SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 10, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12062 In re Zenk Pedicab Rental & Operation, Inc., et al., Petitioners-Respondents,

-against-

New York City Department of Consumer Affairs, Respondent-Appellant.

Index 103519/12

_____

Michael A. Cardozo, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for appellant.

Brennan Law Group, New York (Moira C. Brennan of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered April 15, 2013, annulling respondent's determination, dated April 11, 2012, which denied petitioner's application to renew his pedicab business license, and remanding the matter, brought pursuant to CPLR article 78, for further proceedings, unanimously reversed, on the law, without costs, the judgment vacated and, the petition denied.

Supreme Court incorrectly concluded that respondent's denial

of petitioner's license renewal application on the ground that his mother-in-law, who owned a similar pedicab business, was his "family member" within the meaning of the governing statute was without a reasonable basis in the law and, therefore, arbitrary and capricious (*see Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]). The statute defines family member as "a member of the immediate family, including, but not limited to, a spouse, domestic partner, sibling, child, grandchild, parent or grandparent" (Administrative Code of City of NY § 20-249[a]). Since the "including but not limited to" language grants respondent New York City Department of Consumer Affairs, the agency administering the statute, some discretion in deciding whether it applies, the reviewing court's function is limited to whether the agency's construction "has warrant in the record and a reasonable basis in law" (*see Howard,* 28 NY2d at 438 [internal quotations omitted]). The agency's determination that a mother-in-law is sufficiently comparable to a parent (i.e., mother), to qualify as an immediate family member for purposes of the statute is supported by the record and has a reasonable basis in law (*see Uhlfelder v Weinshall*, 47 AD3d 169, 177 [1st Dept 2007]). Based on the foregoing standard of review, the agency's construction of the term 'family member' as including mothers-in-law was neither

irrational nor unreasonable and should have been upheld on that basis (*see Howard*, 28 NY2d at 438).

In view of our decision, we do not reach respondent's remaining argument.

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12186 The People of the State of New York, Ind. 3075/80
Respondent,

-against-

David Price,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Benjamin Altman, J.), rendered April 22, 1981, as amended February 25 and March 12, 2010, convicting defendant, after a jury trial, of robbery in the first degree, rape in the first degree and sodomy in the first degree, and sentencing him to an aggregate term of 6 to 18 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its evaluation of the victim's history of prostitution and any alleged inconsistencies in her testimony.

We perceive no basis for reducing the sentence. Where defendant absconded during trial and was returned to court involuntarily over 30 years later, neither his age nor the fact that the crimes occurred many years ago warrant further leniency.

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12187 In re Elba Henriquez, Index 112360/11
Petitioner-Appellant,

-against-

Raymond Kelly, etc., et al.,
Respondents-Respondents.

_____

Jeffrey L. Goldberg, Port Washington, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Donna M. Mills, J.), entered May 30, 2012, denying the petition to annul respondents' determination, dated July 11, 2011, which denied petitioner's application for accident disability retirement benefits, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Credible evidence supported the decision to deny accident disability retirement benefits as petitioner failed to demonstrate that the 2005 incident giving rise to the instant proceeding caused her current back disability (*see e.g. Matter of Canfora v Board of Trustees of Police Pension Fund of Police Dept. of City of N.Y., Art. II*, 60 NY2d 347, 352 [1983]). Nor did she establish and that such incident, where she tripped over

a raised screw in the floor and fell during roll call, was an accident within the meaning of Administrative Code of City of NY § 13-252 (*see Matter of Hopp v Kelly*, 4 AD3d 176 [1st Dept 2004]; *Matter of Nicholas v Safir*, 297 AD2d 220 [1st Dept 2002], *lv denied* 99 NY2d 503 [2002]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12188 Eden Roc, LLLP, Index 651027/12
Plaintiff-Appellant,

-against-

Marriott International, Inc., et al.,
Defendants-Respondents.

_____

Pryor Cashman LLP, New York (Todd E. Soloway of counsel), for appellant.

Venable LLP, New York (David N. Cinotti of counsel), for respondents.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 24, 2013, which, to the extent appealed from, granted the portion of defendants' motion to dismiss the complaint seeking dismissal of the twelfth cause of action for trespass, unanimously affirmed, without costs.

Plaintiff-hotel owner's cause of action for trespass was properly dismissed since it is not based on any tort obligation that was "apart from and independent of" defendants hotel managers' obligation under the management agreement to peacefully vacate and surrender the hotel by the effective date of termination of the agreement (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]; *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]). The trespass claim is also

duplicative of the breach of contract claims since it is founded on the same allegations that form the basis of the claims for breach of contract (*see Wildenstein v 5H & Co.*, 97 AD3d 488, 492 [1st Dept 2012]).

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: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12189 The People of the State of New York, Ind. 5854/11
Respondent,

-against-

Raymond Rodriguez,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered February 7, 2012, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Since defendant was sentenced to a term of incarceration of longer than 60 days (*see* Penal Law § 60.35[8]), he was required to seek relief from his mandatory surcharge payments by way of a Criminal Procedure Law 420.10(5) motion for resentencing. Defendant's claims that he was entitled to a financial hardship hearing pursuant to Criminal Procedure Law 420.40, and that the hearing should have been held at the time of his sentencing, are not supported by the applicable statutes. Rather, any application for relief from his surcharges is to be entertained

in postsentence proceedings (*see People v Bradley*, 249 AD2d 103 [1st Dept 1998], *lv denied* 92 NY2d 923 [1998]; *People v Wheeler*, 244 AD2d 277 [1st Dept 1997]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12193 Riverbay Corporation, Index 301509/13
Plaintiff-Respondent,

-against-

Thyssenkrupp Northern Elevator Corporation, et al.,
Defendants-Appellants,

Ver-Tech Elevator Co., Inc.,
Defendant.

_____

Babchik & Young, LLP, White Plains (Bruce M. Young of counsel), for appellants.

Smith, Buss & Jacobs, LLP, Yonkers (Jennifer L. Stewart of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered August 13, 2013, which, to the extent appealed from, denied defendants-appellants' motion to dismiss the complaint against them, unanimously modified, on the law, to grant the motion as to plaintiff's breach of implied warranty, fraud, and breach of good faith causes of action, and otherwise affirmed, without costs.

The court properly declined to dismiss the breach of express warranty cause of action. Plaintiff sufficiently alleged compliance with a condition precedent to bringing an action under the warranty by asserting that it had retained qualified

contractors to provide elevator maintenance services. In addition, assuming the truth of plaintiff's allegations, as we must on a motion to dismiss, defendants' failure to properly service the machines may have "frustrated or prevented the occurrence of the condition" (*ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484, 490 [2006] [internal quotation marks omitted]).

The court properly denied as premature defendants-appellants' motion to dismiss plaintiff's request for an injunction (*Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 87 [1st Dept 2013]). Equitable relief may be appropriate where, as alleged here, there is "difficulty and uncertainty in calculating" the damages that plaintiff would suffer from defendants' breach of the maintenance agreement (*Pfizer Inc. v PCS Health Sys.*, 234 AD2d 18, 19 [1st Dept 1996]).

Plaintiff's fraud cause of action failed to allege specific facts with respect to the time, place, or manner in which defendants-appellants made the purported misrepresentations (*see* CPLR 3016[b]). Plaintiff also failed to allege that the purportedly false representations were made by defendants-appellants with the intent to deceive or to induce plaintiff's

reliance (*see Barbarito v Zahavi*, 107 AD3d 416, 419 [1st Dept 2013]). In any case, the fraud claim, which is premised on the allegation that defendants misrepresented that the subject elevators were suitable for their intended purpose and were the equivalent of the machines specified in the parties' April 2001 elevator modernization contract, is time-barred by the applicable statute of limitations (CPLR 213[8]). Even accepting the truth of plaintiff's allegation that it could not have discovered defendants-appellants' alleged fraud prior to December 31, 2009, because they or their subsidiary controlled the service and maintenance of the subject elevators, plaintiff fails to allege any facts to explain why it could not, with reasonable diligence, have discovered the alleged fraud at any point after December 31, 2009, when defendant Ver-Tech took over the maintenance and service of the elevators (*see Lim v Kolk*, 111 AD3d 518, 519 [1st Dept 2013]). Equitable estoppel is not appropriate here to toll the limitations period, because plaintiff has failed to allege any actions taken by defendants after December 31, 2009 to prevent plaintiff from timely commencing this action (*see Putter v North Shore Univ. Hosp.*, 7 NY3d 548, 552-553 [2006]).

Plaintiff's second cause of action, claiming that defendants-appellants breached an implied warranty that the

elevators they sold and delivered to plaintiff between April 2001 and August 2005 were fit for the specific purpose for which they were purchased, is barred by the applicable four-year statute of limitations (*see* UCC 2-725[1]). Plaintiff's breach of good faith cause of action is duplicative of the breach of warranty claim, because both claims arise from the same facts (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12194 In re Hugh F. Bovich, Jr., Index 114254/11
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

Thomas C. Monaghan, Broad Channel, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Benjamin Welikson of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered April 28, 2012, as amended by order, same court and Justice, entered June 21, 2012, denying the petition to annul respondents' determination, dated August 26, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondents for further proceedings consistent with this decision.

Respondents' determination violated lawful procedure and lacked a rational basis. Respondents arbitrarily concluded that petitioner's prior federal conviction for theft of funds bore a

direct relationship to the duties and responsibilities attendant to a stationary engineer, the license for which he sought renewal after having his license renewed 25 consecutive times (*see* Correction Law §§ 750[3], 752[2]; *Matter of Dellaporte v New York City Dept. of Bldgs.*, 106 AD3d 446 [1st Dept 2013], *affd* — NY3d —, 2014 NY Slip Op 01211 [2014]). Petitioner's prior conviction resulted from the misuse of his administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Those actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license. Accordingly, the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses does not apply (*see* Correction Law § 752[1]).

The second exception is also inapplicable, as respondents could not have rationally found petitioner to pose an unreasonable risk to property or to public safety or welfare (*see* § 752[2]). There was no evidence that petitioner had submitted false documents relating to his stationary engineer responsibilities. In addition, he disclosed his 2005 conviction, based on acts occurring in 2003 through 2005, on prior license renewal applications in 2009 and 2010, both of which were

granted. It is also undisputed that he has been employed as a stationary engineer without incident since 2006, and he submitted performance evaluations and letters of reference from his current employer and several other members of the community, verifying his character, fitness, and qualifications for the license and the position. By contrast, respondents offered "only speculative inferences unsupported by the record" (*Matter of Marra v City of White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12196 The People of the State of New York, Ind. 2703/07
Respondent,

-against-

Karim McLaughlin, etc.,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Michael Gross, J.), rendered on or about May 24, 2013,

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

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

ENTERED: APRIL 10, 2014

CLERK

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

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, JJ.

12197-
12198 Philip Seldon,
Plaintiff-Appellant,

-against-

Lewis Brisbois Bisgaard
& Smith LLP, et al.,
Defendants-Respondents.

Index 111916/10

_____

Philip Seldon, appellant pro se.

Lewis Brisbois Bisgaard & Smith LLP, New York (Anthony J. Proscia of counsel), for Lewis Brisbois Bisgaard & Smith LLP, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Wilson Elser Moskowitz Edelman & Dicker LLP, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 7, 2012, which, among other things, granted defendants' motions to dismiss the second amended complaint, sanctioned plaintiff in the amount of $10,000, and enjoined plaintiff from filing and serving any litigation papers in this matter on the defendants, their agents, employees or attorneys without prior court approval, unanimously affirmed, without costs. Order, same court and Justice, entered January 7, 2013, which denied plaintiff's request for permission to bring a motion to renew and/or reargue the prior motions, unanimously affirmed,

without costs.

Although plaintiff's loss in the underlying action did not collaterally estop him from asserting all of his Judiciary Law § 487 claims in this action (*see generally D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]), the court properly dismissed plaintiff's fraud and § 487 claims. Plaintiff's allegations do not amount to acts of deceit, and do not give rise to any inference that the defendant lawyers making the statements, which mainly consist of simple advocacy, acted with intent to deceive (*see* Judiciary Law § 487; *Amalfitano v Rosenberg*, 12 NY3d 8, 11-12 [2009]).

Sanctions were appropriate, given the meritlessness of plaintiff's allegations and his maintenance of them in a second amended complaint, even after having seen defendants' response to his earlier complaint (*Fowler v Conforti*, 194 AD2d 394 [1st Dept 1993]). Further, given plaintiff's history of vexatious litigation, the court properly required him to obtain court

approval before filing or serving any litigation papers in this matter against defendants and their privies (*see Dimery v Ulster Sav. Bank*, 82 AD3d 1034, 1035 [2d Dept 2011], *appeal dismissed* 17 NY3d 774 [2011]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12199 In re Dianne Spears, Index 103510/12
Petitioner-Appellant,

-against-

New York City Employees' Retirement System, et al.,
Respondents-Respondents.

_____

The Shanker Law Firm, P.C., New York (Steven J. Shanker of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Inga Van Eysden of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered April 9, 2013, denying the petition to annul the determination of respondent New York City Employees' Retirement System (NYCERS), dated May 11, 2012, which denied petitioner's application for disability retirement benefits under Retirement and Social Security Law § 605, unanimously affirmed, without costs.

The determination of NYCERS' Board of Trustees that petitioner failed to meet her burden of showing that her disabling condition was proximately caused by an alleged on-the-job incident had a rational basis (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of*

Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). The record shows that NYCERS' Board of Trustees fulfilled its duty to "make its own evaluation as to the Medical Board's recommendation regarding causation" (*Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760 [1996]).

We have considered petitioner's remaining arguments and find that they do not warrant a different outcome.

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12200 James Kolb, Index 306144/09
Plaintiff-Respondent,

-against-

Royal Lambert,
Defendant-Appellant,

Ralph Lambert, et al.,
Defendants.

_____

Epstein, Gialleonardo & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for appellant.

Rosemarie Cavera, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Edgar G. Walker, J.), entered January 23, 2013, which, to the extent appealed from as limited by the briefs, denied defendant Royal Lambert's motion for summary judgement dismissing plaintiff's common law negligence claims and claims under Labor Law 200 and 241(6), unanimously affirmed, without costs.

The motion court properly denied the portion of defendant owner Royal Lambert's motion seeking dismissal of the claims for violation of Labor Law § 200 and common law negligence. The evidence, which established that plaintiff, a carpenter who was performing renovation work at owner's premises, was injured when he tripped and fell over a 1" to 1 1/4" flooring differential at

a six-foot wide entranceway that separated the kitchen and sunken living room. It further established that the height differential, due to the kitchen floor having been removed as part of the renovation, had existed for at least several days during which time owner visited the premises on several occasions. Thus, there are triable issues as to whether owner had notice of the alleged hazard (*see Pappalardo v New York Health & Racquet Club*, 279 AD2d 134 [1st Dept 2000]), whether the alleged hazard constitutes an actionable defect (*see Bovino v J.R. Equities, Inc.*, 55 AD3d 399 [1st Dept 2008]).

With respect to plaintiff's Labor Law § 241(6) claim, owner has abandoned any argument that his property qualifies for the exemption under Labor Law § 241(6) claim (applicable to one or two-family dwellings)(*see e.g. Reinoso v Biordi*, 105 AD3d 491 [1st Dept 2013]). In any event, plaintiff's deposition testimony and other evidence raises triable issues as to whether the premises was used as a three-family dwelling. Factual issues are also raised as to whether the Industrial Code provision

pertaining to "tripping conditions" in "passageways" (*see* [12 NYCRR] § 23-1.7[e][1], [2]) applies to afford plaintiff protection under Labor Law § 241(6) (*see Thomas v Goldman Sachs Headquarters, LLC*, 109 AD3d 421 [1st Dept 2013]).

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

ENTERED: APRIL 10, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12202 The People of the State of New York, Dkt. 6330C/10
Respondent,

-against-

Dominga Catala,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert Sackett, J.), rendered April 14, 2011, convicting defendant, after a nonjury trial, of menacing in the third degree and harassment in the second degree, and sentencing her to a conditional discharge, unanimously affirmed.

The verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, in which it accepted the complainant's account of the incident and rejected defendant's.

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

ENTERED: APRIL 10, 2014

CLERK

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

10974 The People of the State of New York, Ind. 5258/08
Respondent,

-against-

Christopher Lee,
Defendant-Appellant.

_____

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Debevoise & Plimpton LLP, New York (Matthew I. Fleischman of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered September 9, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts), assault in the second degree, and attempted coercion in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 13 years, unanimously modified, on the law, to the extent of vacating the conviction of assault in the second degree and remanding for further proceedings thereon, and otherwise affirmed.

This appeal arises out of the October 17, 2008 shooting of a 19-year-old victim in which defendant was the shooter and codefendant Raynell Burgess, acting in concert with defendant,

orchestrated the shooting. The victim was Burgess's codefendant in a pending drug case.

On the night of the shooting, Burgess watched from a distance of approximately 10 to 15 feet as defendant, who was armed with a "big" black "automatic" gun, confronted the victim in a play area of the Lincoln Houses in an attempt to intimidate him into accepting responsibility in the drug case. When the victim asked Burgess if he really wanted defendant to shoot him, Burgess walked over and told defendant to end the victim's life or he would do it himself. Complaining that defendant was taking too long, Burgess tried to grab the gun from defendant, but defendant assured him, "I got it."

Burgess walked away, as the victim tried, unsuccessfully, to further engage him. When the victim turned around, defendant was pointing the gun within a few inches of the victim's face, with his finger on the trigger. The victim grabbed defendant's wrist and briefly struggled with defendant. Defendant broke free, with the gun still in his hand, but the victim was "not sure" if defendant still had his finger on the trigger. In the aftermath of the struggle, but while defendant was still holding the gun, it discharged, and the victim was shot in the shoulder. Five minutes had elapsed from the time defendant first pointed the gun

at the victim.

The victim fled, but re-encountered Burgess, who, using a different gun, aimed it at the victim's head, and pulled the trigger. The gun jammed. When the victim escaped from Burgess, he went up to a passerby who called 911.

The victim initially was uncooperative with the police, indicating that he did not know who shot him and gave affirmatively misleading information. As the victim would later explain at trial, he was concerned for his family's safety and did not want to be labeled a "snitch."

However, after interviewing various witnesses, the assigned detective developed a theory of the shooting and went to speak with the victim at his home a week after the shooting. The victim remained reluctant, but the next day finally identified defendant as the shooter and provided other details of the crime.

Among other charges, defendant and Burgess were indicted for attempted murder in the second degree (Penal Law §§ 110.00/ 125.25[1]), attempted assault in the first degree (Penal Law §§ 110.00/120.10[1]), and assault in the second degree (Penal Law § 120.05[2]). On the second day of deliberations, the jurors sent a note which read, "We the jury request a clarification regarding the law; if an individual intends to assault someone, but the gun

discharges accidentally (before he intended to shoot), is that individual guilty of assault? If so, in what degree?" Before the court could respond to the initial inquiry, the jury sent out two more notes, one asking for evidence and one asking the court for the "definition" of the two assault charges, the attempted coercion charge, and "the parameters surrounding those laws."

When discussing how to respond to the notes, defense counsel urged the court to respond to the notes together because the jury was clearly "struggling with the idea of intent in the assault charge." The court indicated that it would respond to the notes in seriatim, and specifically asked counsel for input on how to respond to the jury's hypothetical question. Counsel argued that the answer should be no, particularly in light of the fact that defendant was charged with acting intentionally, not recklessly, as is allowed under other subdivisions of the same statute.

Over objection, the court ultimately responded as follows,

> "I have three notes from you which I have marked as Court Exhibits XII, XIII and [X]IV.
>
> "The first was a clarification regarding the law.
>
> "'If an individual intends to assault someone but the gun discharges accidentally before he intended to shoot, is the individual guilty of assault.'
>
> "The answer to that is yes.
>
> "Your question 'If so, in what degree' goes back

> to the elements which I'm going to charge you on. You have to make that determination."

The court went on to restate the elements of the two assault charges and the attempted coercion charge. The jury acquitted defendant of the counts of attempted murder in the second degree and attempted assault in the first degree and convicted him of all other charges, including assault in the second degree.

We agree with defendant that the court's response erroneously allowed the jury to find defendant guilty of intentional assault without finding that the intent element of that crime existed beyond a reasonable doubt. "It is a well-established rule of law that the intent to commit a crime must be present at the time the criminal act takes place" (*People v Rivera*, 184 AD2d 288, 291 [1st Dept 1992], *appeal dismissed* 81 NY2d 758 [1992]). The intent element is not satisfied if, as in the jury's hypothetical, the individual does not intend to pull the trigger at the moment the gun discharges. While those facts might have supported liability for a crime requiring a lesser mens rea than acting intentionally, defendant here was not charged with such a crime. Because the court's response to the jury's note incorrectly signaled that an accidental firing of the gun could support a conviction for intentional assault, the

conviction on that count must be reversed.

We affirm the remainder of the conviction, as we find that defendant has not shown that he was sufficiently prejudiced by the remaining alleged *Rosario* and *Brady* violations to warrant reversal.

Defendant argues that the trial court should have given an adverse inference charge due to the prosecution's failure to produce the handwritten notes made by the police officer who interviewed the victim at the hospital after the shooting. While the typed report based on these notes indicated that the victim described his assailant as having a "clear complexion" - a description that the People concede does not match defendant – it was not admitted in evidence because the officer did not remember the victim making the remark and had not checked the typed report against his original notes. Although this officer was called as a defense witness, defendant correctly argues that the missing scratch copy constituted *Rosario* material as to the victim, who testified for the People, as well as *Brady* material.

However, defendant is not entitled to reversal based on the trial court's failure to give an adverse inference charge in this instance. Addressing this question under similar circumstances, the Court of Appeals recently concluded that a trial judge did

not abuse his discretion in declining to give an adverse inference charge regarding the loss of a handwritten complaint report (*People v Martinez*, _ NY3d _, 2014 NY Slip Op 01098 [2014]). The Court clarified the rule: "nonwillful, negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice" (*id.* at *12). In that case, as here, the handwritten report that could not be found had served as the basis for a typewritten report that was made available to the defendants. The defendants there relied on a "series of improbable events to create the prospect of prejudice" (*id.*). The Court cautioned that if a prejudice finding could be based on "conjecture like this, built on a foundation of fortuity," loss of *Rosario* material would be per se prejudicial, which flies in the face of "the legislature's antipathy toward per se rules leading to reversal of convictions for *Rosario* violations" (*id.* at *12-13).

Here, defendant's claim of prejudice similarly lacks merit. Defendant called as a witness the officer who interviewed the victim in order to impeach the victim's testimony that he did not say that his assailant had a clear complexion. The officer stated that he did not recall what the victim said and that the typewritten report did not refresh his memory. Because the

original report could not be found, defendant now argues, he was left without a method to impeach the victim's testimony, and the court's refusal to grant an adverse inference charge left him without any recourse for this loss.

Defendant has not shown, however, that an adverse inference charge or the ability to impeach the victim on this issue would have had any impact on the verdict. In defense counsel's opening statement, he told the jury that the victim changed his story a number of times before coming to the one they would hear, after talking to his lawyers. He told the jury they would learn that the victim is a pothead, a crack dealer, and a deal maker with every reason to lie to "get a pass" on a number of previous arrests. Counsel told the jury that immediately after the incident, the victim told police that he did not know who shot him. He argued that the victim told the truth then, when he thought he might die from the wound, and later lied when it was convenient. Counsel walked the jury through each change in the victim's story over time. During the defense's cross-examination of the victim, the holes in his multiple stories were repeatedly brought to light and he admitted a number of times that he lied to the police on several occasions about various details related to the shooting. Defense counsel argued extensively during

summation that the victim lied often and had a clear motive to lie in this case.

Defense counsel had ample opportunity to show the jury that the victim's testimony as to the identity of his shooter was fabricated, and took advantage of this opportunity through repeated attacks on his credibility. On this record, there is no reasonable possibility that extrinsic proof that the victim at one point said his attacker had a clear complexion would have changed the jury's determination, notwithstanding the victim's denial of having given that description when asked that question during cross-examination. Furthermore, to the extent this information may have aided the defense case, it bears noting that once the officer could not recall the victim's having given the prior inconsistent description, defense counsel did not attempt to enter the typed complaint report into evidence through the typist, whose name was on the report and who obviously had seen the handwritten version. Accordingly, we conclude that the trial court did not abuse its discretion in declining to give an adverse inference charge regarding the loss of the report because a sanction is not mandatory for nonwillful, negligent loss or destruction of *Rosario* material where prejudice is not shown (*see Martinez* at *12). For the same reasons, the violation of *Brady*

does not warrant reversal either, as there is no reasonable possibility that the missing handwritten copy of the report contributed to the verdict (*see People v Vilardi*, 76 NY2d 67 [1990]).

Nor is reversal required by the court's failure to direct the People to disclose the "DD5" Complaint Follow Up Informational Reports made by Detective Keane in connection with his investigation, although we note that these reports did constitute *Rosario* material that should have been disclosed. It has long been settled that the notes and reports of a testifying police officer witness qualify as *Rosario* material if they relate to the same subject matter as the officer's hearing or trial testimony and must be produced to the defense for cross-examination (*see People v Malinsky*, 15 NY2d 86, 90-91 [1965]; *People v Quinones*, 139 AD2d 404, 406 [1st Dept 1988], *affd* 73 NY2d 988 [1989]). Detective Keane's DD5 reports were, in his words, "what I would do to outline the steps taken in my investigation . . . basically it is a synopsis of my investigation." Detective Keane testified at trial about that investigation. Therefore, all DD5 reports created by him in connection with the investigation should have been produced to defense counsel, with all redactions necessary to safeguard the

identity of any confidential informants. However, reversal is not required by this *Rosario* violation either, because after considering the substance of the particular undisclosed material and the weight of the remaining evidence against defendant, we do not find a reasonable possibility that defendant would not have been convicted if the DD5 reports had been disclosed.

We perceive no basis for reducing the sentence.

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

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Andrias, Richter, Manzanet-Daniels, Feinman, JJ.

11125 The People of the State of New York, Ind. 1450N/05
Respondent,

-against-

Troy Blanding,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Cleary Gottlieb Steen & Hamilton LLP, New York (Jennifer Kennedy Park of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered June 23, 2006, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of four years, unanimously reversed, on the law, the motion to suppress granted, and the matter remitted to Supreme Court for further proceedings, as appropriate.

During a buy and bust operation, a ghost undercover detective issued a radio transmission identifying defendant as a participant in a drug sale, made to another undercover officer. Based on that radio transmission describing defendant and his

location, a third officer approached defendant on the sidewalk, identified himself, and asked defendant to put his hands up. When defendant acted "a little resistant," the officer attempted to handcuff him. Defendant then resisted, and the police forcibly handcuffed him.

Defendant moved to suppress on the grounds that his arrest was not based on probable cause. The suppression court denied the motion, ruling that although when the officer stopped the defendant, he did not have probable cause to arrest him based on the information that he had received from the radio transmission, the officer obtained probable cause to arrest defendant after the purchasing undercover officer subsequently radioed his confirmatory identification. By denying the suppression motion while finding that there was no probable cause to arrest defendant until the confirmatory identification, the court implicitly found that the initial apprehension, which preceded that identification, was a proper temporary detention based on reasonable suspicion and that the application of handcuffs on defendant did not transform the detention into a full-scale arrest.

At the outset, we reject the People's argument that defendant was not under arrest at the point when he was

handcuffed. Although the use of handcuffs is not dispositive of whether an investigatory detention on reasonable suspicion has been elevated to an arrest, handcuffing is permissible in such a detention only when justified by the circumstances (*see People v Acevedo*, 179 AD2d 465, 465-66 [1st Dept 1992], *lv denied* 79 NY2d 996 [1992]). In this case, the police had no reason to believe that defendant was either armed or dangerous. Nor was there any indication on the record that defendant offered any resistance prior to the handcuffing, or gave the police any reason to believe that he might flee.

We do not reach the merits of the People's argument, made to the hearing court, but rejected by it, that the arresting detective already had probable cause to arrest defendant when he was stopped and before the confirmatory identification. Even assuming the People were correct, we have no "power to review issues . . . decided in an appellant's favor . . . by the trial court" (*People v Concepcion*, 17 NY3d 192, 195 [2011]).

The Decision and Order of this Court entered herein on November 19, 2013 is hereby recalled and vacated (*see* M-6591 decided simultaneously herewith).

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

ENTERED: APRIL 10, 2014

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, Richter, JJ.

11529 The People of the State of New York, Ind. 4388/10
Respondent,

-against-

Adrian Anderson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Orrick, Herrington & Sutcliffe, LLP, New York (Daniel Habib of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 15, 2011, convicting defendant, after a jury trial, of attempted robbery in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years followed by five years postrelease supervision, unanimously affirmed.

Defendant failed to preserve his challenge to the court's handling of a jury note asking about the possible consequences of a split jury. The court read the note in open court, essentially verbatim, before appropriately apprising the jury that their question was premature and that the court would await the jury's

verdict or next communication. The jury then resumed deliberations, and defense counsel raised no objection, either to the court's procedure or the substance of the response. Although the court did not comply precisely with the procedure outlined in *People v O'Rama* (78 NY2d 270 [1991]), no mode of proceedings error occurred and defendant therefore was required to preserve the objection. Defense counsel was on notice of both "the contents of the [jury's] note and the court's response, and failed to object at that time, when the error could have been cured" (*People v Ramirez*, 15 NY3d 824, 826 [2010]; *see also People v Alcide*, 21 NY3d 687, 694 [2013]; *People v Williams*, 21 NY3d 932, 934-935 [2013]; *People v Ippolito*, 20 NY3d 615, 624-625 [2013]).

It was not until the next morning, after the jury had resumed deliberations, that defense counsel complained about what had occurred. However, counsel's belated objection did not suffice to preserve this claim. It was too late for the court to remedy any perceived error because the jury reached a verdict while the court and the parties were discussing the issue. Accordingly, the claim is unpreserved and we decline to review it in the interest of justice.

Furthermore, it is difficult to understand how the court's

short instruction, which simply declined to discuss the consequences of a split jury before there actually was one, was improper or could have coerced the jurors into reaching a verdict. There was no indication in the note that the jurors were hung and there was no reason to give an *Allen* charge. We further note that the jury did not immediately render a verdict after the court responded to the jury, undermining any contention that the court's innocuous response coerced a verdict (*compare People v Aponte*, 2 NY3d 304 [2004]). Although the better practice would have been for the court to apprise defense counsel of its proposed response prior to responding to the jury note, the court was made aware, albeit belatedly, of the response defense counsel thought was necessary. The court had no obligation to do anything further when counsel complained the next morning because the response the court originally gave was appropriate.

Defendant also failed to preserve his claim that the court's ruling limiting cross-examination of a police officer violated his right to present a defense and had the effect of forcing defendant to testify. At the time the court made its ruling, defense counsel voiced no protest and simply continued questioning the officer without making an offer of proof or other

argument (*see People v Martich*, 30 AD3d 305 [1st Dept 2006], *lv denied* 7 NY3d 868 [2006]). Defense counsel did not raise an objection until after the officer had left the stand and another witness had finished testifying. Even then, after explaining the basis of the objection, counsel did not ask the court for permission to recall the officer. Nor did counsel advance the current appellate claim that the court's ruling would prejudice defendant by compelling him to testify. Accordingly, the claim is unpreserved, and we decline to review it in the interest of justice.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 10, 2014

CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11849 The People of the State of New York, Ind. 5638/10
Respondent,

-against-

Robert Johnson,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anastasia Heeger of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Deuel Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered March 30, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of six years, unanimously affirmed.

In this buy and bust case, in which defendant was found to have sold heroin to an undercover police officer, we find that defendant has not sustained his claim that Supreme Court violated his Sixth Amendment right to a public trial by closing the courtroom while the officer testified. While, initially, the

court improperly granted the People's application for closure without conducting a hearing pursuant to *People v Hinton* (31 NY2d 71 [1972], *cert denied* 410 US 911 [1973]), the People immediately alerted the court to the need for a *Hinton* hearing, which was then conducted. The court stated that "[i]f any additional information comes in [during the hearing] to make me change my mind, it will be open then." This statement did not improperly shift the burden of proof on the application from the People to defendant. The court had already heard what it deemed grounds for partial closure and was merely informing the parties that it would reconsider based on evidence adduced at the *Hinton* hearing.

In any event, the evidence established the type of overriding interest warranting the limited closure of the courtroom that has been upheld (*see Waller v Georgia*, 467 US 39 [1984]; *People v Campbell*, 16 NY3d 756 [2011]; *People v Alvarez*, 51 AD3d 167, 175 [1st Dept 2008], *lv denied* 11 NY3d 785 [2008]). The undercover officer's testimony at the hearing supported the court's finding that testifying at trial in an open courtroom would compromise his undercover work and jeopardize his and his family's safety (*see People v Echevarria*, 21 NY3d 1, 12-14 [2013], *cert denied* __ US __, 134 S Ct 823 [2013]). The officer testified that he had been working undercover for four years,

that he was on active duty and bought drugs for buy and bust arrests three or four times per week, and that he had made about 10 purchases near where he bought the drugs from defendant. The officer further testified that several of his investigations were ongoing, that certain targets remained at large, that he had been verbally threatened while working undercover, and that he took numerous precautions to conceal his identity when he had to testify in court.

The court's decision to exclude defendant's sister, who lived within two blocks of the location where the officer bought drugs from defendant and where he continued to work undercover, is consistent with our prior holdings (*see People v Campbell*, 66 AD3d 590 [1st Dept 2009], *affd* 16 NY3d 756 [2011]; *Alvarez*, 51 AD3d at 175). The officer testified that he was concerned that defendant's sister might expose his identity.

Although defendant preserved his general claims that the courtroom should not have been closed, and that his sister should not have been excluded, he did not preserve his specific procedural claims regarding the manner in which the court made these determinations. Specific objections were necessary because, in each instance "a timely objection . . . would have permitted the court to rectify the situation instantly" (*People v*

Doster, 13 AD3d 114, 115 [2004], *lv denied* 4 NY3d 763 [2005]). Accordingly, we decline to review this claim in the interest of justice. As an alternative holding, we find that defendant's procedural objections do not warrant reversal.

There is nothing in the record one way or the other with respect to defendant's assertion that the court refused to consider alternatives to closure (*see Waller*, 467 US at 48). However, as the Court of Appeals has held, where the record in a buy-and-bust case "makes no mention of alternatives but is otherwise sufficient to establish the need to close the particular proceeding . . . it can be implied that the trial court, in ordering closure, determined that no lesser alternative would protect the articulated interest" (*People v Ramos*, 90 NY2d 490, 503-504 [1997], *cert denied* 522 US 1002 [1997]; *see also Echevarria*, 21 NY3d at 18 [finding that the holding in *Ramos* is unaffected by *Presley v Georgia*, 558 US 209 (2010)]).

Turning to defendant's remaining claims, we find that the People also made a sufficient showing to support the court's decision to permit the officer to testify under his shield number (*see People v Waver*, 3 NY3d 748 [2004]), and the court properly exercised its discretion in denying, on the ground of untimeliness, defendant's request for a missing witness charge

(*see People v Medina*, 35 AD3d 163 [1st Dept 2006], *lv denied* 8 NY3d 925 [2007]). Defendant did not preserve his claim that he was constitutionally entitled to learn the officer's true name (*see e.g. People v Acevedo*, 62 AD3d 464, 464-465 [1st Dept 2009], *lv denied* 13 NY3d 741 [2009]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see id.*)

Finally, defendant's arguments concerning the sufficiency and weight of the evidence, based on a slight difference between the way the undercover officer and a technician described the color of the drugs, are without merit (*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: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12166 The People of the State of New York, Ind. 5164/08
Respondent,

-against-

Alfonso Rodriguez,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Douglas M. Schneider of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered November 5, 2009, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the second degree and third degrees, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant, a police confidential informant, claimed that he had infiltrated a drug operation, and that his possession of a large quantity of drugs and packaging materials was in lawful furtherance of his self-assigned mission to pose as a drug factory worker. However, the

evidence established that in his role as an informant defendant was only permitted to possess drugs in very limited circumstances, such as while making a buy, that were far removed from the conduct with which he was charged. Furthermore, the evidence warranted the conclusion that defendant was conducting a drug operation solely for his own benefit.

Defendant now asserts that he held a mistaken belief that he was acting lawfully in his capacity as an informant. However, the defense of mistake of fact (Penal Law § 15.20[1][a]) was neither requested nor charged. Instead, in accordance with the defense defendant actually raised, the court instructed the jury on the defense of temporary possession by a person assisting the police (Public Health Law § 3305[1][c]). Any challenge to the sufficiency or the weight of the evidence must be evaluated according to the court's charge as given (*see People v Sala*, 95 NY2d 254, 260 [2000]; *People v Noble*, 86 NY2d 814, 815 [1995]). In any event, the evidence likewise refutes any defense of factual mistake. The jury could have readily concluded that defendant's entire explanation for his conduct was a fabrication. Moreover, defendant's claimed belief that his conduct was authorized as a confidential informant was more in the nature of a claim of mistake of law, which would not be a defense under the

circumstances of this case (*see* Penal Law § 15.20[2]).

Defendant claims that his trial counsel rendered ineffective assistance by not pursuing a mistake of fact defense. This claim is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that failure to pursue a factual mistake defense fell below an objective standard of reasonableness, or that it deprived defendant of a fair trial or affected the outcome of the case. As noted, there is no reasonable possibility that the jury would have credited a mistake of fact defense.

Defendant's arguments concerning the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12167 Patrick Glasheen, Index 20586/12
Plaintiff-Respondent,

-against-

Miguel A. Valera, et al.,
Defendants-Appellants,

City of New York,
Defendant.

_____

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Vanessa M. Corchia of counsel), for appellants.

Held & Hines, LLP, New York (James K. Hargrove of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered September 19, 2012, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion to dismiss the complaint as against them on the ground that plaintiff failed to serve a notice of claim on them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff timely filed a notice of claim on the City by using its online form, provided by the Comptroller's Office, which allowed plaintiff to specify that the claim was against the New York City Transit Authority (NYCTA) (*see* General Municipal

Law § 50-e; 2010 Sess. Law News of N.Y. Ch. 12 [A. 2575]). The complaint, served and filed more than one year and 30 days after the accident, alleged that a notice of claim had been timely served on the City, but did not allege service upon NYCTA or the Metropolitan Transportation Authority (MTA)(Public Authorities Law §§ 1212[2] and 1276[2]). It is well settled that service of a notice of claim on the City through the Comptroller's Office is not service upon a separate public authority (*see Castro-Castillo v City of New York*, 78 AD3d 406 [1st Dept 2010]; *Ringgold v New York City Transit Authority*, 286 App Div 806 [1st Dept 1955]). Since plaintiff did not comply with the condition precedent of service of a notice of claim upon the Transit Authority defendants, and they deny having received the notice of claim from the Comptroller's Office, dismissal is required.

While the electronic notice of claim form provided by the City Comptroller's Office had the potential to confuse claimants, at least as to NYCTA, the facts do not present the kind of unusual situation that would warrant application of the doctrine of equitable estoppel since there is no basis for finding that the Transit Authority defendants "wrongfully or negligently" induced plaintiff to believe that service upon the Comptroller's office would be acceptable as against them (*Matter of Hamptons*

Hosp. & Med. Ctr. v Moore, 52 NY2d 88, 94 n1 [1981]; *compare Bender v New York City Health & Hosps. Corp.*, 38 NY2d 662, 668 [1976]; *Padilla v Department of Educ. of the City of NY*, 90 AD3d 458 [1st Dept 2011]). Moreover, there is no basis for finding that the Transit Authority defendants received actual notice of the essential facts constituting plaintiff's claim within 90 days of the accident.

Defendants also argue that the action was untimely commenced as against MTA (*see* Public Authorities Law § 1276[1], [2]). This argument is irrefutable on the record. Although it is raised for the first time on appeal, it may be considered since it presents a question of law that could not have been avoided had it been raised before the motion court (*Matter of Fleischer v New York State Liq. Auth.*, 103 AD3d 581 [1st Dept 2013], *lv denied* 21 NY3d 856 [2013]; *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

Plaintiff's argument that defendants' motion should not have

been considered because defendants failed to annex all of the pleadings lacks merit. This requirement does not apply to a motion to dismiss (*see* CPLR 3211), and, in any event, can be excused by the motion court (*see* CPLR 2001).

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12168-
12169-
12170 Index 650488/12

Board of Managers of Soho North
267 West 124th Street Condominium,
Plaintiff-Appellant,

-against-

NW 124 LLC, et al.,
Defendants-Respondents,

C3D Architecture, PLLC, et al.,
Defendants.

_____

Ansell Grimm & Aaron, P.C., White Plains (Joshua S. Bauchner of counsel), for appellant.

Penn & Associates, LLP, New York (Craig E. Penn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered on or about December 6, 2012, which, to the extent appealed from as limited by the briefs, granted the sponsor defendants' NW 124 LLC, Bennett Holding LLC, Jeffrey Bennett and Refik Radoncic's (defendants) motion to dismiss the second, third and fourth causes of action, unanimously affirmed, without costs; order, same court and Justice, entered on or about April 12, 2013, which granted plaintiff's motion for reargument of the order entered on or about December 6, 2012 and, upon reargument, adhered to the prior ruling, unanimously dismissed, without

costs, as academic; and (3) order, same court and Justice, entered on or about October 15, 2013, which denied plaintiff's motion for leave to amend the complaint to assert certain causes of action dismissed by the order entered on or about December 6, 2012, unanimously affirmed, without costs.

The Supreme Court correctly dismissed the second, third and fourth causes of action alleging breach of implied warranty, negligence and negligent misrepresentation. In opposition to defendants' motion to dismiss insofar as it sought dismissal of the second cause of action, plaintiff did not argue that it had stated a valid cause of action for breach of implied warranty. Rather plaintiff argued that it wished to amend the complaint to instead assert a cause of action for breach of implied covenant of good faith and fair dealing. Thus, to the extent plaintiff argues that Supreme Court erred in dismissing the second cause of action, alleging breach of implied warranty, the argument is unpreserved. Alternatively, the argument lacks merit (*see 20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733 [1st Dept 2013]).

Supreme Court properly dismissed plaintiff's third and fourth causes of action, alleging negligence and negligent misrepresentation. Breach of contract is not to be considered a

tort unless a legal duty independent of the contract itself has been violated (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). Allegations of negligence based on defects in construction of a condominium sound in breach of contract rather than tort (*see Sutton Apts. Corp. v Bradhurst 100 Dev. LLC*, 107 AD3d 646, 648 [1st Dept 2013]; *Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581, 582 [1st Dept 2010]). A claim for negligent misrepresentation is not separate from a breach of contract claim where the plaintiff fails to allege a breach of any duty independent from contractual obligations (*see Greenman-Pedersen, Inc. v Levine*, 37 AD3d 250, 251 [1st Dept 2007]). Here, plaintiff failed to allege any legal duty that would give rise to an independent tort cause of action. Neither General Business Law art 23-A nor its regulations create a special duty or support a private right of action. Thus, the negligence and negligent misrepresentation claims were duplicative of the breach of contract claim and did not state a cause of action.

Supreme Court did not abuse its discretion in denying plaintiff's motion to amend the complaint. Since a claim for breach of implied duty of good faith and fair dealing "cannot be maintained where, as here, the alleged breach is 'intrinsically

tied to the damages allegedly resulting from a breach of the contract'" (*Bostany v Trump Org. LLC*, 73 AD3d 479, 481 [1st Dept 2010]). Thus, to the extent plaintiff sought to amend the complaint to assert a claim for breach of the covenant of good faith and fair dealing, Supreme Court did not abuse its discretion in denying the motion as futile. Similarly, to the extent plaintiff sought to amend the complaint to assert the dismissed claims for negligence and negligent misrepresentation, Supreme Court did not abuse its discretion in denying the motion as futile.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12171 The People of the State of New York, SCI 270N/12
Respondent,

-against-

Eric White,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard M. Weinberg, J.), rendered on or about June 29, 2012,

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

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

ENTERED: APRIL 10, 2014

CLERK

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

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12172 Raul Suconota, Index 101303/09
Plaintiff, 590413/10
590213/11

-against-

Knickerbocker Properties, LLC, et al.,
Defendants,

Mega Contracting, Inc.,
Defendant-Respondent.

[And A Third-Party Action]
- - - - -
Mega Contracting, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Flagge Contracting, Inc.,
Second Third-Party Defendant-Appellant.

_____

Cascone & Kluepfel, LLP, Garden City (Andrew M. Lauri of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Peter T. Shapiro of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about June 12, 2013, which, insofar as appealed from as limited by the briefs, granted the cross motion of defendant/second third-party plaintiff Mega Contracting, Inc. (Mega) for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims as against it, and on its

contractual indemnification claim against second third-party defendant Flagge Contracting, Inc. (Flagge), unanimously affirmed, without costs.

Where, as here, a construction accident arises out of the means and methods of plaintiff's work, liability for common-law negligence or under Labor Law § 200 may be imposed against an owner or general contractor if it "actually exercised supervisory control over the injury-producing work" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). Here, Mega satisfied its burden of establishing that it did not control the work that caused plaintiff's accident. Plaintiff, a mason employed by Flagge, testified that he worked solely under the supervision of his employer's foreman, did not receive any direction from anyone else and had never even heard of Mega, the construction manager (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449 [1st Dept 2013]). The construction management agreement between Mega and the owner demonstrated that Mega had, at most, general supervisory authority over plaintiff's work, which is insufficient to form a basis for the imposition of liability (*see Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]).

Mega further demonstrated that it was entitled to

contractual indemnification from Flagge pursuant to the terms of their trade contract. The subject indemnification provision required Flagge to indemnify Mega for all claims "directly or indirectly arising out of, resulting from or related to the negligent act, omission or breach of contract of [Flagge] . . . or any individual . . . directly or indirectly employed by [Flagge]." Contrary to Flagge's contention, the motion court did not make a specific finding absolving it of all negligence in connection with plaintiff's accident. Even if it had, such a finding would have been improper in light of the conflicting accounts provided by plaintiff and his foreman as to the specific instructions given to plaintiff as to how he was to perform his work. However, regardless of which account is ultimately credited by the fact-finder, plaintiff's claim falls within the scope of the subject indemnification provision because the evidence shows that his accident was the result of a negligent

act or omission attributable to either Flagge or plaintiff, an "individual . . . directly . . . employed" by Flagge.

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

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12173-
12174 Olivia Kate Ofer,
Plaintiff-Appellant,

-against-

Ido Sirota,
Defendant-Respondent.

Index 311215/12

_____

Stein Riso Mantel McDonough, LLP, New York (Allan D. Mantel of counsel), for appellant.

Shmuel Agami, New York, for respondent.

_____

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered April 17, 2013, which held in abeyance defendant's motion to dismiss and plaintiff's cross motion for, inter alia, summary judgment, pending a report and recommendation of a Special Referee on the issue of whether plaintiff may bring an action for divorce in Israel while defendant's reconciliation petition filed in Israel was pending, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered December 3, 2013, which denied the parties' motion and cross motion held in abeyance as moot and as subsumed by defendant's motion for leave to renew, granted plaintiff's motions for leave to reargue and renew, but adhered to its April 17, 2013 decision, and granted defendant's motion for leave to

renew, and upon renewal, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Following the referral of the reconciliation petition issue, defendant withdrew his reconciliation petition filed in Israel rendering the issue referred to the Special Referee moot, and we dismiss the appeal from the April 17, 2013 order accordingly.

Supreme Court properly found that the parties' prenuptial agreement was enforceable and was not the product of fraud or duress, or otherwise invalid (*see Van Kipnis v Van Kipnis*, 11 NY3d 573, 577 [2008]). The forum selection clause in the agreement, which granted exclusive jurisdiction over any divorce litigation to a competent Israeli court, was also enforceable (*see Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006]). Accordingly, Supreme Court properly dismissed this action.

The fact that plaintiff alleges that defendant refuses to grant her a get (Jewish divorce decree) as required by their agreement is irrelevant to determining whether to enforce the forum selection clause. Defendant's obligations under the agreement and his alleged breach of same can be handled by the Israeli courts. Further, as Supreme Court found, the parties'

experts agreed that absent the reconciliation petition there is nothing preventing plaintiff from filing for divorce in Israel.

There is no merit to plaintiff's claim that she will be deprived of her day in court in Israel because Israel does not provide for no fault divorce and defendant's consent to a divorce is required there. While litigation in Israel may be more challenging, plaintiff will have her day in court (*see Sydney Attractions Group Pty Ltd. v Schulman*, 74 AD3d 476 [1st Dept 2010]). Moreover, it is inappropriate for plaintiff to attempt to avoid Israel's legal system because New York's legal system may treat her more favorably by permitting her to obtain a no fault divorce. Plaintiff, an Israeli citizen, was well aware that Jewish religious laws govern Israeli divorces when she consented to the forum selection clause in the agreement.

While we recognize this State's strong and important public policy with regard to compelling civil litigants to remove any barriers to remarriage (see DRL § 253), contrary to plaintiff's contention, this policy cannot override the forum selection clause that the parties knowingly included in their prenuptial agreement, particularly because plaintiff will not be deprived of her day in court in the chosen forum.

The conversion claim, which concerns the parties' joint bank

accounts and other property allegedly taken from the marital residence, fails because such a cause of action cannot be predicated on a mere breach of contract, and no independent facts are alleged giving rise to tort liability (*Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]). Accordingly, Supreme Court correctly declined to sever the claim.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12175 Erik Perry, Index 302572/12
Plaintiff-Appellant,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Burns & Harris, New York (Blake G. Goldfarb of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 14, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion to strike certain allegations in plaintiff's bill of particulars, unanimously reversed, on the law, without costs, and the motion denied.

In this slip and fall action, plaintiff's notice of claim alleging that the stairway on which he fell was, among other things, slippery, uneven, worn, broken, and cracked, "fairly implie[s]" the more specific allegations set forth in the bill of particulars concerning, among other things, the uneven heights and widths of the risers and treads, and the slippery, worn paint

covering the steps (*see Dones v New York City Hous. Auth.*, 81 AD3d 554, 554 [1st Dept 2011]). Plaintiff's allegations that these conditions violated regulations and statutes do not assert a distinct or independent theory of liability.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12176 The People of the State of New York, Dkt. 21365C/11
Respondent,

-against-

Federico Perez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered December 12, 2011, convicting defendant, upon his plea of guilty, of disorderly conduct, and sentencing him to a $100 fine, unanimously affirmed.

Under the particular circumstances of the case, we find that the record establishes defendant's understanding and waiver of his constitutional rights (*see People v Tyrell*, 22 NY3d 359, 366 [2013]), even though there was no discussion on the record of defendant's rights under *Boykin v Alabama* (395 US 238 [1969]). "There are, historically, certain minor transgressions which admit of summary disposition" (*People v Letterio*, 16 NY2d 307, 312 (1965), *cert denied* 384 US 911 (1966).

Defendant pleaded guilty to a violation, with no

consequences other than a $100 fine, which he subsequently paid. In defendant's presence, defense counsel acknowledged that defendant agreed to waive "formal allocution." In response to the court's questioning, defendant personally confirmed that he wanted to plead guilty, and that he made this decision after having enough time to confer with his counsel. Moreover, the record shows that defendant had ample opportunity to review his options in consultation with counsel, including a one-month adjournment to consider the plea offer.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12177 [M-983] One William Street Capital Management L.P., Petitioner-Appellant-Respondent,

The Depository Trust Company, et al., Nominal Petitioners,

-against-

US Education Loan Trust IV, LLC, et al., Respondents-Respondents-Appellants,

Education Loan Trust IV, et al., Respondents-Respondents.

Index 652274/12

Arnold & Porter LLP, New York (Kent A. Yalowitz of counsel), for appellant-respondent.

Greenberg Traurig, LLP, New York (Eric N. Whitney of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered August 22, 2013, which, insofar as appealed from as limited by the briefs, granted petitioner's motion for leave to amend the petition, denied respondent U.S. Education Loan Trust, IV, LLC's (respondent) motion to dismiss the petition, and denied petitioner's motion for, in effect, summary judgment on its claim for unpaid principal and interest under the Article 77 petition, unanimously affirmed, without costs.

The amended petition adequately states a claim under the

subject indenture and Fourth Supplemental Indenture (SI) for payment of principal and interest. We find that it is not clear on the face of the indenture and SI whether the key term "successful," contained in SI § 2.01(a), includes an "All Hold" auction such as that held in this matter in June 2011. Accordingly, we find that issues of fact exist as to whether that auction was "successful" and, correspondingly, whether the trustee properly applied the "All Hold" interest rate subsequent to that auction. Issues of fact also exist as to whether petitioner has any present right of special redemption of the subject notes, since, among other things, special redemption would not apply if there is a finding that the interest rate was properly set at the All Hold Rate.

Petitioner's claims are not barred by the indenture's "No Action" clause (*see RBC Cap. Mkts., LLC v Education Loan Trust IV*, ___ A3d ___, 2014 WL 868668, *5-*6, 2014 Del LEXIS 96, *17-*20 [Del Sup Ct 2014]). Respondent's argument that petitioner is not a "Holder of any Note" with standing to sue under § 6.09 of the indenture lacks merit, since petitioner cured its lack of standing by adding the Depository Trust Company and Cede & Co. to this proceeding as nominal petitioners (*see Springwell Nav. Corp.*

v Sanluis Corporacion, S.A., 81 AD3d 557, 558 [1st Dept 2011]).

We have considered cross-appellants' remaining arguments and find them unavailing.

M-983 - *One William Street Capital Mgmt L.P. v Education Loan Trust IV, et al.,*

Motion seeking leave to enlarge the record and file supplemental record granted.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12178 The People of the State of New York, Ind. 351/11
Respondent,

-against-

Edwin Mendez,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Fitzpatrick, Cella, Harper & Scinto, New York (C. Austin Ginnings of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered January 10, 2012, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a term of seven years, unanimously affirmed.

Although the record is silent regarding the court's responses to three jury notes requesting materials not in evidence, reversal is not required. None of these notes were substantive inquiries that required compliance with the procedures mandated by CPL 310.30 (*see People v O'Rama*, 78 NY2d 270 [1991]). Instead, these notes only necessitated the ministerial actions of informing the jury that none of the items

they requested were in evidence (*see People v Ziegler*, 78 AD3d 545 [1st Dept 2010], *lv denied* 16 NY3d 838 [2011]). Furthermore, defendant's claims are unreviewable for lack of a sufficient record (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]). "[A] presumption of regularity attaches to judicial proceedings and may be overcome only by substantial evidence" (*see People v Johnson*, 46 AD3d 415, 417 [1st Dept 2007], *lv denied* 10 NY3d 812 [2008]). Accordingly, there was no mode of proceedings error (*see People v Starling*, 85 NY2d 509, 516 [1995]).

Under the circumstances of the case, defendant received a sufficient opportunity to demonstrate, in connection with his justification defense, his knowledge of prior violent acts by his opponents in the altercation at issue, and the court's limitations on such evidence were reasonable exercises of discretion (*see People v Miller*, 39 NY2d 543, 552-553 [1976]). In the context of the particular justification defense actually presented by defendant, the prior violent acts had very little probative value (*see id.*). To the extent any of the court's restrictions could be viewed as erroneous, we find them to be harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant did not preserve his claims that certain prior acts of prosecution witnesses were admissible to impeach their

credibility, or that any of the court's evidentiary rulings impaired his constitutional right to present a defense (*see People v Lane*, 7 NY3d 888, 889 [2006]; *see also People v Padro*, 75 NY2d 820 [1990]), and we decline to review these claims in the interest of justice. As an alternative holding, we reject them on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]).

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12179 Ethan Ebanks Brown, etc., Index 18174/07
Plaintiff-Appellant,

-against-

The New York City Health & Hospitals Corporation (North Central Bronx Hospital),
Defendant-Respondent.

_____

Fitzgerald & Fitzgerald, P.C., Yonkers (John M. Daly of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 9, 2012, which granted defendant hospital's motion to dismiss the complaint for failure to comply with General Municipal Law § 50-e, and denied plaintiff's cross motion for, among other things, leave to file a late notice of claim, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff's cross motion and dismissing the complaint. The mother's professed ignorance of the law is not a reasonable excuse for the delay in seeking leave to file a late notice of claim (*see Basualdo v Guzman*, 110 AD3d 610, 610 [1st Dept 2013]). Moreover, "plaintiff's infancy carries little weight," because

there is no connection between his infancy and the untimely notice of claim (*Rodriguez v New York City Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 78 AD3d 538, 539 [1st Dept 2010], *lv denied* 17 NY3d 718 [2011]; *see Williams v Nassau County Med. Ctr.*, 6 NY3d 531, 537-538 [2006]). In addition, plaintiff failed to demonstrate that the hospital's medical records alone sufficed to put the hospital on notice of the alleged malpractice (*Basualdo*, 110 AD3d at 610). Indeed, the records indicate that the infant plaintiff was delivered at and released from the hospital in a healthy condition, without apparent injury, and that he was taken to the intensive care unit as a precaution, due to the mother's fever. Given the delay and lack of notice, the court properly determined that the hospital has been deprived of the opportunity to conduct a prompt investigation of the merits of plaintiff's malpractice claims (*Velazquez v City of N.Y. Health & Hosps. Corp. [Jacobi Med. Ctr.]*, 69 AD3d 441, 442-443 [1st Dept 2010], *lv denied* 15 NY3d 711 [2010]).

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12180-
12181 Index 301311/07

Zalaya Tart, an Infant by her
Mother and Natural Guardian,
Kia Bynoe, et al.,
Plaintiffs-Respondents,

-against-

New York Bronx Pediatric
Medicine, P.C., et al.,
Defendants-Appellants,

Anthony Njapa, M.D., et al.,
Defendants.

_____

Kaufman Borgeest & Ryan, LLP, Valhalla (Edward J. Guardaro, Jr. of counsel), for appellants.

Landers & Cernigliaro, P.C., Carle Place (Stanley A. Landers of counsel), for respondents.

_____

Judgment, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered August 30, 2012, against defendants New York Bronx Pediatric Medicine, P.C. and St. Barnabas Hospital, after a jury trial, awarding plaintiffs the principal sums of $300,000 for past pain and suffering and $4,200,000 for future pain and suffering, unanimously modified, on the law, to vacate the damages awards, and the matter remanded for a new trial on the issue of damages, unless plaintiffs, within 30 days after service of a copy of this order with notice of entry, stipulate to reduce

the awards for past and future pain and suffering to $200,000 and $1 million, respectively, and to entry of an amended judgment in accordance therewith, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered July 17, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's finding that nonparty Dr. Chowdhury deviated from the accepted standard of care in treating the infant plaintiff was supported by sufficient evidence and was not against the weight of the evidence (*see Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). The trial evidence included expert testimony that Dr. Chowdhury should have removed the arterial line placed in the infant's right wrist immediately upon being informed that cyanosis had been observed on the tips of the fingernails on the middle fingers of her right hand, and that the failure to do so proximately caused the infant to lose the top portions of four fingers on that hand. Contrary to defendants' contention, plaintiffs' expert did not engage in "inappropriate retrospective analysis"; he explained that cyanosis indicated that the blood supply to those fingers was compromised and could not be reestablished without removal of the catheter. Although defendant Dr. Ronald Arevalo agreed that the placement of the

catheter contributed to the decreased blood flow, and testified that the infant's condition warranted close monitoring, the neonatal intensive care unit (NICU) records contain no contemporaneous entries concerning the nature of this monitoring until hours later, after the infant's condition had progressed to necrosis (cell death) of the fingers.

It is clear that the jury credited plaintiffs' expert's testimony over that of the defense experts, and its verdict is not one that "could not have been reached on any fair interpretation of the evidence" (*Lolik v Big v Supermarkets*, 86 NY2d 744, 746 [1995] [internal quotation marks omitted]).

The trial court correctly determined as a matter of law that New York Bronx Pediatric Medicine (Pediatric) and St. Barnabas Hospital were vicariously liable for the acts of Dr. Chowdhury. The evidence established that Pediatric had been contracted to operate the hospital's NICU and had assigned Dr. Chowdhury to the relevant shift. Plaintiff mother, who had been receiving pre-natal care at another facility, was delivered to the hospital by ambulance and entered through the emergency room, seeking care from the hospital, rather than from an individual physician. Moreover, she was admitted to the NICU, where, rather than receiving treatment from a doctor assigned to her, she was

treated by the doctor (Dr. Chowdhury) assigned to the NICU by Pediatric for that particular shift. This evidence establishes vicarious liability, regardless of Dr. Chowdhury's employment status (*see Hill v St. Clare's Hosp.*, 67 NY2d 72, 80-81 [1986]; *compare Shafran v St. Vincent's Hosp. & Med. Ctr.*, 264 AD2d 553, 558 [1st Dept 1999] [finding issue of fact whether plaintiff, who walked into hospital on her own and was admitted under care of particular doctor, could properly assume doctor was acting on behalf of hospital]).

In a medical malpractice case a general verdict is usually inappropriate, but defendants here did not object, and we see no prejudice in this case. The court properly compelled a juror who had reported feeling pressured by the other jurors to return to deliberations, after questioning each of the other jurors individually as to the nature of the complaints, satisfying itself that the juror was not being coerced, ensuring that the other jurors were prepared to continue deliberations, and posting a court officer in front of the deliberation room. In any event, the juror subsequently informed the court that upon her return to deliberations there had been "a big change among us and we were able to work it out." Defendants failed to establish that comments made by the court to counsel for Pediatric during the

trial were prejudicial.

Plaintiff suffered a serious injury to her right hand, resulting in the loss of the top portion of four fingers, which rendered her unable to perform certain activities with that hand and caused her to be the subject of ridicule by other children. However, based upon a review of cases involving similar injuries, we find the damages award excessive to the extent indicated (*see* CPLR 5501[c]; *compare Robinson v New York City Dept. of Educ.*, 94 AD3d 428 [1st Dept 2012]; *Shi Pei Fang v Heng Sang Realty Corp.*, 38 AD3d 520 [2nd Dept 2007]; *Brown v City of New York*, 309 AD2d 778 [2nd Dept 2003]; *McKeon v Sears, Roebuck & Co.*, 262 AD2d 7 [1st Dept 1999], *lv denied* 93 NY2d 818 [1999]; *Allende v New York City Health & Hosps. Corp.*, 228 AD2d 229 [1st Dept 1996], *revd on other grounds* 90 NY2d 333 [1997]).

We have considered and rejected appellants' remaining arguments.

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12182 Gladys Castro, Index 306404/12
Plaintiff-Appellant,

-against-

Albert Rivera, et al.,
Defendants-Respondents.

_____

Brad A. Kauffman, PLLC, New York (Brad A. Kauffman of counsel), for appellant.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered May 30, 2013, which denied plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of her entitlement to judgment as a matter of law by submitting her affidavit asserting that her car had come to a complete stop before it was struck in the rear by a vehicle driven by defendant Rivera and owned by defendant Empire Metal Supply (*see Williams v Kadri*, 112 AD3d 442, 442 [1st Dept 2013]).

Defendants, however, raised a triable issue of fact by submitting Rivera's affidavit averring that plaintiff caused the accident by abruptly changing into his lane prior to the accident

(*see Beaubrun v Boltachev*, 111 AD3d 494, 494 [1st Dept 2013]; *compare Cabrera v Rodriguez*, 72 AD3d 553, 554 [1st Dept 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: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12183 Cherokee Owners Corp., Index 601201/05
Plaintiff-Respondent,

-against-

DNA Contracting, LLC, et al.,
Defendants-Appellants,

JMA Consultants, Inc., et al.,
Defendants.

_____

Jaspan Schlesinger LLP, Garden City (Charles W. Segal of counsel), for appellants.

Horowitz Sigmond LLP, New York (Carol A. Sigmond of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 15, 2013, which denied the motion of defendants DNA Contracting, LLC (contractor) and Vigilant Insurance Company for summary judgment dismissing the complaint as against them and awarding DNA judgment on its counterclaims, unanimously affirmed, with costs.

Defendant movants made a prima facie showing of entitlement to judgment as a matter of law by submitting the affidavit of an individual with personal knowledge who averred that defendant contractor's work was in accordance with the contract documents, drawings and specifications and that there were no overcharges.

In opposition, plaintiff submitted evidence based on personal knowledge supporting its claim of defects in the work and other claimed breaches of the construction contract, thereby creating issues of fact. Plaintiff's claim against the contractor is not barred by law of the case (*cf. Matter of East 51st St. Crane Collapse Litig.*, __ AD3d __, 2014 WL 747544, 2014 NY App Div LEXIS 1351 [1st Dept 2014]).

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

ENTERED: APRIL 10, 2014

CLERK

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12184 The People of the State of New York, Ind. 3411/10
Respondent,

-against-

David Farrell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about March 10, 2011,

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

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

ENTERED: APRIL 10, 2014

CLERK

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

Friedman, J.P., Moskowitz, Freedman, Gische, Clark, JJ.

12185N Tony Rinkiewicz, Index 302742/10
Plaintiff-Respondent,

-against-

The Dugout, Inc., et al.,
Defendants-Appellants.

_____

Yalkut & Israel, Bronx (Arlen S. Yalkut of counsel), for appellants.

Pardalis & Nohavicka, LLP, Astoria (Joseph D. Nohavicka of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kibbie F. Payne, J.), entered November 9, 2012, which denied defendants' motion to vacate a default judgment entered against them, unanimously affirmed, without costs.

While there were some facts to suggest defendant Harold Terry was not the person served, nothing offered was dispositive. Therefore, in light of the detailed testimony of the process server regarding the specifics of the service, his substantially accurate description of Terry in the affidavit of service and his in-court identification of Terry as the individual served, this Court will accept the credibility determinations of the IAS court in finding that service was effected on Terry in his individual capacity (*cf. Holtzer v Stepper*, 268 AD2d 372 [1st Dept 2000]).

Moreover, because Terry was a manager of employees of defendant Dugout, who was in their locked premises at the time of service, and agreed to accept the papers, service was effected on Dugout, even though Terry was not a person identified in CPLR 311. (*Fashion Page v Zurich Ins. Co.*, 50 NY2d 265, 272-273 [1980]).

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

ENTERED: APRIL 10, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11428 The People of the State of New York, Ind. 2448/10
Respondent,

-against-

Scott Barden,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Gregory Carro, J. at speedy trial motion; Juan M. Merchan, J. at jury trial and sentencing), rendered December 7, 2011, as amended December 12, 2011, modified, on the law and as a matter of discretion in the interest of justice, to the extent of vacating the identity theft conviction and dismissing that count, and otherwise affirmed.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Rolando T. Acosta
David B. Saxe
Karla Moskowitz
Darcel D. Clark, JJ.

11428
Ind. 2448/10

_____x

The People of the State of New York,
Respondent,

-against-

Scott Barden,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Gregory Carro, J. at speedy trial motion; Juan M. Merchan, J. at jury trial and sentencing), rendered December 7, 2011, as amended December 12, 2011, convicting him of identity theft in the first degree, criminal possession of stolen property in the fourth degree, and theft of services (two counts), and imposing sentence.

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

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley and Alice Wiseman of counsel), for respondent.

ACOSTA, J.

This appeal raises questions about the elements of identity theft and whether intangible property can be criminally possessed, where a defendant used his associate's credit card number to pay for hotel expenses without authorization. Specifically, we are called upon to determine, first, whether assumption of identity is a discrete element of identity theft or whether it occurs automatically when a person uses another's personal identifying information, and second, whether criminal possession of stolen property includes intangible property, namely a credit card number. Regarding the first issue, we find that to secure a conviction for identity theft the People must prove not only that a defendant used another's personal identifying information, but that he or she consequently assumed the identity of that person. Because the hotel was aware of defendant's identity, he did not assume the identity of his associate by charging the credit card and, accordingly, the evidence was legally insufficient to support his conviction of identity theft. As to the second issue, we have determined that the legislature intended intangibles, including credit card numbers, to fall within the ambit of criminal possession of stolen property. Defendant constructively possessed his

associate's stolen credit card number, and thus he was properly convicted of the latter offense.

I. Background

In or around March 2009, defendant met businessman Anthony Catalfamo and began to assist him in a business venture by seeking potential investors for a development project in the Bahamas. On at least three occasions between that time and February 2010, Catalfamo paid for defendant to stay in hotels, pursuant to third-party billing agreements, in order to facilitate defendant's work on the project. Those agreements required Catalfamo to supply his credit card information to the hotels, and they established duration and expense limits on the hotels' permission to charge the account.

In February 2010, Catalfamo and defendant agreed that Catalfamo would cover the expenses of defendant's stay at the Thompson LES Hotel (the hotel) in Manhattan, anticipating that defendant would soon strike a deal with prospective investors. They further agreed that defendant would stay at the hotel for approximately five days and that his expenses would be limited to $2,300. Catalfamo entered into a third-party billing agreement with the hotel, intending that defendant would stay for the nights of February 12 through February 16.

When defendant checked into the hotel on February 13, 2010, at around 2:00 a.m., he told a front-desk staff member, Vanessa Vega, that his company was paying for his stay and that he did not want the charges to exceed $2,300. Vega prepared the third-party billing agreement and wrote on it the words "Total authorized charges not to exceed $2,300." After defendant reviewed and approved the form, Vega scanned and emailed it to Catalfamo.

Upon receipt of the form, Catalfamo called the hotel and spoke with an assistant front-desk manager, Craig Weber, to ensure that the hotel would abide by the $2,300 limit. Catalfamo then completed the form, providing his American Express card number, the card's expiration date, and his signature. On the agreement, Catalfamo wrote the phrases "This Transaction Agreement is for *one* swipe *one* charge ONLY!" and "No additional payment will be authorized with this card." Catalfamo returned the form to the hotel, and Weber wrote on the agreement "$2,300 authorized on 2/12/10 for account of Bane Barden [another name by which defendant was known]."

When the hotel processed the third-party billing agreement, Catalfamo's credit card information – but *not* his name – became "attached to [defendant's] profile" on the hotel's computer

system. However, due to an error on the part of the hotel, the third-party billing agreement did not attach to defendant's computer profile. Whenever hotel employees subsequently accessed defendant's profile, they would see that he previously used an American Express card ending in four specific digits, but they were unable to see Catalfamo's name, the billing agreement, or the $2,300 limit. At no point did Catalfamo authorize the hotel to charge his credit card account beyond the terms of this initial agreement, nor did he provide his credit card information directly to defendant.

Defendant stayed at the hotel for five nights and checked out on February 17th, incurring charges slightly in excess of the specified limit, and the hotel charged the full amount to Catalfamo's American Express card. The extent of excess charges to Catalfamo's credit card did not end there, however. Because of another mistake on the hotel's part, Catalfamo's credit card information was not deleted from defendant's computer profile upon his departure. The result was a slew of substantial unauthorized charges.

A reservation at the hotel was made in defendant's name for the night of February 28, 2010. On March 1, 2010, when defendant had not checked in, the hotel charged $205.41 to Catalfamo's

credit card, because that was the payment method that was still linked to defendant's computer profile from his earlier stay. The evidence at trial did not explain how that reservation was made.

By mid-March 2010, defendant's business relationship with Catalfamo soured. Catalfamo indicated that he no longer wished to fund defendant's expenses because the Bahamas project had not made sufficient progress. Nonetheless, defendant arrived at the hotel on March 24, 2010, and, according to Vega's trial testimony, told Vega to charge the American Express card on file. Vega routinely dealt with third-party agreements, so she did not recall the expired agreement with Catalfamo. She simply used Catalfamo's card, the only American Express card that was linked to defendant's hotel computer profile – although Catalfamo's name was not visible on the profile – and obtained approval for the charges from American Express.

Defendant checked out of the hotel on March 25 and settled the bill of nearly $2,000 with the same credit card. On checking out, defendant decided to extend his stay and immediately checked back in until March 27, incurring a bill of nearly $1,000, which the hotel also charged to Catalfamo's card. Defendant returned to the hotel on March 30. Again, Vega checked him in and

defendant said she could bill the card "on file." This time, defendant stayed at the hotel for nearly six weeks, until his arrest. During this stay, Vega and Weber saw him "[a]t least every other day." Catalfamo's card remained the only account that was attached to defendant's computer profile. Defendant consistently directed the hotel staff to bill the American Express card "on file" or responded affirmatively when they asked whether they should bill the same card.

At some point during defendant's stay, Weber recalled the expired third-party billing agreement and confronted defendant about it. According to Weber's trial testimony to which neither party objected, defendant responded that he was authorized to use Catalfamo's American Express card for his post-February expenses. That statement, however, was untrue.

In April 2010, Catalfamo discovered the unauthorized charges, totaling more than $10,000, and reported them to American Express. On or about April 12, the hotel discovered that American Express had declined the post-February charges. The hotel was notified of a "chargeback," meaning that it did not receive payment for the unauthorized charges.

At that point, the hotel attempted unsuccessfully to reach defendant by phone in order to discuss the billing issues.

Catherine Angulo, the director of the hotel's front office, encountered defendant at the front desk and asked for an alternate method of payment. She mentioned that the hotel had a "Visa card on file" and, without providing details, asked if defendant wanted her to charge that card. Defendant answered in the affirmative, and that was the extent of their conversation. That Visa card, however, belonged to Mark Barden, a person who had no connection to defendant. Nevertheless, the hotel continued to charge defendant's expenses to Mark Barden's Visa card from April 12 to May 13, 2010.[1] Visa declined some of the charges on May 13, at which point the hotel became more aggressive in attempting to obtain payment from defendant. Hotel staff members called his room several times and attempted to confront him when he passed through the lobby, but defendant was consistently dismissive, claiming he was busy or that his accountant would handle it. At some point, defendant requested a new third-party billing agreement, and Angulo obliged.

On May 13, 2010, the hotel received a completed agreement from Joseph Rizzuti, Catalfamo's business associate who had initially introduced him to defendant. The authorization was

[1]Defendant's conviction of identity theft was based on his use of Catalfamo's, not Mark Barden's, credit card information.

declined, however, when the hotel attempted to charge the outstanding balance to Rizzuti's card on the morning of May 14. That same day, the hotel received notice from Visa stating that the company was declining all prior charges made to Mark Barden's account between April and May. Consequently, after the "chargebacks" from the credit cards of Catalfamo and Mark Barden, the hotel had not received payment for approximately $50,000 worth of charges that defendant had incurred between March and May. Several hours later, on May 14, Angulo called the police, and defendant was arrested.

After a jury trial, defendant was convicted of identity theft in the first degree, criminal possession of stolen property in the fourth degree, and two counts of theft of services. He was sentenced to concurrent terms of 2 1/3 years to 7 years for identity theft, 1 1/3 to 4 years for possession of stolen property, and 1 year for each theft of services count. Defendant now appeals, arguing that the evidence was legally insufficient to support his convictions for identity theft, possession of stolen property, and one count of theft of services (Penal Law § 165.15[1]). He further argues that his statutory rights to a speedy trial were violated. For the reasons set forth below, we vacate the conviction of identity theft and affirm the remaining

convictions.

II. Discussion

A. Identity Theft

First, although inartfully phrased, defendant's objection at trial preserved his argument that his conduct did not amount to identity theft because the People failed to prove that he assumed another's identity. In any event, to the extent his argument may not have been preserved, we reach it in the interest of justice.

A person commits identity theft in the first degree

> "when he or she knowingly and with intent to defraud assumes the identity of another person by presenting himself or herself as that other person, or by acting as that other person or by using personal identifying information of that other person, and thereby . . . obtains goods . . . or services or uses credit in the name of such other person in an aggregate amount that exceeds two thousand dollars"

(Penal Law § 190.80[1]). There are, accordingly, three methods by which an individual can assume another's identity under the statute: a defendant might (1) present himself or herself as another, (2) act as another, or (3) use the personal identifying information of another.

The parties agree that a person must assume the identity of another in order to be guilty of identity theft. Where the

parties differ is on the question of whether engaging in one of the statute's enumerated methods - here, using another's personal identifying information in the form of a credit card account number - necessarily constitutes an assumption of identity. In other words, is assumption of identity a discrete element of the statute that must be proven independently of one of the methods by which identity can be assumed, or do the People automatically prove assumption of identity by proving that a defendant used another's personal identifying information? This question requires us to refer to the canons of statutory interpretation.

"The governing rule of statutory construction is that courts are obliged to interpret a statute to effectuate the intent of the [l]egislature, and when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of [the] words used" (*People v Finnegan*, 85 NY2d 53, 58 [1995], *cert denied* 516 US 919 [1995] [internal quotation marks omitted]). On the other hand, "if two constructions of a criminal statute are plausible, the one more favorable to the defendant should be adopted in accordance with the rule of lenity" (*People v Green*, 68 NY2d 151, 153 [1986] [internal quotation marks omitted]). In any event, "the core question always remains that of legislative intent" (*id.* [internal

quotation marks omitted]).

To begin with, the legislative history is of little help in determining whether assumption of identity was intended to be a distinct element of the crime. In 2002, reports of identity theft were on the rise, and New York was second only to California in terms of the prevalence of identity theft complaints (Sponsor's Mem, Bill Jacket, L 2002, ch 619 [hereinafter 2002 Sponsor's Mem]). As a result, the legislature created the offense of identity theft, in addition to other offenses such as unlawful possession of personal identification information (*see id.*). The statute was intended to aid prosecution of identity theft by clarifying that "'theft of identity' is considered a crime" and by ensuring that individuals, not credit card companies alone, would be considered victims entitled to restitution (*id.*). At the time, the expansion of Internet commerce left consumers increasingly vulnerable to identity theft (*Identity Theft: Is Your Identity Safe?*, 2000 Rep of Sen Comm on Investigations, Taxation, and Gov Operations at 3 [hereinafter 2000 Senate Report]). Identity theft is often perpetrated anonymously over the Internet, where a person's identity is typically not verified (*see id.* at 10). This helps to explain why the legislature found it appropriate to

include the unlawful use of personal identifying information in its framing of proscribed conduct. In our modern age of technology, identity theft is perhaps more easily and more fruitfully accomplished through the use of another's personal information – used to apply for a mortgage or credit card, for example – rather than by presenting oneself as another (*see id.* at 1-4).

However, the legislative history does not confirm an intent to criminalize as identity theft the use of another's personal identifying information when that use does not result in the assumption of that person's identity.[2] Therefore, although the statute was intended to proscribe Internet identity theft and other fraudulent use of personal information where an assumption of identity occurs, we cannot say that it was designed to be so broad as to encompass the conduct of someone who, like defendant, uses another's personal identifying information but does *not* assume his or her identity.

Moreover, the statute is facially ambiguous, because it is unclear whether the words that follow the phrase "assumes the

---

[2]As discussed below, it is possible to use another's personal identifying information without concomitantly assuming that person's identity.

identity of another person" are intended to define that phrase – in which case, committing one of the described acts would constitute an assumption of identity – or whether they serve as various means by which assumption of identity *can*, but does not necessarily, take place. The statute's definitional subsection (Penal Law § 190.77) helps to elucidate our query. That subsection clearly defines, inter alia, "personal identifying information," which includes a person's "credit card account number or code" (Penal Law § 190.77).[3] However, the phrase "assumes the identity of another" does not appear in the list of definitions (*see id.*).

Had the legislature specifically defined the phrase, the question of interpretation presented here would not be an issue. The statute could have included, for example, a definition that might have read "a person 'assumes the identity of another' when he or she (1) presents himself or herself as that person, (2) acts as that person, or (3) uses the personal identifying information of that person." Instead, the legislature simply included in the body of the provision the three methods by which

[3]It is undisputed that defendant used Catalfamo's personal identifying information, since the evidence established that he repeatedly authorized the use of Catalfamo's credit card account to pay for hotel expenses.

a person can assume the identity of another. As a result, the legislative intent remains nebulous. On one hand, the legislature may have intended to define "assumes the identity of another" in the wording of the statute itself, implying that a person necessarily assumes the identity of another simply by engaging in one of the listed methods. On the other hand, by excluding the phrase from the list of definitions, the legislature may have intended that the methods provided in the body of the statute are ways by which a person *can* assume another's identity, but that assumption of identity must be the result of the method used.

Because the statute is susceptible to these two reasonable interpretations and the legislative history is inconclusive, we decide this issue in accordance with the rule of lenity and sanction the interpretation more favorable to defendant (*see Green*, 68 NY2d at 153). Clearly, the more favorable interpretation would require the People to prove both elements, that defendant used Catalfamo's personal identifying information *and* that he consequently assumed Catalfamo's identity. In addition, we think this is the more sensible reading according to the plain meaning of the statute because the word "by," as used in the phrase "assumes the identity of another person by [one of

the enumerated methods],” indicates the vehicle by which the assumption of identity takes place. It does not, however, indicate that assumption of identity is an inevitable consequence of using a person’s identifying information. Put another way, although the statute provides three alternative *means* by which a defendant may commit the offense, assumption of identity must be the end result. Accordingly, whether defendant “assumed the identity” of another is a separate and essential element of the offense of identity theft which must be proven beyond a reasonable doubt.

To treat assumption of identity as an element of the crime does not, as the People argue, require proof that defendant used another’s identifying information *and* that he presented himself as another. The People are correct that a defendant can assume another’s identity by using personal identifying information, without ever presenting herself or acting as the other person. The statute is clear in that regard, because using personal identifying information is one of the disjunctive methods by which one can assume another’s identity. However, the People fail to recognize that, conversely, a person can use the personal identifying information of another *without* assuming that person’s identity. Engaging in the former does not necessarily result in

the latter.

Presenting oneself as another – e.g. affirmatively stating "I am John Doe" or signing another person's name – is the quintessential way in which one assumes another's identity. Indeed, it is difficult to imagine a situation in which presenting oneself as another would not result in an assumption of that person's identity. By contrast, assumption of identity is not necessarily accomplished when a person uses another's personal identifying information. The use of that information can be accompanied by an implicit assumption of identity, but that will not always be the case. In a typical credit card transaction, for example – when a person offers a credit card to pay for a hotel stay or to purchase an item at a store, or enters the person's credit card information to make an Internet purchase – it is implied that the person presenting or using the card *is* the cardholder, even if the person does not affirmatively present himself or herself as such (*see People v Wilson*, 52 AD3d 239, 240 [1st Dept 2008], *lv denied* 11 NY3d 743 [2008] [suppression motion properly denied where arresting officer viewed the defendant rapidly purchasing multiple MetroCards with multiple credit cards at vending machine]; *People v Vandermuelen*, 42 AD3d 667, 670 [3d Dept 2007], *lv denied* 9 NY3d 965 [2007] [evidence was legally

sufficient to establish commission of identity theft where the defendant opened credit card account in victim's name, using victim's identifying information, and made three charges with credit card]). Using another's credit card will, in most cases, also necessarily constitute an implied assumption of that person's identity.

The implication falls away, however, when the person accepting the credit card knows that the card user is, in fact, someone other than the cardholder. Without that inference – where, as here, the person presenting the card indicates that he or she has the cardholder's authorization to charge the card, and where the vendor is aware of the card user and cardholder's distinct identities – assumption of identity does not result. In the rare case where the implied assumption of identity is lacking, identity theft cannot be committed via the use of another's credit card. Such is the case before us.

Here, defendant undoubtedly used Catalfamo's credit card information without authorization (after the initial third-party billing agreement had expired), but he did not assume Catalfamo's identity by doing so. Defendant simply misrepresented his authority to use Catalfamo's card, and because the hotel staff knew that he was in fact not Catalfamo, the ordinary inference

that a person using a credit card is the cardholder did not arise.

Defendant first used Catalfamo's credit card pursuant to a third-party billing agreement that Catalfamo had executed with the hotel's employees. Upon his initial arrival at the hotel in February 2010, defendant affirmatively stated to Vega that Catalfamo was going to pay for his hotel stay and that the charges would have to be limited to $2,300. Furthermore, Catalfamo spoke over the phone with hotel employees to confirm the terms of the agreement, and wrote the specific monetary limit on the face of the third-party billing agreement. He explicitly indicated that the agreement was authorized for one swipe only and for a maximum charge of $2,300. Weber, the hotel's front-desk manager, also wrote the charge limit on the face of the agreement. This means that, at least initially, the hotel staff knew defendant's true identity, and they knew that he was not the person whose card was being attached to his computer profile. Therefore, the hotel was aware that defendant was not Catalfamo; it could not thereafter have properly drawn the inference of identity that ordinarily arises in credit card transactions.

Due to the hotel's error, neither Catalfamo's name nor the billing agreement were ultimately attached to defendant's

computer profile, and the credit card was not deleted from defendant's profile when he departed the hotel in February 2010. Nevertheless, the employees who testified at trial had knowledge of the agreement and knew or had known that defendant was not using his own credit card. All of the hotel staff that testified at trial knew defendant as Scott Barden or Bane Barden. None of them believed he was Anthony Catalfamo. The hotel's front-office director, Angulo, identified hotel documents associated with defendant, all of which listed him as the guest. At one point in March 2010, when Weber confronted him about the expired third-party billing agreement, defendant even stated that he was authorized to use Catalfamo's credit card after February, necessarily implying that the card did not belong to defendant. Defendant misrepresented his authority to use Catalfamo's credit card. However, he never presented himself as Catalfamo, nor did he implicitly assume Catalfamo's identity by using his credit card.

Furthermore, contrary to the People's assertion, the evidence does not show that Catalfamo endured the "unique harms suffered by individuals whose identities have been stolen." Defendant rightly points out that the harms suffered by those whose identities have been stolen – "damaged reputations, bad

credit reports and the resource-consuming task of trying to correct the false credit record information" (2002 Sponsor's Mem) – are often more severe than the harms suffered by victims of theft whose identities have not been stolen. The People argue that victims "can spend hundreds of hours and thousands of dollars to clear their names and restore their credit" (2000 Senate Report at 3). However, the evidence in this case did not show that Catalfamo experienced such difficulty; to the contrary, the evidence suggests that he was able to have American Express initiate the chargeback fairly easily. Regardless of the effect on Catalfamo, defendant cannot be guilty of identity theft unless he knowingly and factually assumed Catalfamo's identity.

Our decision should not foment any worry that someone in defendant's position could avoid criminal liability altogether. There are offenses under which his conduct more squarely falls, such as unlawful possession of personal identification information and theft of services (he was not charged with the former offense, but he was convicted of the latter). Identity theft is a serious issue, to be sure, but we cannot give the statute so broad a reading as to bring defendant's conduct within its orbit (*People v Harper*, 75 NY2d 313, 318 [1990]; *People v Gottlieb*, 36 NY2d 629, 632 [1975]).

Accordingly, the evidence was insufficient to establish that defendant "assume[d] the identity of another person" as required by Penal Law § 190.80, and defendant's conviction of identity theft in the first degree should be vacated and the count dismissed.

B. Possession of Stolen Property

"A person is guilty of criminal possession of stolen property in the fourth degree when he knowingly possesses stolen property, with intent to benefit himself or a person other than an owner thereof . . . and when . . . [t]he property consists of a credit card" (Penal Law § 165.45[2]).

Defendant argues that the evidence was legally insufficient to support his convictions of possession of stolen property in the fourth degree (Penal Law § 165.45) and one count of theft of services (Penal Law § 165.15[1]) because (1) a credit card number is intangible and a person can only be convicted of possession of stolen property if he or she possesses tangible property, (2) there was no stolen property because Catalfamo always possessed his credit card, and (3) even if the crime could be committed by possession of intangible information, defendant did not physically or constructively possess Catalfamo's credit card

number.[4] Insofar as defendant's arguments may have been unpreserved, we reach them in the interest of justice. Nevertheless, we find defendant's contentions unconvincing.

First, much of defendant's argument that it is impossible to criminally possess intangible property is rooted in the Penal Law's definition of "possess." The term is found in the section containing definitions of general applicability, which prescribes that the terms defined therein have their assigned meanings throughout the Penal Law "[e]xcept where different meanings are expressly specified in subsequent provisions" (Penal Law § 10.00). In section 10.00, "'possess' means to have physical possession or otherwise to exercise dominion or control over *tangible* property" (Penal Law § 10.00[8] [emphasis added]).[5]

---

[4] Defendant argues that, because a credit card number cannot be stolen, the evidence was legally insufficient to support his conviction of one count of theft of services under Penal Law § 165.15(1) (which penalizes a person who obtains a service "by the use of a credit card . . . which he knows to be stolen"). Defendant does not dispute the legal sufficiency of his conviction of the second theft of services count, under Penal Law § 165.15(2).

[5] Black's Law Dictionary defines "tangible property" as "[p]roperty that has physical form and characteristics" (Black's Law Dictionary [9th ed 2009], property). "Intangible property," by contrast, is defined as "[p]roperty that lacks a physical existence" such as "stock options and business goodwill" (*id.*). A number, such as a credit card number, is intangible although it

Taken together, section 10.00 and subsection 10.00(8) indicate that "possess," as used throughout the Penal Law, should apply only to tangible property unless otherwise specified.

However, the plain language of the statute at issue and a broader view of the Penal Law suggest that the legislature has not always imbued the term "tangible," as it appears in § 10.00(8), with such significance. For example, as an interesting point of comparison, the offense of unlawful possession of personal identification information applies almost exclusively to possession of *intangibles* (*see* Penal Law § 190.81 *et seq*. [making it a crime to "knowingly possess[] [inter alia] a person's financial services account number or code, . . . credit card account number or code, . . . [or] mother's maiden name . . . knowing such information is intended to be used in furtherance" of a crime]). Yet that provision does not expressly modify the general definition of "possess." To conclude that the legislature intended to apply the general definition of "possess" to that offense would lead to an absurd result: the provision would be almost entirely nullified. We cannot accept that the

---

may be reduced to a tangible medium as in the form of an imprinted plastic credit card. The parties do not dispute that Catalfamo's credit card number – as opposed to the credit card on which the number is embossed – is intangible.

legislature intended to pass a statute that would be stillborn because of the use of the word "tangible" in the definition of "possess." Because "courts should not legislate or nullify statutes by overstrict construction" (*People v Versaggi*, 83 NY2d 123, 131 [1994]) and because we must seek to effect the legislature's objectives, unlawful possession of personal identification information must embrace the possession of intangible property.

Similarly, the mention of "tangible property" in § 10.00(8) cannot strictly apply to criminal possession of stolen property, because to do so would thwart the legislative intent to criminalize the knowing possession of certain types of intangible stolen property. This analysis is borne out by reference to Penal Law § 155.00, which contains definitions applicable to criminal possession of stolen property as well as other offenses involving theft (located in Title J of the Penal Law). That section provides a definition of property that clearly includes intangible items (*see* Penal Law § 155.00[1] ["'property' means any . . . computer data, computer program," or "thing of value . . . which is provided for a charge or compensation"]). In fact, the Court of Appeals has ruled that intangible rights constitute property, at least inasmuch as larceny by extortion is concerned

(*People v Garland*, 69 NY2d 144 [1987] [rights of tenants to occupy and possess their apartments are "property" that can be extorted]; *see also People v Spatarella*, 34 NY2d 157, 162 [1974] ["advantageous business relationship which was based on an at-will arrangement" constituted "property" under extortion statutes]).[6]

Although we are not aware of any appellate case law on the particular issue at hand, there has been some disagreement among lower courts, since *Garland*, concerning whether property must be tangible in order to garner a conviction for possession of stolen property. First, in *People v Molina*, the Queens County Criminal Court dismissed a complaint as facially insufficient where a defendant possessed telephone credit card numbers written on a piece of paper, reasoning that "the numbers in and of themselves are not tangible property" and "the mere isolated knowledge of those numbers . . . ha[d] not yet been defined by the [l]egislature as a crime" (145 Misc 2d 612, 615 [1989]). One

[6] In reaching its conclusion, the *Spatarella* Court favorably reviewed previous Court of Appeals and Appellate Division decisions that had "construed the term 'property' . . . for the purpose of defining the kind of property which can be threatened [under the extortion statutes], and consistently held the term to include intangible rights" (*Spatarella*, 34 NY2d at 162 [noting that an employer's business, a painter's job, and a milk route were each properly deemed "property"]).

year later, in *People v Johnson*, the New York County Criminal Court declined to follow *Molina* on essentially identical facts because the number had inherent value and "there is little, if any, relevance to the form in which the telephone credit card number is possessed" (148 Misc 2d 103, 110 [1990]). Two years later, the New York County Supreme Court, analyzing *Molina* and *Johnson*, sided with *Molina* and dismissed criminal possession charges where the defendants possessed telephone authorization codes on home phones or on pieces of paper (*People v Tansey*, 156 Misc 2d 233 [1992]). The court reasoned that the wording of Penal Law § 165.45 and the general definition of "possess," read together, "makes clear that the possession of such intangible . . . codes ha[d] not yet been designated a crime" (*id.* at 239-240).

Notably, each of these cases preceded the 2002 creation of unlawful possession of personal identification information, a crime that, as discussed above, indicates the diminished relevance of the term "tangible" in the Penal Law's definition of "possess." We are thus inclined to reject the reasoning of *Molina* and *Tansey* and, instead, adopt an analysis more consistent with *Johnson*. The proposition that intangible property cannot be criminally possessed leads to the bizarre result that a person may commit larceny of intangible property, but may not be guilty

of criminally possessing the very property which he or she has stolen (*see* 6 NY Prac, Criminal Law § 15:24 [3d ed 2007]). The *Tansey* court pointed out that "[i]n neither *Spatarella* nor *Garland* did the Court [of Appeals] suggest that this view of property would be applicable to larceny by means other than extortion, or to a possession offense" (*Tansey*, 156 Misc 2d at 239). However, the Court did not foreclose the possibility of expanding that view to criminal possession offenses.

It is evident to us that, by creating a distinct definition of "property" that applies to all offenses involving theft and undoubtedly incorporates intangibles, the legislature intended to include intangible items within the purview of § 165.45, notwithstanding that the definition of "possess" remains unaltered in that provision. Apparently, when the legislature created the offense of criminal possession of stolen property – and subsequently unlawful possession of personal identification information – it either overlooked the term "tangible" in § 10.00(8), or it considered the term inconsequential. It is more sensible to read § 10.00(8) as clarifying that possession can be physical or constructive, rather than denoting that only tangible property can be criminally possessed. Therefore, a person can commit criminal possession of stolen property when he

or she possesses stolen property that is intangible.

Of course, the question presented is not resolved by our determination of the tangible/intangible dichotomy. We must further determine whether possession of a credit card number is sufficient to convict defendant of criminal possession of stolen property in the fourth degree. We have considered defendant's argument that the definition of "credit card" as used in the statute forecloses application to credit card numbers, but we ultimately find it unavailing. For purposes of the offense at issue (as well as other theft offenses under Title J of the Penal Law), a "'[c]redit card' means any instrument or article defined as a credit card in [§ 511] of the general business law" (Penal Law § 155.00[7]). That section of the General Business Law (GBL) defines "credit card" to include "any credit card, credit plate, charge plate, courtesy card, or other identification card or device issued by a person to another person which may be used to obtain . . . credit or to purchase or lease property or services on the credit of the issuer or of the holder" (GBL 511[1]). This definition appears to exclude credit card numbers. In fact, GBL 511-a clarifies that "[f]or purposes of this article [i.e. Article 29-A of the GBL] 'credit card' shall also mean any number assigned to a credit card" (GBL 511-a). The addition of

GBL 511-a suggests the legislature's belief that, prior to the amendment, the definition in § 511 did not incorporate credit card numbers. The People contend that, because § 511-a modifies all of article 29-A, it also necessarily modifies the definition found in § 511(1), so that the term "credit card" includes credit card numbers for purposes of Penal Law § 155.00 as well as article 29-A of the GBL. We agree.

The trial court instructed the jury that the broader definition of credit card, which includes credit card numbers, applies to criminal possession of stolen property. Although the parties appear to have overlooked it, the legislative history might seem to indicate that the addition of GBL 511-a in 2002 was meant to apply only to the GBL (2002 Sponsor's Mem ["Section 511-a is created in the [GBL], providing that only for purposes of the [GBL] the term credit card shall also mean any number assigned to a credit card."]). However, because § 511-a purports to modify the definition of "credit card" for the purposes of the same article of the GBL in which § 511 appears, it follows that GBL 511-a modifies § 511. As a result, the Penal Law's reference to GBL 511 also incorporates the expanded definition found in § 511-a.

Moreover, as set forth above, the definition of "property"

in Penal Law § 155.00 sufficiently demonstrates the legislature's intent to criminalize the possession of intangible stolen property, under which falls a credit card number. Because possession of the credit card number enabled defendant to access the value of Catalfamo's line of credit, the credit card number is a "thing of value . . . which is provided for a charge or compensation" (*see* § 155.00[1]; *Johnson*, 148 Misc 2d at 112), and we deem it property that can be stolen and criminally possessed. It would run contrary to the legislative intent underlying the statute to hold that credit card numbers could not be possessed as stolen property, when the account associated with a credit card, not the physical card alone, has inherent value. The credit card number, along with other information embossed on the card, allows a person who possesses it to charge the card up to the account limit. Additionally, as noted in *Johnson* with respect to telephone calling cards, "the charge attaching to the credit card number is, of course, a subsequent charge, for calls that are placed by using that number" (148 Misc 2d at 112). Likewise, the "charge" associated with a credit card is a subsequent charge, plus any applicable interest and fees, for purchases made by the card user.

Therefore, a credit card number is "property" for the

purposes of the possession offenses. It is irrelevant whether defendant had physical or constructive possession over a tangible credit card, because he had access to the full value of Catalfamo's account as if he had possessed the credit card itself. The legislative intent would be stifled by a contrary interpretation of the statute.

To accept defendant's narrow construction of the statute, while concurrently recognizing that the definition of "property" in Penal Law § 155.00 embraces other intangibles, would lead to the anomalous result that defendant could not be guilty of the fourth degree crime charged for possessing a credit card number, but could be guilty of any other degree of the crime for engaging in the very same conduct, because the term "credit card" only appears in criminal possession of stolen property in the fourth degree and not in other degrees of the crime. For example, because "property" includes intangibles for the purposes of offenses involving theft, a defendant could be guilty of possession of stolen property in the third degree for possession of a credit card number where the value of the account associated with the card "exceeds three thousand dollars" (*see* Penal Law § 165.50), but he or she could not be guilty of the lesser crime in the fourth degree, simply because the term "credit card" appears

in that provision. To prevent such an absurdity, we must accept that a credit card number can be the subject property in a charge of criminal possession of stolen property in the fourth degree. Although defendant's conduct might fall more squarely within the crime of unlawful possession of personal identification information (Penal Law § 190.81 *et seq*.), we find that possession of a stolen credit card number is within the ambit of criminal possession of stolen property.

Furthermore, we reject defendant's argument that, because Catalfamo continued to possess his credit card during defendant's stay at the hotel, there was no stolen property. The card became stolen property in March 2010, when defendant had the intent to appropriate property and began wrongfully charging Catalfamo's card after the expiration of the third-party billing agreement (*see* Penal Law § 155.05 ["A person steals property and commits larceny when, with the intent . . . to appropriate [the property of another] . . . he wrongfully takes, obtains, or withholds such property from an owner thereof"]; § 155.00[4] [to "appropriate" property means, inter alia, "to exercise control over [the property of another] . . . under such circumstances as to acquire the major portion of its economic value or benefit"]). Furthermore, in *Matter of Reinaldo O.* (250 AD2d 502, 503 [1st

Dept 1998], *lv denied* 92 NY2d 809 [1998]), we observed that "acquisition of a credit card number meets th[e] definition [of 'appropriate' in § 155.00(4)] because the number itself permits the thief to make purchases . . . up to the credit limit." Here, defendant clearly obtained Catalfamo's credit card number because he was able to charge expenses to the card, and he had the intent to appropriate the card number because he instructed hotel employees to charge what he knew to be Catalfamo's credit card, thereby acquiring a major portion of the card's value. Thus, the card number was stolen despite Catalfamo's continued possession of the tangible card.

Finally, we find meritless defendant's argument that he did not constructively possess the credit card number. To prove that defendant had constructive possession of the property, "the People must show that the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized" (*People v Manini*, 79 NY2d 561, 573 [1992]). The record shows that defendant was able to charge hotel expenses and services to Catalfamo's American Express credit card by directing hotel employees to charge the "card on file." The hotel's employees, believing defendant's

misrepresentations of authority to use the card, followed his directives. Whether defendant actually knew the credit card number is immaterial; irrespective of his knowledge, he was able to use the card number and acquire goods and services for his own benefit. Defendant's ability to have the account charged at his request demonstrates that he had sufficient dominion or control to constructively possess the credit card number contained in the hotel's computer system (*see Manini*, 79 NY2d at 573).

Accordingly, defendant's convictions of criminal possession of stolen property in the fourth degree and theft of services (based on his use of Catalfamo's credit card) were supported by legally sufficient evidence.

Lastly, we have considered and rejected defendant's speedy trial argument.

Accordingly, the judgment of the Supreme Court, New York County (Gregory Carro, J. at speedy trial motion; Juan M. Merchan, J. at jury trial and sentencing), rendered December 7, 2011, as amended December 12, 2011, convicting defendant of identity theft in the first degree, criminal possession of stolen property in the fourth degree, and two counts of theft of services, and sentencing him to an aggregate term of 2 1/3 to 7 years, should be modified, on the law and as a matter of

discretion in the interest of justice, to the extent of vacating the identity theft conviction and dismissing that count, and otherwise affirmed.

All concur.

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

ENTERED: APRIL 10, 2014

CLERK