costs.

On September 15, 2006, plaintiff allegedly sustained serious injuries when the livery cab in which she was a passenger collided with another livery cab. After she complained of persisting pain and discomfort emanating from the left buttock area and radiating down her left leg, plaintiff's treating

physician confirmed that she sustained left piriformis syndrome and left sacroiliac joint syndrome, based on diagnostic sacroiliac joint block and piriformis block injections. Plaintiff also alleges, inter alia, that she sustained acute thoracic and lumbar sprain/strain as a result of the accident, and that she was confined to bed and home, and was unable to work, as advised by her doctor, for about four months immediately after the accident.

We affirm the motion court's denial of summary judgment, although on partly different grounds. Contrary to the motion court's finding, the reports of defendant's medical experts were sufficient to meet defendant's prima facie burden of showing an absence of serious injury to plaintiff's cervical, thoracic and lumbar spine, left hand/wrist, left knee, and left foot/ankle. Defendant's neurologist and orthopedist set forth the tests they performed and recorded ranges of motion expressed in numerical degrees and the corresponding normal values. The objective tests they performed provided support for their conclusions that the ranges of motion were normal and that plaintiff suffered no permanent injury to those parts as a result of the accident (*see Spencer v Golden Eagle, Inc.*, 82 AD3d 589 [2011]; *Glover v Capres Contr. Corp.*, 61 AD3d 549 [2009]; *DeLeon v Ross*, 44 AD3d 545

[2007], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351 [2002]; *cf. Beazer v Webster*, 70 AD3d 587 [2010]). In addition, defendant's radiologist opined that the MRI of plaintiff's lumbar spine showed preexisting degenerative changes. In opposition, plaintiff did not submit any evidence to substantiate her claim of serious injury to those body parts, and therefore failed to raise an issue of fact as to those claims of serious injury.

However, in support of his motion, defendant failed to submit any medical evidence addressing plaintiff's claim of serious injury based on piriformis syndrome and left sacroiliac joint syndrome in her pelvis/left buttock. Further, since defendant's experts examined her more than three years after the accident and did not address those claimed injuries, and defendant submitted no other evidence concerning plaintiff's condition in the 180 days following the accident, defendant also failed to meet his burden on plaintiff's 90/180-day claim (*see e.g. Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [2011]; *Feaster v Boulabat*, 77 AD3d 440, 441 [2010]). Since defendant did not meet his prima facie burden as to those claims, the burden did not shift to plaintiff and it is unnecessary to consider the sufficiency of her evidence in opposition (*see Reyes v Diaz*, 82 AD3d 484 [2011]; *Shumway v Bungeroth*, 58 AD3d 431 [2009]). If

the trier of fact determines that plaintiff sustained a serious injury, it may award damages for all injuries causally related to the accident, even those that do not meet the threshold (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [2010]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6587-
6588 Jacqueline Myers-Skinner, Index 15138/05
Plaintiff, 18528/06

-against-

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

– – – – –

4201 Webster Corp.,
Third-Party-Plaintiff-Respondent,

-against-

ExxonMobil Oil Corporation,
Third-Party-Defendant-Appellant.

_____

McCusker, Anselmi, Rosen & Carvelli, P.C., New York (Alicyn B. Craig of counsel), for appellant.

Francis M. DeCaro, Bronx, for respondent.

_____

Orders, Supreme Court, Bronx County (Larry Schachner, J.), entered August 12, 2011 and April 1, 2011, which, to the extent appealed from as limited by the briefs, denied ExxonMobil's motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, the motion granted, and the third-party complaint dismissed. The Clerk is directed to enter judgment accordingly.

Under the terms of the applicable lease, lessee ExxonMobil

owed lessor 4201 Webster no duty to maintain the sidewalk where plaintiff fell (*cf. Collado v Cruz*, 81 AD3d 542 [2011]), and the record refutes 4201 Webster's argument that it was physically excluded from the property. The sidewalk where plaintiff fell was not under ExxonMobil's control. Any lease obligation to maintain it was not in effect insofar as the parties were still in the preliminary period.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6589 The People of the State of New York, Respondent, Ind. 3165N/08

-against-

Tommy Nettles, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered on or about July 27, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the 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: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6590-
6591 Altona Joseph, Index 27675/02
Plaintiff-Respondent,

-against-

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

_____

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

Greshin, Zeigler & Amicizia, P.C., Smithtown (Vincent M. Amicizia of counsel), for respondent.

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Order, Supreme Court, Bronx County (Faviola A. Soto, J.), entered October 20, 2010, which, to the extent appealable, denied defendant's motion for leave to renew its motion for, among other things, summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion for renewal granted, and upon renewal, the motion for summary judgment dismissing the complaint granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered July 20, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as academic.

Where the parties stipulated to a date for making a summary judgment motion and defendant inadvertently failed to append the "so ordered" version of the stipulation, the motion court improvidently exercised its discretion in finding the motion to be untimely. On the motion to renew, defendant provided a so-ordered version of a stipulation, offered a reasonable excuse for its failure to include the new evidence in the original motion (i.e., law office failure), and demonstrated the merit of its defense (*see* CPLR 2221[e]). In addition, there is no claim of prejudice by plaintiff (*see Scannell v Mt. Sinai Med. Ctr.*, 256 AD2d 214 [1998]). That the additional evidence was available at the time of the original motion is not dispositive (*see Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597, 598 [2010]; *Scannell*, 256 AD2d at 214). Here, the additional evidence addressed an issue raised by the court in the original decision (*Scannell*, 256 AD2d at 214). In such circumstances, it was error for the court not to consider the new evidence (*id.*).

Defendant's motion for summary judgment dismissing the complaint should have been granted. Defendant made a prima facie showing that plaintiff's injuries were not caused by defendant's alleged negligence (*see Salvador v New York Botanical Garden*, 71 AD3d 422, 423 [2010]). Indeed, defendant submitted plaintiff's

medical records indicating that her injuries existed before the subject incident. That the hospital records are unsworn is of no moment, given that plaintiff relied on the records in opposition to the motion (*cf. Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [2010]).

In response, plaintiff failed to raise an issue of fact. The affirmation of her gastroenterologist, who stated that plaintiff never complained of, or had, any back or neck problems before the incident, does not raise an issue of fact as to causation, particularly since the doctor does not specialize in back and neck injuries. The other medical records plaintiff submitted also do not raise an issue of fact as to causation, as none of the doctors opined as to the cause of any injury to plaintiff.

Even if plaintiff raised an issue of fact, her action is barred by the collateral estoppel effect of a medical

arbitrator's determination that her alleged injuries were not caused by the subject incident (*see Safchik v Board of Educ. of City of N.Y.*, 158 AD2d 277, 278 [1990]; *see also Pisano v New York City Bd. of Educ.*, 303 AD2d 735, 736 [2003]).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6592 W & W Glass Systems, Inc., Index 111707/09
Plaintiff-Respondent,

-against-

Admiral Insurance Company, et al.,
Defendants-Appellants.

_____

Litchfield Cavo LLP, New York (Joseph E. Boury of counsel) for appellants.

James J. Toomey, New York (Eric P. Tosca of counsel), for respondent.

_____

Order, Supreme Court, New York County (Martin Shulman, J.), entered September 14, 2010, which, to the extent appealed from, granted plaintiffs' motion for summary judgment declaring that defendant Admiral Insurance Company (Admiral) had a duty to defend plaintiff in the underlying action, awarding past defense costs, and referring the calculation of defense costs to a special referee, unanimously affirmed, with costs.

In this declaratory judgment action, plaintiff general contractor seeks a declaration that it was entitled to defense and indemnification from Admiral in connection with an underlying personal injury action in which an employee of defendant Metal Sales Company, Inc., a subcontractor hired by plaintiff, was injured. Metal Sales had a commercial general policy with

Admiral pursuant to which plaintiff was named as an additional insured. The policy provided that plaintiff was covered "only with respect to liability caused by [the subcontractor's] ongoing operations performed for that insured [i.e., plaintiff]." The policy further provided that it "does not apply to liability caused by the sole negligence of the person or organization [named as an addition insured]."

Contrary to defendants' argument that the "caused by" language in the policy is "narrower" than the "arising out of" language in *BP Air Conditioning Corp. v One Beacon Ins. Group* (8 NY3d 708 [2007]), the case relied on by the motion court, the phrase "caused by your ongoing operations performed for that insured," does not materially differ from the general phrase, "arising out of" (*see Regal Constr. Corp. v Natl. Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]; *see also QBE Ins. Corp. v Adjo Contr. Corp.*, 32 Misc 3d 1231 [2011]). The language in the additional insured endorsement granting coverage does not require a negligence trigger (*see Hunter Roberts Const. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 407-08 [2010]), and the record demonstrates that the loss involves an employee of Metal Sales, the named insured, who was injured while performing the named insured's work under the subcontract. It is immaterial that the

complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions (*BP Air Conditioning*, 8 NY3d at 714). The duty to defend is "exceedingly broad and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest . . . a reasonable possibility of coverage" (*id.* [internal quotation marks and citation omitted).

Defendants' argument that further discovery is warranted and that the motion is therefore premature, is unavailing. Defendants participated in lengthy discovery in the underlying action. Admiral had all of the relevant policies of insurance and had ample opportunity to gather evidence.

No proof was offered demonstrating that wrap-up coverage may have been in effect, and Admiral's bare affirmation raising speculative defenses is insufficient to defeat a prima facie showing of entitlement to summary judgment (*see* Gilbert *Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]). Defendants cannot

avoid summary judgment based on speculation that further discovery may uncover something.

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

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6593 Flavia Castillo, Index 111416/07
Plaintiff-Appellant,

-against-

Akdeniz Realty, LLC, et al.,
Defendants-Respondents.

_____

The Law Office of Yana Rubin, LLC, New York (Yana Rubin of counsel), for appellant.

Barry McTiernan & Moore, New York (David H. Schultz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about November 30, 2010, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing so much of the complaint as is premised upon violations of the New York City Building Code, unanimously affirmed, without costs.

Plaintiff seeks damages for injuries she sustained when she slipped and fell on the stairway outside the front door of defendants' premises. As a matter of law, Administrative Code of City of NY § 27-375 does not apply to these exterior stairs because the stairs were not "used as exits in lieu of interior stairs" pursuant to § 27-376 (*see Gaston v New York City Hous. Auth.*, 258 AD2d 220 [1999]). "Exit" is defined as "[a] means of egress from the interior of a building to an open exterior space"

(Administrative Code § 27-232). This stairway "was outside the parameters of the building [and] did not provide a means of egress from the interior of the building to an open exterior space" (*Gaston*, 258 AD2d at 224).

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

ENTERED: JANUARY 19, 2012

CLERK

Andrias, J.P., Sweeny, Moskowitz, Renwick, Freedman, JJ.

6594N Gurumurthy Kalyanaram, Index 115829/09
Petitioner-Appellant,

-against-

New York Institute of Technology,
Respondent-Respondent.

_____

Gallet Dreyer & Berkey, LLP, New York (David T. Azrin of counsel), for appellant.

Fulbright & Jaworski L.L.P., New York (Douglas P. Catalano of counsel), for respondent.

_____

Appeal from order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered June 3, 2011 and reentered July 8, 2011, which, after the court had declined to sign petitioner's order to show cause, denied the motion and ordered that judgment be entered against petitioner, unanimously dismissed, without costs, as taken from a nonappealable paper.

There is no right of appeal from an order that does not determine a motion on notice (CPLR 5701[a][2]; *see Sholes v Meagher*, 100 NY2d 333 [2003]), including an order declining to sign an order to show cause (*see Naval v American Arbitration Assn*, 83 AD3d 423 [2011]) and a judgment entered upon such an order (*see Hladun-Goldmann v Rentsch Assoc.*, 8 AD3d 73 [2004]). In light of the evident lack of merit to the appeal, we decline

to grant leave to appeal.

Petitioner's assertion that disputes as to performance of the remedy provisions of the arbitration award should be determined by the arbitrator is without merit. Since a final arbitration award has been rendered finally resolving the dispute between the parties, and the award has been judicially confirmed (79 AD3d 418 [2010], *lv denied* 17 NY3d 712 [2011]), a judgment enforceable by the courts has been entered (*see* CPLR 7514), and the arbitrator is *functus officio*, without power to amend or modify the final award (*see Matter of Hanover Ins. Co. v American Intl. Underwriters Ins. Co.*, 266 AD2d 545 [1999]). In any event, petitioner failed to identify any provision of the final award that was violated by respondent.

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

ENTERED: JANUARY 19, 2012

CLERK

Tom, J.P., Saxe, Catterson, Moskowitz, Manzanet-Daniels, JJ.

5120 Rose Group Park Avenue LLC, et al., Index 117190/09
Petitioners-Plaintiffs-Respondents,

-against-

The New York State Liquor Authority,
Respondent-Defendant-Appellant.
- - - - - -
The Preservation Coalition, et al.,
Intervenors-Respondents-
Defendants-Appellants.

_____

Eric T. Schneiderman, Attorney General, New York (Monica Wagner of counsel), for New York State Liquor Authority, appellant.

Kurzman Karelsen & Frank, LLP, New York (Charles Palella of counsel), for Preservation Coalition and George Davis, intervenors-appellants.

Davis Wright Tremaine LLP, New York (Victor A. Kovner of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 19, 2010, reversed, on the law and the facts, without costs, the determination of the State Liquor Authority reinstated, and the proceeding dismissed.

Opinion by Catterson, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
James M. Catterson
Karla Moskowitz
Sallie Manzanet-Daniels, JJ.

5120
Index 117190/09

_____x

Rose Group Park Avenue LLC, et al.,
Petitioners-Plaintiffs-Respondents,

-against-

The New York State Liquor Authority,
Respondent-Defendant-Appellant.

- - - - -

The Preservation Coalition, et al.,
Intervenors-Respondents-
Defendants-Appellants.

_____x

Respondent-defendant and intervenors-respondents appeal from a judgment of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 19, 2010, granting petitioners-plaintiffs' motion to the extent of vacating the determination of respondent-defendant, The New York State Liquor Authority, issued on or about December 2, 2009, which denied petitioner-plaintiff Rose Group Park Avenue LLC's application for an Alcoholic Beverage Control Retail License, and directing the Authority to issue the license, and denying that portion of intervenors-respondents' motion seeking to deny the petition and complaint and dismiss this hybrid CPLR article 78 and 42 USC § 1983 proceeding.

Eric T. Schneiderman, Attorney General, New York (Monica Wagner and Richard Dearing of counsel), for New York State Liquor Authority, appellant.

Kurzman Karelsen & Frank, LLP, New York (Charles Palella, Phyllis H. Weisberg and Marissa Winter of counsel), for Preservation Coalition and George Davis, intervenors-appellants.

Davis Wright Tremaine LLP, New York (Victor A. Kovner, Lacy H. Koonce, III and Monica Pa of counsel), for respondents.

CATTERSON, J.

In this article 78 proceeding, petitioner Rose Group Park Avenue, a special events catering company, challenges respondent State Liquor Authority's denial of its application for a liquor license for regularly scheduled events in a church located in midtown Manhattan. We find that Rose Group's catering facility in the Third Church of Christ Scientist at Park Avenue and 63rd Street fails to meet the statutory requirements governing the "church venue" exception of the Alcoholic Beverage Control Law (hereinafter referred to as the "ABC Law"). For the reasons set forth below, we find, therefore, that SLA's denial of the catering license was not arbitrary and capricious.

The undisputed salient facts are as follows: In January 2006, the Church, facing major budget deficits, entered into an agreement with tenant Rose Group, a commercial caterer, for a 20-year lease on the premises with two five-year renewal options. The lease provides for an annual rent of $250,000 in the first year escalating to $519,732.00 in the last year. Additionally, the Church receives 10% of gross sales of Rose Group's business where gross sales exceed the annual rent. Under the terms of the triple net lease, Rose Group also pays the property taxes and charges for utilities and services.

The lease further provides that Rose Group as tenant "shall use and occupy the [p]remises solely as a high end, first class catering facility and for banquets, special events and meetings, all of which may include the preparation and service of food and alcoholic and non-alcoholic beverages."

The church is located 60 feet from another church, the Central Presbyterian Church. This brings it within the ambit of the ABC Law's 200-foot rule which prohibits the issuance of a permanent liquor license for any premises located within 200 feet of a building occupied exclusively as a school or place of worship. See ABC Law 64(7)(a).

However, a 1970 amendment to the law created an exception known as the church venue exception which states in relevant part that the 200-foot rule should not be deemed "to restrict the issuance ... of a caterer's license to a person *using the permanent catering facilities of a church* [...] or other place of worship pursuant to a written agreement between such person and the authorities in charge of such facilities." ABC Law 64 (7)(c)(emphasis added).[1] Pursuant to the terms of the lease,

[1]The generally accepted wisdom, gleaned from contemporaneous memoranda, correspondence and the Bill Jacket, as to the initial impetus for passing such exception holds that it was a way to accommodate church functions like weddings, or christenings where liquor could be served.

Rose Group applied for a caterer's license, also known as a liquor license.

Rose Group's first application in 2006 disclosed that its location of operations was Third Church and moreover that it was located 200 feet from Central Presbyterian. The SLA conditionally approved the application, but withdrew the approval in October 2007 after the Department of Buildings withdrew an occupancy permit for the premises. Rose Group reapplied for a catering license in May 2009. A neighborhood group, the Preservation Coalition (hereinafter referred to as the "Coalition") opposed the application and a hearing was held by the SLA. At the hearing, Rose Group argued that it was exempt because its catering facilities constitute the permanent catering facilities of the Third Church.

The SLA denied its application on the grounds, inter alia, that "Rose Group is not using the permanent catering facility of a church .... Rather, the Rose Group has transformed the premises from a church into an extravagant commercial catering business in a building it leases from a church." SLA concluded that "based on the dramatic changes to the building done at Rose Group's expense ... combined with the large number and types of functions taking place inside the building, this building has lost its primary use as a place of worship."

In December 2009, Rose Group commenced an article 78 proceeding in Supreme Court challenging the SLA's determination as arbitrary and capricious. The Coalition moved, without objection, to intervene. The SLA and the Coalition asserted that the premises had not maintained the predominant character of a house of worship, but had been converted to a de facto catering establishment, thus failing to fall within the church venue exception.

In April 2010, Supreme Court reversed and vacated SLA's determination, granted the petition and ordered the SLA to issue the catering license. Supreme Court observed that SLA's determination requiring a nexus between the catered functions and the place of worship is not supported by either "[l]egislative history or by [the law's] plain meaning." The court also found that the provision permits use by Rose Group even though there is no nexus between the events and the church because "use of the building by non-congregant members of the community for private social function" (ABC Law 64(7)(d-1)) does not detract from its predominant character as a place of worship. The court additionally found that 583 Park Avenue had not ceased to be exclusively occupied as a place of worship because "it appears that the Church uses the [p]remises many more hours per week for church-related activities than for unrelated catering events."

The court misread the statutory scheme. Its analysis focused on a vague and imprecise calculation of usage hours rather than on the clear statutory requirements that catering events must be "incidental uses that are not of a nature to detract from the predominant character of the building as a place of worship." The court also ignored the principle that statutory interpretation by SLA is entitled to deference unless the interpretation is "irrational or unreasonable." Matter of Fineway Supermarkets v. State Liq. Auth., 48 N.Y.2d 464, 468, 423 N.Y.S.2d 649, 651, 399 N.E.2d 536, 538 (1979).

It is undisputed that the Central Presbyterian Church – located 60 feet from the subject Church - has the predominant character of a church thus implicating the 200-foot rule. This prohibits Rose Group from obtaining a catering license unless it can show that under the church venue exception, it is using the "permanent catering facilities of a church." See ABC Law 64 (7)(c). The SLA correctly determined that the catering facilities at 583 Park Avenue are neither permanent nor do they belong to the church as required by the statute.

As a threshold matter, it is not necessary to look beyond the plain language of the statute. Indeed, Rose Group concedes that point, arguing that "[w]here a statute is unambiguous, a court or agency should not reach beyond its plain language to

find some unexpressed alternative meaning." See also Sega v. State of New York 60 N.Y.2d 183, 190-191, 469 N.Y.S.2d 51, 55, 456 N.E.2d 1174, 1178 (1983) ("a statute is to be construed according to the ordinary meaning of its words"). Unfortunately, Rose Group does not adhere to this principle, but thereupon segues into an argument that "permanent catering facilities *of* a church" means "catering facilities permanently *installed in* a church *building*" (emphasis added). This, of course, is nothing more than a highly transparent attempt to find an unexpressed alternative meaning which more closely suits its purpose. Clearly, had the Legislature wanted to specify "*in a church building*," it could have easily done so.

Rose Group's attempt to change the wording from "of" to "in" indicates that it understands the distinct and material difference between the two words: "Of" connotes a possessory or ownership interest, and generally establishes a relationship between the object owned and the entity owning it; "in," on the other hand, simply describes the situate or location of an object. Moreover, as SLA correctly asserts, "church" cannot refer simply to the building because that construction would exclude a church's catering facilities in, for example, a church hall, which the exception was expressly intended to include. See ABC Law 64 (7)(c). To construe the word "church" merely as a

building rather than the religious organization or body that worships in the building would essentially reference only a style of architecture.

Thus, we find that "of a church" requires a showing that the catering facilities belong to the religious organization, that is they were created and installed for it, or, at the very least, are used by church members. The catering facilities at issue include a banquet hall/ballroom, a balcony overlooking the banquet hall/ballroom, a cocktail reception area, a full commercial banquet and prep kitchen, upgraded restrooms, a VIP/bridal suite, a wine cellar/storage area, and upgraded wiring, lighting and acoustics.

It is undisputed that Rose Group has spent millions of dollars installing catering facilities throughout the Church. It is also undisputed that the Church did not own any catering facilities until Rose Group installed them. There was no kitchen on the premises, much less a full commercial kitchen like the one installed by Rose Group. There was no banquet hall or ballroom until Rose Group created a public event space with carpeting, lighting, acoustics and the requisite decor and dance floor. There was no VIP/bridal suite.

However, none of these catering facilities were installed for the Church's use. The public event space/auditorium is used

as ballroom or banquet hall only by Rose Group; otherwise it is set up for Church use as a sanctuary. The lease makes it clear that Rose Group's renovation and upgrading work which includes the installation of kitchen equipment and of the VIP suite was "to accommodate [Rose Group's] catering business."

Notwithstanding Rose Group's declarations that the Church owns the facilities "now and in perpetuity," there is no provision in the lease that reflects current or future Church ownership of the catering facilities. Indeed, the lease, to the contrary, states that upon expiration or termination of the lease, Rose Group "shall remove all of its property."

Equally significant is that the lease does not even permit the Church to use the catering facilities. There is no provision in the lease that contemplates the Church setting up its own tables and chairs in the banquet hall, or using the kitchen equipment or kitchen area. Notwithstanding the affidavit of Jacqueline Draper, the Church's Chairman of the Board of Trustees, in which she stated that the Church "expect[s] to use the kitchen to prepare food for various Church events" there is no provision in the lease that would allow such use. On the contrary, in the second amendment to the lease, executed in September 2006, paragraph two specifically provides that Rose Group will cater 20 Church functions at cost; and over and above

that number will cater Church functions at a ten percent discount off Rose Group's standard fees.

Nor, under the terms of the lease, does the Church retain any option to contract with another entity to cater a church function. For example, if the Church perceived the cost of Rose Group's catering to be too high, even at cost, it does not have the option of entering into an agreement with any other caterer which it could do if the facilities indeed belonged to, or were "of the Church."

Nor are the catering facilities "permanent" as required by the church venue exception. The most visible component of the facilities, the banquet hall/ballroom, the arcade and the balcony become a sanctuary when used by the Church. It is true that the church pews have been removed from this area. However, following any Rose Group event, tables and chairs and setting stations must be removed and stored. Plastic folding chairs are then arranged for use by the congregation. Thus, what is now described as an auditorium is sometimes the ballroom or banquet hall, and sometimes the sanctuary. The SLA, therefore, rationally determined that "[t]his constant rotation of the building's setup from church to banquet hall renders nothing permanent about this facility."

Equally without merit is Rose Group's contention that there

is no requirement of a nexus between a catered event and the Church. The court below focused on the Legislature's apparent rejection of the SLA's objection at the time of passage of the legislation. That objection stated, in relevant part, that

> "[t]he bill does not require the caterer, when licensed, to confine his catering operation to affairs sponsored by the school, or house of worship nor to affairs related to their activities. Once licensed by the Authority, the law permits him to lawfully conduct his business in a manner most profitable to him and he may, if he chooses, cater affairs entirely unrelated to the activities of schools or houses of worship."

Consequently, the court interpreted the church venue exception as permitting a catered event that is unrelated to the activities of a church. In turn, Rose Group states baldly: "So long as a catering facility is housed in a church building and there is a written agreement between a caterer and church authorities, the [c]hurch-[v]enue [e]xception applies."

This interpretation, of course, would render impossible any attempt to harmonize sub-sections of the same article of ABC Law. Instead, it would allow the incongruous result that while any commercial enterprise within a 200-foot radius of the Church would be refused a liquor license, the Church itself could rent out its space to that same commercial enterprise which could serve liquor to guests under the church venue exception.

In any event, it is no longer necessary to guess at the Legislature's intent as to the church venue exception. That intent was made clear enough with the passage of a 2007 amendment to the ABC Law. See §64(7)(d-1). The amendment codifies a holding of the Court of Appeals which held that certain activities can take place in a church without the building losing its predominant character as a place of worship, and thus without losing the protection of the 200-foot rule. Matter of Fayez Rest. v. State Liq. Auth., 66 N.Y.2d 978, 499 N.Y.S.2d 375, 489 N.E.2d 1277 (1985).

The amendment, in relevant part, states that a church "does not cease to be 'exclusively' occupied" as a church because of "incidental uses that are not of a nature to detract from the predominant character of the building as a place of worship." See ABC Law 64 (7)(d-1). It is generally accepted that the exclusivity language applies also to the church venue exception. Although Rose Group appears to disagree with this assertion, it would simply make no sense that a building, rendered ineligible for protection under the 200-foot rule because it has engaged in activities that detract from its predominant character as a place of worship, would nevertheless remain eligible for the benefits of the church venue exception.

The amendment, in any event, is relied on both by the court

below, and on appeal by Rose Group in support of its argument that a nexus is not required between a catered event and the place of worship. Rose Group points to the amendment's lengthy, though not exclusive, list of the types of events that may be considered valid "incidental uses." Specifically, it points to the last enumerated use, that is, "use ... by non-congregants of the community for private social functions." However, to rest the argument on one enumerated use is to ignore the statutory requirement contained in the sentence preceding the list which is that the use must be "incidental" and that "incidental use" may not "detract from the predominant character of the building as a place of worship." ABC Law 64(7)(d-1).

The plain meaning of this statutory requirement is that any single incidental use whether it be "legally authorized games of bingo" or use "by non-congregant members of the community for private social functions" may not render the building unrecognizable as a place of worship either before, during or after the event. Even were we to agree that the last enumerated use be given the widest and most lax interpretation, as Rose Group urges ("community" refers to the New York community of executives, lawyers and fashonistas), the documentary evidence establishes that the events staged by Rose Group are neither "incidental use" of the premises, nor of such nature that they do

not detract from the predominant character of the building as a place of worship.

The record contains calendars of the events scheduled by Rose Group between September 2007 and December 2009. In terms of volume, they numbered 38 in the last four months of 2007, 53 in 2008 (an average of more than four per month) and 67 in 2009 (more than five a month). They included fully-catered corporate functions for Wall Street executives, banks, law firms, publishing companies, and fashion houses with the latter involving the staging of runway shows. The best view of such catered events is to be found by "Googling" 583 Park Avenue, the address of the Church. The first website on the list is "583parkave.com." It contains almost 100 photographs from a variety of elegant "black-tie" events on the premises. They show the lobby, a cocktail reception area, the banquet hall with dance floor, tables with immaculate white linen tablecloths set with silverware, crystal stemware and exotic centerpieces, and setting stations decorated with elaborate ice sculptures. The written descriptions refer to the premises as "the most exciting event space" or "one of Manhattan's most distinctive private event spaces." There is a reference to "grandly elegant proportions

designed by architects Delano and Aldrich."[2] The descriptions also include references to the ballroom and the arcade reception space (shown in the record as floor plans), to a 2,500-pound crystal chandelier (seen in many of the photos), to vaulted ceilings, herringbone cork floors, concert hall quality acoustics and a "state of the art kitchen operated by a family with generations of experience in providing the highest quality food and service."

Nothing suggests that the "space" doubles as a Church. None of the photos conveys any suggestion that the building has been used, or is still used as a place of worship. It could not be said of a single scheduled event that it does not detract from the predominant character of the building as a place of worship.

This alone would be sufficient to find that Rose Group's uses of the premises fail to comply with the statutory requirement, but additionally this Cinderella-style transformation does not end at the stroke of midnight; even when the catered event is over, the building's predominant character does not revert to that of a place of worship as it was prior to

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[2]William Adams Delano and Chester Holmes Aldrich formed one of the most successful architectural firms of the early 20th century. In New York, the firm rivaled that of the legendary McKim, Mead & White. In my view, Delano and Aldrich are spinning in their respective graves over the conversion of their soaring house of worship masterpiece into a pedestrian catering facility.

the execution of the lease with Rose Group.

Pursuant to the lease, Rose Group removed all the church pews for the duration of the 20-year lease and for the periods of renewal. Following each event, Rose Group is required only to set up plastic folding chairs for the congregants. Hence, depending on the time of day, there may either be plastic folding chairs set up for the congregation in the sanctuary/ballroom, or Rose Group employees may be setting up tables and chairs for a catered event later in the evening. Rose Group, under the terms of the lease, has been permitted to install curtains to conceal the church's organ pipes. It is also permitted to conceal any religious messages inside the sanctuary. Moreover, a visitor wandering into the church would be greeted not by a church custodian, but by a doorman hired by the Rose Group. On the lower level, Rose Group's kitchen staff works on the preparation of food and beverages for hours prior to the scheduled event.

On the exterior of the building, the lease has permitted Rose Group to "install a sign above the center doorway of the center front of the [b]uilding identifying it as '583 Park Avenue'" where previously signs and lettering on the front pillars and over the main door identified the building as the Third Church of Christ Scientist. It should be noted here that the Court of Appeals in Fayez Rest. specifically held that a

neighborhood church qualified as "exclusively occupied" because, inter alia, "[o]utside the building is a sign stating it is the home of New York Christian Outreach." Fayez Rest., 66 N.Y.2d at 979, 499 N.Y.S.2d at 375.

The lease further allows Rose Group to "remove or cover ... the existing signs on the building facade and replace or cover them with blank ("faux") windows" and to "install ... a blank piece of limestone or limestone veneer over the engraved lettering over the front pillars." Although Rose Group is obligated to install two electronic signs on the corners of the building, one on 63rd Street, which will indicate the existence of a Sunday school and church, those signs, controlled from an office on the premises will be switched off "when [Rose Group] is using the [p]remises for a third-party function or [even] marketing the premises."

Hence, whether the building is being used incidentally for a catered event or not, its character can no longer be described as predominantly that of a place of worship. On the contrary, the provisions of the lease have permitted the building to be so altered that little remains as evidence of its use as a place of worship.

The contention that square footage used by the Church establishes a predominant use as a place of worship is without

merit. In this case, the square footage used exclusively by the Church encompasses a 4th floor area reserved for Church offices and classes, and a corner of the basement, now reserved for Sunday school and a nursery. Nor can an analysis based on usage hours by the Church establish predominant character or use. In Fayez Rest., the Court included "daily worship" as a factor in determining exclusivity of occupation. Fayez Rest., 66 N.Y.2d at 979, 499 N.Y.S.2d at 375. In this case, however, there is no *daily* worship, only twice-weekly services with two extra services on Christmas Eve and Thanksgiving. Also, any finding of predominant use based on hours would have to take into account the hours spent by Rose Group preparing for a catered event on the premises, not just the hours of the event itself. Work on the premises by Rose Group clearly involves setup and breakdown of the banquet hall and cocktail area. It includes the arrangement of tables and chairs, setting stations and decorations such as centerpieces/flowers for each table, not to mention the setting of silverware and stemware. Rose Group's use of the premises also involves the preparation of food, at times for up to 1,000 guests, and the subsequent cleanup of the banquet hall and kitchen.

Finally, Rose Group's catered events cannot be characterized as "incidental uses" where the generally accepted meaning of

incidental is subordinate or nonessential. On the contrary, under the triple net lease, Rose Group events are essential because the material terms of the lease require Rose Group to pay rent and make additional payments based on gross revenues from its use of the building "as a first-class catering facility."

Far from being a subordinate use of Church property, Rose Group events take priority over Church events. It is simply an error for the court below to find a predominant Church use on the grounds that Rose Group events are scheduled "when they do not conflict with the Church's own activities." That observation ignores the fact that church activities are strictly limited by the lease. The Church's use is limited to specific designated times: Sunday mornings; Wednesday evenings; Christmas Eve, Thanksgiving. Church association meetings are "not to exceed four in any calendar year" and must be held on the specific dates referenced in the lease unless the Church gives Rose Group "not less than *one (1) year's prior written notice* of any such change in date" (emphasis added). In the event the Church may want to schedule an additional service, meeting or church activity, the Church is required to consult with Rose Group in order "to schedule such meetings (i) in a manner *which causes no disruption* to [Rose group's] scheduled events in the [p]remises and (ii) at *such times as do not conflict with [Rose Group's] reasonably*

anticipated use of the [p]remises" (emphasis added).

Indeed, Rose Group's statement in an initial private offering memorandum hews most closely to the reality that the company has entered into a lease with the church "which *permits* the current congregation to use the [f]acility [s]pace on a limited basis at times when *the [c]ompany is not using* the [f]acility [s]pace" (emphasis added). Thus, the Church's use is subordinate to Rose Group's use according to the plain language of the lease which reflects simply that Rose Group has established a catering business in a building it has leased from the Church.

Accordingly, the judgment of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered April 19, 2010, granting petitioners-plaintiffs' motion to the extent of reversing and vacating the determination of respondent-defendant the State Liquor Authority, issued on or about December 2, 2009, which denied petitioner-plaintiff's Rose Group Park Avenue LLC's application for an Alcoholic Beverage Control Retail License, and directing the Authority to issue the license, and denying that portion of intervenors-respondents' motion seeking to deny the

petition and complaint and dismiss this hybrid CPLR article 78 and 42 USC § 1983 proceeding, should be reversed, on the law and the facts, without costs, the determination of the State Liquor Authority reinstated, and the proceeding dismissed.

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

ENTERED: JANUARY 19, 2012

CLERK