SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 17, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Andrias, DeGrasse, Manzanet-Daniels, JJ.

11317 Maria Carmela Farina, Index 109524/11
Plaintiff-Appellant,

-against-

Lidia M. Bastianich, etc., et al.,
Defendants-Respondents.

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Katsandonis, P.C., New York (Paul Catsandonis of counsel), for appellant.

Cozen O'Connor, New York (Michael C. Schmidt of counsel), for respondents.

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Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 1, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the fourth cause of action for quantum meruit and the eighth cause of action for unjust enrichment, unanimously modified, on the law, to reinstate the fourth and eighth causes of action against defendant Bastianich, and otherwise affirmed, without costs.

Plaintiff is a 61-year-old Italian citizen; defendant Bastianich is a gourmet chef and restaurateur. The complaint alleges that the late husband of Mrs. Luigia Crespi, Oscar

Crespi, worked for many years for defendant Bastianich as a handyman. The complaint alleges that Mr. Crespi, wishing to ensure that his wife would be taken care of following his death, approached defendant Bastianich with an offer: he would deed over his house in College Point, Queens, to Bastianich, upon the understanding that Bastianich would care for his wife after he passed away. On March 9, 1995, Oscar Crespi died from stomach cancer, and on August 20, 1996 his then 89-year-old wife deeded their home to defendant Bastianich in consideration for 10 dollars. Mrs. Crespi retained a life estate in the home. There is no familial relationship between Bastianich and Mrs. Crespi.

The complaint alleges that in 2005, an associate of defendant Bastianich offered plaintiff, then residing in Venice, a position as a chef managing and overseeing kitchens for both Bastianich's television show and defendants' restaurants. Plaintiff alleges that she was to receive not less than $600 per week for 40 hours of work. Bastianich, through her company Tavola Productions, sponsored plaintiff's application for an H2-B visa. H2-B visas are only available to individuals who can demonstrate a certain level of education or a specialty occupation. The visa application represented that plaintiff was to serve as a test kitchen and menu preparation coordinator at a salary of not less than $600 per week.

Upon arriving in the United States in 2006, however, plaintiff was immediately placed in the home of Mrs. Crespi, in College Point, Queens, and told that she was to serve as the personal assistant to the elderly Mrs. Crespi. Her duties involved cleaning Crespi's home, cooking her meals, bathing her, feeding her, shopping and other tasks. Plaintiff also performed housework and gardening for defendant Bastianich. It is undisputed that plaintiff never received monetary compensation for performing these services.

Plaintiff alleges that when she inquired about the compensation she had been promised, she was informed that the process of applying for a green card was "very expensive" and that her earnings were being saved toward costs associated with her green card. When Mrs. Crespi died, in 2011, plaintiff was presented with a one-way ticket back to Italy. Shortly thereafter, defendants instituted an eviction proceeding against plaintiff to remove her from the College Point property. Plaintiff instituted this action seeking compensation for services she had rendered on behalf of defendants and asserting claims for, inter alia, quantum meruit and unjust enrichment.

The motion court granted defendants' motion to dismiss the complaint in its entirety. As to plaintiff's claim for quantum meruit, the court found plaintiff's allegations on the element of

acceptance to be in "direct conflict with her claim that she never received any compensation for her six years of work," noting that plaintiff had been given "health insurance, a place to live, food, [] basic necessities and assist[ance] with immigration matters." The court deemed plaintiff's allegations that "at some unspecified time [defendants] were placing money into a bank account for her" insufficient to satisfy the element of a reasonable expectation of compensation. The court dismissed plaintiff's claim for unjust enrichment because it relied on "the same factual allegations" as her claim for quantum meruit and sought the same damages. We now modify to reinstate the causes of action as against defendant Bastianich.

Generally, under the doctrine of quantum meruit, "the performance and acceptance of services gives rise to the inference of an implied contract to pay for the reasonable value of such services" (*Moors v Hall*, 143 AD2d 336, 338 [2d Dept 1988]). To state a cause of action for quantum meruit, plaintiff must allege "(l) the performance of the services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services" *(id.* at 337-338*)*

Allegations that plaintiff provided personal services in good faith to Mrs. Crespi on behalf of defendant Bastianich are

sufficient. Similarly, plaintiff has sufficiently alleged the element of acceptance via allegations that defendant, inter alia, placed her on Tavola's group insurance, filed tax returns on her behalf, and submitted visa applications in which she represented that plaintiff was an employee of Tavola.

The motion court found plaintiff's allegation that she had a reasonable expectation of compensation to be "inherently incredible" in light of the fact that she received no compensation for the period of six years that she cared for Mrs. Crespi. However, "[t]he question of whether a party had a reasonable expectation of compensation for services rendered is a matter for the trier of fact to determine based on the evidence before it." (*Caribbean Direct, Inc. v Dubset LLC*, 100 AD3d 510, 511 [1st Dept 2012], quoting *Moors v Hall* at 338).

Similarly, plaintiff has sufficiently alleged, at this juncture, that defendant Bastianich was unjustly enriched at her expense. To state a cause of action for unjust enrichment, a plaintiff must demonstrate "that (1) defendant was enriched, (2) at plaintiff's expense, and (3) that 'it is against equity and good conscience to permit [] defendant to retain what is sought to be recovered" (*Lake Minnewaska Mts House v Rekis*, 259 AD2d 797 [3rd Dept 1999]). A person may be unjustly enriched not only where she receives money or property, but also where she

otherwise receives a benefit (*see Manufacturers Trust Co. v Chemical Bank*, 160 AD2d 113, 117-118 [1st Dept], *lv denied* 77 NY3d 803 [1991]). Such a benefit may be conferred where the person's debt is satisfied or where she is otherwise saved expense or loss (*id.*).

Plaintiff alleges that she conferred a benefit upon defendant Bastianich by serving as a home care attendant to Mrs. Crespi, and that Bastianich has unjustly received and retained those benefits without duly compensating her. Plaintiff asserts that in 1996, Mrs. Crespi deeded her property to Bastianich for $10, reserving a life estate in the property, "with the understanding that Ms. Bastianich would provide a home care attendant to Mrs. Crespi if and when her health deteriorated to the point where she could not take care of herself." Bastianich was also benefitting from the fact that plaintiff was cleaning and maintaining a house she admittedly owns. Plaintiff alleges that Bastianich promised to pay her $600 per week for her work, and asserts that "equity and good conscience" demand that she be compensated for her services.

The fact that plaintiff may have been compensated, in part, by room and board and health insurance, is not dispositive on the question of whether she received adequate compensation for her

services, and does not bar the claim at the pleading stage (*see Foster v Kovner*, 44 AD3d 23, 29 [1st Dept 2007] ["the adequacy of the compensation cannot be resolved on a motion to dismiss, in that even if plaintiff received his salary, he did not receive the equity he was allegedly promised"]). Plaintiff alleges that she was not adequately compensated for her services insofar as a 24-hour home attendant would have cost defendants $200,000 per year, and she received no compensation other than health insurance.

However, the complaint fails to sufficiently allege how defendant Manuali, Bastianich's daughter, or the corporate defendant, Lidia's Enterprise Holdings LLC, were either unjustly enriched by the services plaintiff performed for Mrs. Crespi, or how plaintiff had a reasonable expectation of compensation by defendant Manuali specifically. Accordingly, the fourth and eighth causes of action were properly dismissed as to those defendants.

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

ENTERED: APRIL 17, 2014

CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Gische, JJ.

11415-
11415A Dovid Feld, etc.,
Plaintiff-Appellant,

-against-

Apple Bank for Savings,
Defendant-Respondent.

Index 651565/11

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Tusa P.C., Lake Success (Joseph S. Tusa of counsel), for appellant.

Stern Tannenbaum & Bell LLP, New York (David S. Tannenbaum of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 15, 2013, which, insofar as appealed from, granted defendant's motion to dismiss the amended complaint pursuant to CPLR 3211 (a)(1), (5) and (7), unanimously affirmed, with costs. Order, same court and Justice, entered March 15, 2013, which denied plaintiff's motion to strike the affidavits and most of the exhibits submitted by defendant in support of its motion to dismiss, unanimously affirmed, without costs.

Defendant is a New York State-chartered savings bank. The amended complaint challenges the method by which defendant has imposed overdraft charges against plaintiff's checking account. It is stated in the preamble to the amended complaint that

defendant has engaged in the following allegedly unlawful practices:

> (1) applying "'courtesy overdraft'" payments and loans to defendant's customers without their prior approval;
>
> (2) imposing overdraft charges when deposit tickets indicate that sufficient funds are available to cover particular debits;
>
> (3) imposing overdraft charges that amount to usurious interest rates;
>
> (4) reordering (prioritizing) account withdrawals to create or maximize overdraft charges;
>
> (5) comingling automated clearing house and electronic fund transfer debits to manufacture overdraft charges;
>
> (6) using "'shadow'" lines of credit to make overdraft loans without disclosing same to defendant's customers;
>
> (7) stating in literature provided to customers that defendant "'may'" provide overdraft protection or pay overdrafts as a discretionary courtesy while knowing that it would do the same as a matter of policy;
>
> (8) imposing account fees that result in overdraft charges; and
>
> (9) misstating account balances in statements issued to defendant's customers.

Plaintiff's three causes of action are based on theories of contract, alleged violations of General Business Law § 349 and usury. Plaintiff asserts that his contract with defendant consists of a brochure entitled "All About Your Apple Bank Accounts" that was issued in March 1998. The contract cause of action was properly dismissed pursuant to CPLR 3211(a)(7) because

"plaintiff failed to allege the breach of any particular contractual provision" set forth in the brochure (*see Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408 [1st Dept 2003]; *see also McNeary v Niagara Mohawk Power Corp.*, 286 AD2d 522, 524 [3d Dept 2001]). To be sure, plaintiff conceded below that "the Agreement is silent as to several of Plaintiff's allegations, and thus, no specific provision of the Agreement can be pleaded." We are also not persuaded by plaintiff's argument that a breach of the covenant of good faith and fair dealing is sufficiently pleaded with respect to the brochure's representation that defendant *may* provide overdraft protection or pay overdrafts as set forth above. Plaintiff misplaces his reliance on *Broder v MBNA Corp.* (281 AD2d 369 [1st Dept 2001]). In *Broder* there was an issue of fact as to whether a purported lower promotional interest rate was deceptive and violative of the implied covenant of good faith and fair dealing under a credit card agreement (*id.* at 370). Although it stated that it may do so, the credit card issuer in *Broder* did not allocate payments to satisfy promotional balances with lower interest rates before cash advance balances that carried higher interest rates (*id.*). To that extent, the cardholders in *Broder* were deprived of the opportunity to take advantage of the promoted lower interest rate. By contrast, the complaint here does not set forth any difference in the fees and

charges that plaintiff would have incurred had defendant decided to reject his checks for insufficient funds instead of paying the overdrafts. In all other respects, the claim that defendant breached the implied covenant of good faith and fair dealing was properly dismissed because it duplicates the contract cause of action (*see Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

To state a claim under General Business Law § 349, "a plaintiff must allege that the defendant has engaged in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof" (*Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 344 [1999] [internal quotation marks omitted]. A "'deceptive act or practice'" is defined as "a representation or omission 'likely to mislead a reasonable consumer acting reasonably under the circumstances'" (*id.*). Plaintiff asserts that the alleged so-called "shadow" lines of credit violate the statute. The complaint borrows from the definition of the term that is set forth in *Gutierrez v Wells Fargo Bank, N.A.* (730 F Supp 2d 1080 [ND Cal 2010], *affd in part, revd in part on other grounds* 704 F3d 712 [9th Cir 2012]), a case that involved overdrafts on debit card transactions. The *Gutierrez* court explained the practice as follows: "Wells Fargo implemented a practice involving a secret bank program called

'the shadow line.' Before, the bank declined debit-card purchases when the account's available balance was insufficient to cover the purchase amount. After, the bank authorized transactions into overdrafts, but did so with no warning that an overdraft was in progress. Specifically, this was done without any notification to the customer standing at the checkout stand that the charge would be an overdraft and result in an overdraft fee. Thus, a customer purchasing a two-dollar coffee would unwittingly incur a $30-plus overdraft fee" (*id.* at 1085).

The practices alleged in the instant complaint are demonstrably distinguishable because plaintiff makes no claim that the applicability of his overdraft protection was not disclosed to him. Unlike the debit card customers in *Gutierrez*, plaintiff was advised in his brochure that defendant had reserved the right to pay overdrafts on his checking account. We further note that the *Gutierrez* court specifically avoided the issue of whether the use of shadow lines of credit is an illegal practice. The court stated: "Plaintiffs' claims did *not* target the legality of the shadow line but were limited strictly to high-to-low posting and its impact on overdraft fees. As such, the relief granted herein will be limited to the bank's high-to-low

resequencing practices" (*id.* at 1136).[1] The holding in *Gutierrez*, therefore, does not support plaintiff's argument that the shadow lines of credit alleged in the complaint are actionable under General Business Law § 349.

The court properly rejected plaintiff's argument that the practice of "reordering," as described in the complaint, violates General Business Law § 349 as well as the implied covenant of good faith and fair dealing. Although not dispositive, UCC 4-303(b) gives banks broad discretion with respect to the posting of transactions by providing that "items may be accepted, paid, certified or charged to the indicated account of its customer in any order." As aptly explained in the Official Comment to the statute: "As between one item and another no priority rule is stated. This is justified because of the impossibility of stating a rule that would be fair in all cases, having in mind the almost infinite number of combinations of large and small checks in relation to the available balance on hand in the drawer's account; the possible methods of receipt; and other variables. Further, [where] the drawer has drawn all the checks,

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[1]In *Gutierrez*, high-to-low posting is described as a bookkeeping device by which the bank posted debit card purchases in order of highest-to-lowest dollar amount with the effect of maximizing the number of overdrafts (*Gutierrez*, 704 F3d at 716-717). This is the same practice plaintiff refers to as "reordering."

the drawer should have funds available to meet all of them and has no basis for urging one should be paid before another . . . " (UCC 4-303, Official Comment 7). On this record, we find that plaintiff has not sufficiently alleged that defendant has engaged in a deceptive practice or violated the implied covenant of good faith and fair dealing by posting transactions to plaintiff's checking account in the manner authorized by UCC 4-303(b) (*see e.g. Hill v St. Paul Fed. Bank for Sav.*, 329 Ill App 3d 705, 768 NE2d 322 [2002]).

Plaintiff's claim that defendant's deposit tickets misrepresented his account balances is refuted by the brochure that plaintiff acknowledges as his agreement. The brochure disclosed defendant's funds-availability policy. In particular, it advised defendant's customers of delays in the availability of deposited funds and that withdrawals could not be made during the delay. These express disclosures also belie plaintiff's claim that defendant's monthly bank statements were deceptive.

The third cause of action, alleging usury, was properly dismissed because, as found by the motion court, overdraft charges are not interest. "If an instrument provides that the creditor will receive additional payment in the event of a contingency *beyond the borrower's control*, the contingent payment constitutes interest within the meaning of the usury statutes"

(*Blue Wolf Capital Fund II, L.P. v American Stevedoring, Inc.*, 105 AD3d 178, 183 [1st Dept 2013][emphasis added]). Even assuming a debtor-creditor relationship between the parties, the contingency of an account overdraft would have been within plaintiff's control (*see e.g. Video Trax, Inc. v NationsBank, N.A.*, 33 F Supp 2d 1041, 1054-1055 [SD Fla 1998], *affd* 205 F3d 1358 [11th Cir 2000], *cert denied* 531 US 822 [2000]).

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 17, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11558 Honoria Caicedo, by her Guardian Ad Litem Roberto A. Ferreira,
Plaintiff-Appellant,

-against-

Janet Sanchez, M.D.,
Defendant-Respondent.

[And a Third-Party Action]

Index 300379/08

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

Law Office of Lori D. Fishman, Tarrytown (Michael J. Latini of counsel), for respondent.

Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered August 28, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff Honoria Caicedo sustained injury on May 28, 2006 when she fell down the basement stairs on premises owned by defendant Janet Sanchez, M.D., a two-story structure containing a medical office on the first floor and a residential apartment on the second. Dr. Sanchez was not present at the time of the accident. She had permitted her brother, Hugo Zambrano, to stay in her apartment for a few days while she was on vacation. Although he had been instructed not to allow anyone else onto the

premises, Hugo invited third-party defendant Maria Torres to stay with him. She arrived, accompanied by her son and daughter and plaintiff, her mother, in the early evening of May 27, 2006. Plaintiff suffers from a variety of ailments, including dementia, and an attempt to depose her in October 2009 was abandoned when she could not remember the accident, did not recall having been injured and did not recognize Maria Torres, who had brought her to the deposition.

Dr. Sanchez gave deposition testimony in which she described the layout of the premises. Referring to a photograph of the exterior, which depicts two doors, she identified the right door as the main entrance to her office and the left as the entrance leading to her apartment. Immediately inside the left door is a "procedure room," on the other side of which are another two doors, the right leading to the waiting room and the left to the stairs to the second-floor apartment. At the back of the waiting room is a door to a room used to take blood and to the immediate left is the door to the basement stairs, which is kept locked.

Maria Torres testified that, upon arriving at the premises, she and her family used the left entrance door to go into the procedure room, where a bed had been set up for her mother. She identified the room from a photograph as the procedure room. In any event, she stated that she was present in the room occupied

by her mother on the following morning after her mother had eaten breakfast. Ms. Torres stated that her mother rose, took two or three steps, and slipped and fell down the basement stairs. She could not state what, if anything, her mother had slipped on and had not noticed that the floor was slippery. She did not explain how her mother came to fall down stairs separated from the procedure room by a door and the full length of the waiting area.

Plaintiff offered the affidavit of an expert who tested the floor tiles. Using a drag sled to measure the coefficient of friction, the expert obtained a reading of 0.36. He opined that any reading of less than 0.50 is indicative of an unsafe condition.

The duty of an owner of property to maintain his or her premises so that they are reasonably safe (*see Kellman v 45 Tiemann Assoc.*, 87 NY2d 871, 872 [1995]; *Basso v Miller*, 40 NY2d 233, 241 [1976]) extends to any hazardous condition about which the owner has actual or constructive notice. Except where the landowner created the defective condition, thereby affording actual notice (*see Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 [1st Dept 1984], *affd for reasons stated below* 64 NY2d 670 [1984]), it is incumbent upon the injured party to establish that the condition was either known to the owner or had existed for a sufficient period of time to have allowed the owner to

discover and correct it (*see Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]; C*usack v Peter Luger, Inc.*, 77 AD3d 785, 786 [2d Dept 2010]).

Here, plaintiff is alleged to have fallen as a result of a slippery floor. Plaintiff was unable to supply any information about the circumstances of the accident. Plaintiff failed to explain how she took two or three steps from a chair in the procedure room and slipped and fell down the basement stairs that were located in the back of the adjacent waiting room. As pointed out by defendant, "Plaintiff would have had to slipped [sic] all the way across the length of the office (waiting room) and made a 180 degree turn before reaching the top of the stairs." Moreover, Maria Torres conceded that she did not know what caused her mother to fall and had not noticed that the floor was slippery. Finally, there is no evidence of any prior injury or complaint about the floor to support the conclusion that Dr. Sanchez should have known about the allegedly hazardous condition (*see e.g. Galler v Prudential Ins. Co. of Am.*, 99 AD2d 720 [1st Dept 1984] *affd* 63 NY2d 637 [1984]; *Silva v American Irving Sav. Bank*, 31 AD2d 620 [1st Dept 1968], *affd* 26 NY2d 727 [1970]). Proof that a floor is "inherently slippery," standing alone, is insufficient to support a cause of action for negligence (*Waiters*

v Northern Trust Co. of N.Y., 29 AD3d 325, 326-327 [1st Dept 2006]; *Kruimer v National Cleaning Contrs.*, 256 AD2d 1 [1st Dept 1998]), and the complaint was properly dismissed.

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

ENTERED: APRIL 17, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, DeGrasse, Richter, JJ.

11981 Chrystelle Rondin, Index 102268/08
Plaintiff-Respondent,

-against-

Victoria's Secret Stores, LLC,
Defendant-Appellant.

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Goldberg Segalla LLP, Albany (Matthew S. Lerner of counsel), for appellant.

Goldblatt & Associates, P.C., Mohegan Lake (Kenneth B. Goldblatt of counsel), for respondent.

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Order, Supreme Court, New York County (Richard F. Braun, J.), entered on or about July 9, 2013, which, upon a finding that both plaintiff and defendant Victoria's Secret Stores, LLC, were negligent, apportioned liability 25% to plaintiff and 75% to Victoria's Secret, unanimously affirmed, without costs.

Plaintiff tripped and fell on the first step from the landing of a staircase leading down from the mezzanine level to the lobby of the Victoria's Secret store located on West 57th Street. At trial, plaintiff expert testified that her fall was caused by a one half inch height differential between the landing and the first step, and the first step and the second step, which caused plaintiff to lose her balance.

Defendant contends that the staircase was not defective because the height differential of the risers between the first

and the second stair from the landing complied with Section 27-375 of the Administrative Code of the City of New York. However, under Administrative Code § 27-375(f), "Interior stair[s]" are defined as "stair[s] within a building, that serve[ ] as a required exit" (Administrative Code § 27-232). "Exit" is defined as "[a] means of egress from the interior of a building to an open exterior space . . . " (*id.*). The stairs leading from the mezzanine level to the lobby did not serve as a means of egress. Thus, Administrative Code § 27-375 is inapplicable (*see Gibbs v 3220 Netherland Owners Corp.*, 99 AD3d 621 [1st Dept 2012]*; Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [1st Dept 2010]).

Plaintiff's expert supported her opinion that the stairway was defective "by nonconclusory reference to specific, currently applicable safety standards or practices" (*Contreras v Zabar's*, 293 AD2d 362 [1st Dept 2002]; *see Hotaling v City of New York*, 55 AD3d 396 [1st Dept 2008], *affd* 12 NY3d 862 [2009]). Section 5-2.2.2.4 of the National Fire Protection Association Life Safety Code [1994] requires that there can be no variation exceeding three sixteenths of an inch "in the depth of adjacent treads or in the height of adjacent risers and the tolerance between the largest and smallest tread cannot exceed 3/8." Plaintiff's expert identified the Life Safety Code Handbook as a published authoritative and nationally recognized accepted industry

standard for safe staircase construction and maintenance in the field of architecture. When asked if plaintiff's expert was correct in that regard, defendant's expert replied "yes."

The trial court's finding that the 1994 Life Safety Code is applicable because the stairs were renovated in 1996, when defendant constructed a new tile floor directly on top of an existing floor on the second floor landing, which created the height differential in the location where plaintiff lost her balance, is supported by a fair interpretation of the evidence. Defendants' store manager admitted that the tile was added to the landing after the staircase was originally built and defendant's Exhibit G at trial included an application, filed by defendant on July 19, 1996 with the New York City Department of Buildings, to alter the mezzanine floor. Thus, plaintiff's expert testimony that the one half inch differential caused plaintiff's fall established a case of negligence against defendant.

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

ENTERED: APRIL 17, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12028N- Index 652110/10
12029N AXA Mediterranean Holding, S.A.,
Plaintiff-Appellant,

-against-

Ing Insurance International, B.V.,
Defendant-Respondent.

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Appeals having been taken to this Court by the above-named appellant from orders of the Supreme Court, New York County (Eileen Bransten, J.), entered on or about July 30, 2012,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated March 18, 2014,

It is unanimously ordered that said appeals be and the same are hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12225 The People of the State of New York, Respondent, Ind. 3179/11

-against-

Roberto Rodriguez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Natalia B. Bedoya of counsel), for respondent.

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered January 20, 2012, as amended January 31, 2012 and February 21, 2012, convicting defendant, after a jury trial, of four counts of grand larceny in the fourth degree and three counts of criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to concurrent terms of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence established that defendant went through the pockets of the sleeping victim and passed something to the codefendant. Upon their immediate arrest, defendant was in possession of the victim's cell phone, and the codefendant was in possession of the

victim's wallet.

Since defendant agreed to the court's proposed remedies for certain difficulties arising during deliberations, defendant's contention that the court should have conducted individual juror inquiries is unpreserved and waived (*see People v Zayas*, 89 AD3d 610 [1st Dept 2011], *lv denied* 18 NY3d 964 [2012]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. After the court learned that one juror had complained that another juror was exerting undue pressure over the deliberations, and the jury subsequently reported that it was deadlocked, the court delivered thorough and proper supplemental instructions addressing these matters (*see People v Ford*, 78 NY2d 878 [1991]). Although the jury reached a verdict within an hour of the supplemental instructions, there is no indication that the unanimous verdict, confirmed by polling, resulted from any juror misconduct or a desire to avoid returning to court the next day (*see People v Marshall*, 106 AD3d 1, 10 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Haxhia*, 81 AD3d 414 [1st Dept 2011], *lv denied* 17 NY3d 796 [2011], *cert denied* 565 US __, 132 S Ct 1539 [2012]),

and there was nothing to warrant a sua sponte inquiry.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12226 Jose Jaime Garzon-Victoria, Index 306505/12
Plaintiff-Respondent,

-against-

Michael C. Okolo, et al.,
Defendants-Appellants.

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Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Colin F. Morrissey of counsel), for appellants.

Law Offices of Brad A. Kauffman, New York (David S. Zwerin of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about April 4, 2013, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability by submitting his affidavit stating that defendants' yellow cab struck him as he was crossing within a crosswalk, with the pedestrian light in his favor, and after he had looked for oncoming traffic (*see Cartagena v Girandola*, 104 AD3d 599 [1st Dept 2013]; *Beamud v Gray*, 45 AD3d 257 [1st Dept 2007]).

In opposition, defendants failed to raise a triable issue of fact. Defendant driver Michael Okolo himself admits in his affidavit that both he and plaintiff spoke with the police.

Because Okolo's statement constitutes an admission against interest, it is admissible (*see Penn v Kirsh*, 40 AD2d 814, 814 [1st Dept 1972]). Okolo's affidavit containing a different version of the facts appears to have been submitted to avoid the consequences of his prior admission to the police officer and, thus, is insufficient to defeat plaintiff's motion for partial summary judgment (*see Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053, 1053 [2d Dept 2012]; *Abramov v Miral Corp.*, 24 AD3d 397, 398 [2d Dept 2005]).

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

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12227 Henry A. Ward, Index 300931/12
Plaintiff-Respondent,

-against-

Lincoln Electric Company,
Defendant-Appellant.

_____

Butler Snow LLP, New York (David M. Cohen of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered September 11, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this action for injuries related to the latent effect of exposure to a toxic substance, the statute of limitations began to run when plaintiff discovered the primary condition on which his claim is based, and not when he discovered the causation connection to the toxic substance (*Matter of New York County DES Litig.*, 89 NY2d 506 (1997).

Plaintiff's uncertified medical records may be considered since plaintiff does not dispute their accuracy or veracity

(*Carlton v St. Barnabas Hosp.*, 91 AD3d 561 [1st Dept 2012]; CPLR 4518[c]). He only disputes the inferences to be drawn from the records as to the date on which his condition was sufficiently apparent to start the limitations period running (*see* CPLR 214-c[2]).

In any event, plaintiff's own deposition testimony establishes that he had persistent, severe, progressively worsening symptoms that limited his physical activity, for which he sought regular, ongoing medical treatment, as far back as at least 2007, and that, by 2008, necessitated an invasive procedure that confirmed a diagnosis of pulmonary fibrosis. These dates are corroborated by his workers' compensation claim. Contrary to plaintiff's contention, his symptoms were not "too isolated or inconsequential" to start the limitations period running before January 30, 2009 (*see Cabrera v Picker Intl.*, 2 AD3d 308 [1st Dept 2003] [internal quotation marks omitted]). They became

apparent by, at the latest, the latter half of 2008, more than three years before this action was commenced, on January 30, 2012 (*see New York County DES Litig.*, 89 NY2d at 514 [1997]).

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12228 In re Trayvon D.,

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

_____

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about May 3, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the third degree and menacing in the third degree, and placed him on enhanced supervision probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding 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 court's credibility determinations, including its evaluation of any inconsistencies in testimony. The element of physical injury was established by evidence warranting the

conclusion that the assault victim's injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and that they caused "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]), even though the victim did not seek medical treatment (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12229 Utica Mutual Insurance Company, as subrogee of Ferro Enterprises NY LLC, Plaintiff-Respondent, Index 303548/10

-against-

James McCorvey, Jr., Defendant-Appellant.

_____

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for appellant.

Randall B. Smith, P.C., Melville (Joshua D. Smith of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 17, 2013, which denied defendant's motion, inter alia, to vacate a default judgment and dismiss the complaint, unanimously affirmed, without costs.

Defendant did not proffer a reasonable excuse for his default. The record supports plaintiff's claim that defendant engaged in a pattern of default that warranted the denial of his motion to vacate the default.

In light of the above, we need not reach the merits of defendant's defense.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12230 The People of the State of New York, Ind. 2677/10
Respondent,

-against-

Ismeal Roldan,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marianne Stracquadanio 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 (Steven L. Barrett, J.), rendered on or about March 8, 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 17, 2014

CLERK

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

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12231 Robert Piorkowski, et al., Index 103241/08
Plaintiffs-Respondents,

-against-

Hospital for Special Surgery, et al.,
Defendants-Appellants.

_____

Bartlett McDonough & Monaghan, LLP, Mineola (Bhalinder L. Rikhye of counsel), for appellants.

The Jacob D. Fuchsberg Law Firm, LLP, New York (Joseph Lanni of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Milton Tingling, J.), entered July 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendants' cross motion for a pre-trial hearing, unanimously dismissed, without costs.

An evidentiary ruling made before trial is generally reviewable only in connection with the appeal from the judgment rendered after trial (*see Santos v Nicolas*, 65 AD3d 941 [1st Dept 2009]; *Rivera v New York Health & Hosps. Corp. [Bellevue Hosp. Ctr. & Gouverneur Diagnostic & Treatment Ctr.*], 38 AD3d 476 [1st Dept 2007). Accordingly, no appeal lies from the order which

denied defendants' motion seeking a *Frye* hearing (*see Frye v United States* 293 F 1013 [DC Cir 1923]) concerning plaintiffs' proposed expert testimony (*see Rodriguez v Ford Motor Co.*, 17 AD3d 159, 160 [1st Dept 2005]).

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12234 In re Karen Michelle F.,
Petitioner-Respondent,

-against-

Wilfredo C.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

_____

Order, Family Court, Bronx County (James E. d'Auguste, J.), entered on or about November 27, 2012, which, inter alia, granted petitioner mother's petition to relocate from Bronx County to Florida with the parties' child, unanimously affirmed, without costs.

The court's determination has a sound and substantial basis in the record, and there is no reason to disturb the court's findings (*see generally Matter of Alaire K.G. v Anthony P.G.*, 96 AD3d 216, 220 [1st Dept 2011]). The court considered all of the relevant factors and properly concluded that the proposed relocation would serve the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]). Although the then four-year-old child has a loving relationship with both parties, petitioner has been the child's primary caregiver and has been

responsible for his day-to-day routine and his financial support for the past 2½ years. Petitioner also showed that a move to Florida would improve the child's quality of life (*see Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124, 131 [1st Dept 2013]; *Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658 [1st Dept 2010].

Moreover, both petitioner and her current husband are committed to fostering a relationship between the child and respondent father (*see Sonbuchner v Sonbuchner*, 96 AD3d 566, 567 [1st Dept 2012]). Although petitioner's relocation will have an impact upon respondent's ability to spend time with his child, the liberal visitation schedule set by the court will allow for respondent and the child to continue to have a meaningful relationship (*see Matter of Carmen G. v Rogelio D.*, 100 AD3d 568 [1st Dept 2012]).

Respondent's contention that the court failed to adequately take into consideration the ability of the parties to equally bear the additional travel expenses that would be incurred as the result of the child's relocation to Florida is unpersuasive. The record demonstrates that respondent was not forthcoming to the court about his finances and neither petitioner nor her husband

testified that they were unable afford the additional travel expenses.

We have considered respondent's remaining arguments, including that he was deprived of a fair hearing, and find them unavailing.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12235 The People of the State of New York, Respondent, Ind. 2686/10

-against-

Floyd Townsend, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered July 11, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of 6½ years, unanimously affirmed.

The court properly exercised its discretion in limiting cross-examination of police witnesses concerning overtime pay and arrest quotas, allegedly demonstrating a motive to lie. Defense counsel was unable to articulate a good faith, nonspeculative basis for his questions (*see People v McKnight*, 144 AD2d 702 [2d Dept 1988], *lv denied* 73 NY2d 974 [1989]; *see also People v Torres*, 289 AD2d 136, 136-137 [1st Dept 2001], *lv denied* 97 NY2d 762 [2002]). To the extent that defendant is raising a

constitutional claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]).

Defendant did not preserve his claim that, before accepting the verdict, the court should have conducted an inquiry into whether the jury rushed to reach a verdict to avoid having to return to court and resume deliberations several days later, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There is no reason to believe that the jury's verdict, confirmed by polling, was coerced or tainted in any way (*see People v Marshall*, 106 AD3d 1, 10 [1st Dept 2013], *lv denied* 21 NY3d 1006 [2013]; *People v Morency*, 93 AD3d 736, 738 [2d Dept 2012], *lv denied* 20 NY3d 934 [2012]), and there was nothing to warrant a sua sponte inquiry.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12236 In re East River Housing Corporation, Petitioner-Appellant, Index 101137/13

-against-

New York State Division of Human Rights, Respondent-Respondent.

_____

Rosenberg & Estis, P.C., New York (Dani Schwartz of counsel), for appellant.

Carolyn J. Downey, Bronx (Michael K. Swirsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 24, 2013, which, in this article 78 proceeding, denied the petition to annul and vacate the determination of respondent New York State Division of Human Rights (DHR), dated July 14, 2003, dismissing a housing discrimination complaint brought against petitioner East River Housing Corporation (East River), on the ground of administrative convenience, unanimously reversed, on the law, without costs, the petition granted, and respondent's determination dismissing the complaint on the ground of administrative convenience annulled.

DHR's dismissal of a housing discrimination complaint brought by a tenant against East River, on the ground of administrative convenience, was "purely arbitrary" and issued in

contravention of the agency's own rules (*see* 9 NYCRR 465.5[e]; *Matter of Pan Am. World Airways v New York State Human Rights Appeal Bd.*, 61 NY2d 542, 547 [1984]; *Eastman Chem. Prods. v New York State Div. of Human Rights*, 162 AD2d 157, 158 [1st Dept 1990]). This determination was made after DHR completed its investigation of the complaint, made factual findings, and dismissed the complaint upon a finding that there was no probable cause to believe that East River had engaged in the complained of discriminatory conduct. DHR's stated grounds for the administrative convenience dismissal (ACD), to wit, (1) that noticing the complaint for a hearing would be undesirable, (2) that the interests of justice would be served by allowing the U.S. Department of Housing and Urban Development (HUD) to reactivate its complaint concerning the same grievance and continue the investigation, and (3) that processing the complaint would not advance the State's human rights goals, cannot be rationally applied to the instant circumstances.

In the absence of any basis upon which to notice a hearing (*see* Executive Law § 297[4][a]), the stated undesirability of noticing such a hearing cannot serve as a basis for an ACD. Rather than serving the "interests of justice," allowing the ACD to stand would result in a duplicative proceeding, in another forum, involving claims that have been investigated and

determined by DHR (*compare Acosta v Loews Corp.*, 276 AD2d 214 [1st Dept 2000]). DHR's conclusory claim that the State's human interest goals would not be advanced by processing the complaint does not square with the fact that there was nothing left to process and DHR's earlier acceptance of the complaint from HUD.

DHR also maintains that the availability of another forum for the complainant to pursue her grievances served as an additional basis for the ACD. However, there is no indication that the complainant, who continued to pursue her complaint by seeking review by DHR's General Counsel, sought to pursue her claims in another forum and, in any event, doing so, after dismissal based upon a finding of "no probable cause," would contravene the election of remedies provision contained in section 297(9) of the Executive Law (*see* 9 NYCRR 465.5[e][2][vi]). Unlike in *Tribune Entertainment Corp. v New York State Div. of Human Rights,* 210 AD2d 11 [1st Dept 1994]), the ACD here occurred after the formal fact finding and an earlier dismissal of the complaint.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12237 In re Judy Gilbert, Petitioner, Index 403307/11

-against-

New York City Housing Authority, Respondent.

_____

Judy Gilbert, petitioner pro se.

Kelly D. MacNeal, Acting General Counsel, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent, dated November 23, 2011, which terminated petitioner's public housing tenancy, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Peter H. Moulton, J.], entered January 9, 2013), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The record shows that petitioner violated three stipulations barring her grandchildren's father from her apartment because of his illegal drug activities, and that after several incidents, he was arrested in the apartment, which was also found to contain

marijuana and crack cocaine *(see Latoni v New York City Hous. Auth.*, 95 AD3d 611 [1st Dept 2012]; *Matter of Gibbs v New York City Hous. Auth.*, 82 AD3d 412 [1st Dept 2011]). There exists no basis to disturb the credibility determinations of the hearing officer (*see Latoni* at 611). Furthermore, the record shows that at the time of the hearing, petitioner owed back rent.

The penalty imposed does not shock our sense of fairness. Although the penalty may have significant adverse consequences for petitioner, the other residents of the housing development should not be placed at risk because petitioner was unwilling to exclude an individual who used her apartment for criminal activity over an extended period of time (*see Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631 [1st Dept 2013]). It is further noted that petitioner's record as a tenant was not unblemished in light of her chronic rent delinquency.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12238 Leslie Trager, Index 651061/12
Plaintiff-Appellant,

-against-

St. John's University,
Defendant-Respondent.

_____

Leslie Trager, New York, appellant pro se.

Garfunkel Wild, P.C., Great Neck (Michael J. Keane of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 11, 2013, which granted defendant's motion to dismiss, unanimously affirmed, with costs.

The motion court did not abuse its discretion in dismissing this declaratory judgment action because it seeks to determine the rights of the parties upon the happening of a future event, defendant's receipt of funds, that "is beyond the control of the

parties and may never occur" (*see New York Pub. Interest Research Group v Carey*, 42 NY2d 527, 531 [1977]). Thus, a determination in this action would be merely advisory (*see id.*).

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12239 The People of the State of New York, Respondent, Ind. 642/12

-against-

Tyquan Doyle, Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about November 15, 2012, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12240 The People of the State of New York, Ind. 298/11
Respondent,

-against-

Joel Gudino-Sanchez,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Nancy Killian of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered January 2, 2013, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Initially, we decline to dismiss this appeal on the ground that defendant has been deported (*see People v Scott*, 113 AD3d 491 [1st Dept 2014]). The People have not established that defendant's absence from the United States renders this appeal moot.

The People presented clear and convincing evidence that defendant did not accept responsibility for his crime, instead blaming the victim (*see People v Teagle*, 64 AD3d 549 [2d Dept 2009]), and, under the circumstances, his participation in rehabilitation programs was not an acceptance of responsibility.

Therefore, the court correctly assessed 10 points under that risk factor.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate any mitigating factors not taken into account by the risk assessment instrument that would warrant a downward departure.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12241 In re Ronald Grassel, Index 105552/05
Petitioner-Appellant,

-against-

Department of Education of
the City of New York,
Respondent-Respondent,

The University of the State
of New York, et al.,
Respondents.

_____

Warren S. Hecht, Forest Hills, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 24, 2012, which, to the extent appealed from as limited by the briefs, denied petitioner's application to vacate the hearing officer's opinion and award, dated May 14, 2012, sustaining disciplinary charges, imposing a penalty of suspension without pay, and ordering reinstatement within 30 days, unanimously affirmed, without costs.

Petitioner erroneously commenced this proceeding to challenge the opinion and award by filing a motion in Supreme

Court under the index number for a proceeding pursuant to CPLR article 75 in which he had challenged respondent's prior determinations. This error required dismissal of petitioner's application.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12244 The People of the State of New York, Respondent, Ind. 4215/09

-against-

Oscar Padilla, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Carol A. Berkman, J.), entered on or about June 23, 2011 which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Clear and convincing evidence supported the court's assessment of 15 points for defendant's history of substance abuse, since defendant admitted to regular use of ecstasy, marijuana and alcohol. We reject defendant's argument that the use of these illegal substances is akin to occasional social drinking (*see People v Palmer*, 20 NY3d 373 [2013]). Clear and convincing evidence likewise supported the court's assessment of 20 points for defendant's establishment of a relationship for the purpose of victimization, since the record supports the inference

that he established a relationship with the victim, a stranger to him, for the purpose of sexual activity, including employing her as a prostitute.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Cintron*, 12 NY3d 60, 70, *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]). Defendant did not demonstrate any mitigating factors not taken into account by the risk assessment instrument that would warrant a downward departure, given the seriousness of the underlying conduct.

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

ENTERED: APRIL 17, 2014

CLERK

Friedman, J.P., Sweeny, Andrias, Gische, Clark, JJ.

12245 Sherry C. Nicholas, Index 305719/10
Plaintiff-Appellant,

-against-

Cablevision Systems Corp., et al.,
Defendants-Respondents.

_____

Phillips, Krantz & Associates, LLP, New York (Heath T. Buzin of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered April 2, 2013, which granted defendants' motion for summary judgment dismissing the complaint on the serious injury threshold, and denied as moot plaintiff's cross motion for summary judgment as to liability, unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer a serious injury to her neck, back, or left knee as a result of the motor vehicle accident. They submitted the affirmed reports of an orthopedist who found normal ranges of motion in all body parts, and a neurologist who, while finding limitations in the lumbar spine, opined that MRI films of the spine showed nonspecific degenerative conditions unrelated to the accident (*see* Insurance Law § 5102[d]; *Robinson v Joseph*, 99 AD3d

568 [1st Dept 2012]).

In opposition, plaintiff submitted her examining physician's report finding recent range-of-motion deficits. However, the physician failed to explain the inconsistencies between his earlier findings of almost full range of motion in her cervical and lumbar spine and his present findings of deficits (*see Santos v Perez*, 107 AD3d 572, 574 [1st Dept 2013]; *Colon v Torres*, 106 AD3d 458 [1st Dept 2013]). Nor did plaintiff's physicians address either the degeneration that defendants' neurologist found in the MRIs taken of the cervical and lumbar spine or the preexisting conditions of morbid obesity and scoliosis (*see Malupa v Oppong*, 106 AD3d 538 [1st Dept 2013]; *Rosa v Mejia*, 95 AD3d 402, 404-405 [1st Dept 2012]). The MRI of plaintiff's left knee was insufficient to provide objective medical evidence of any injury, and no other objective proof of a serious injury to the knee was submitted.

Moreover, plaintiff failed to offer a reasonable explanation for ceasing treatment, despite her physicians' recommendations of further treatment, which renders her expert's conclusions as to permanency and causation speculative for all body parts (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]).

Defendants established prima facie that plaintiff did not

sustain a serious injury of the 90/180-day category, since her own evidence showed that her claimed injuries were no bar to the performance of her usual pre-accident activities, and there is no evidence that her absence from work was medically determined as a result of the accident and not related to the bunion surgeries she had undergone shortly before and after the accident. That plaintiff missed more than 90 days of work is not determinative of a 90/180-day injury (*see Uddin v Cooper*, 32 AD3d 270 [1st Dept 2006], *lv denied* 8 NY3d 808 [2007]).

Given the absence of serious injury, the issue of liability is academic (*see Hernandez v Adelango Trucking*, 89 AD3d 407 [1st Dept 2011]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12246 The People of the State of New York, Respondent, Ind. 5481N/10

-against-

Rod H. Brown, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered April 20, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in or near school grounds, and criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of 10 years, unanimously affirmed.

Although the court did not explicitly discuss on the record alternatives to closing the courtroom for the testimony of the undercover officers, the record sufficiently demonstrates that the court fulfilled its obligation under *Waller v Georgia* (467 US 39 [1984]) to consider such alternatives (*see People v Echevarria*, 21 NY3d 1, 14-19 [2013]). 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)]).

Criminal Court (Ellen M. Coin, J.), properly determined that defense counsel had the ultimate authority to decide whether his client should testify before the grand jury, and properly denied defendant's request to testify against the advice of his attorney. Defendant's argument "incorrectly equates the right to testify before the grand jury with the right to testify at trial" (*People v Santiago*, 72 AD3d 492, 492 [1st Dept 2010], *lv denied* 15 NY3d 757 [2010]). "[U]nlike certain fundamental decisions as to whether to testify at trial, which are reserved to the defendant . . . with respect to strategic and tactical decisions like testifying before the grand jury, defendants represented by counsel are deemed to repose decision-making authority in their lawyers" (*People v Lasher*, 74 AD3d 1474 [3d Dept 2010] [citations and internal quotation marks omitted], *lv denied* 15 NY3d 894 [2010]). The strategic decision to testify before the grand jury

requires the "expert judgment of counsel" (*People v Colville*, 20 NY3d 20, 32 [2012]), because it involves weighing the possibility of a dismissal, which, in counsel's judgment, may be remote, against the potential disadvantages of providing the prosecution with discovery and impeachment material, making damaging admissions, and prematurely narrowing the scope of possible defenses.

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.

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12247-
12247A-
12247B-
12247C-
12247D In re Gina Maritza S., and Others,

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

Lisa S., also known as Lisa V.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

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

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), attorney for the children Gina Maritza S., Brianna J.B. and Cassandra Aaliya J.B.

Daniel R. Katz, New York, attorney for the children Jennifer Elizabeth W. and Vincent Taylor W.

_____

Orders of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 22, 2013, which, to the extent appealed from as limited by the briefs, after a hearing, determined that respondent-appellant mother had permanently neglected the subject children, terminated her parental rights to the children, and committed custody and guardianship of the children to petitioner agency and the

Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

There was clear and convincing evidence that the agency exerted diligent efforts to reunite the mother with the children by creating a service plan for the mother, referring her to domestic violence counseling and a program for sex abusers, scheduling numerous service plan reviews, and scheduling supervised and unsupervised visitation with the children (*see* Social Services Law § 384-b[7][a], [f]). Despite these efforts, the mother failed to address the problems that led to the children's placement into foster care, including the ongoing sexual abuse of the children.

A preponderance of the evidence supports the court's determination that it is in the children's best interests to terminate the mother's parental rights rather than issue a

suspended judgment (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The mother failed to demonstrate that she had made substantial progress in addressing the problems in her home.

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

ENTERED: APRIL 17, 2014

CLERK

CORRECTED ORDER - JULY 21, 2014

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12248 Barbara Terrero, as legal guardian of **"Jane Doe,"** Plaintiff-Respondent,

-against-

New York City Housing Authority, Defendant-Appellant.

[And a Third-Party Action]

Index 106964/10
590216/11

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Zaremba, Brownell & Brown, PLLC, New York (Donald D. Brown of counsel), for respondent.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 25, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff commenced this action on behalf of her 14-year-old granddaughter, who was sexually assaulted by her ex-boyfriend in a building owned by defendant. Viewed in the light most favorable to plaintiff, the evidence raises issues of fact whether the assailant was an intruder, whether he gained access to the building as a result of a broken lock at the front entrance door, and whether the assault was foreseeable (*see Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550-551 [1998]). The granddaughter testified that the assailant followed her into

the building through the front door, but she gave conflicting testimony as to the amount of time that elapsed between her entry and her assailant's. It is undisputed that the front entrance lock was not working on the date of the assault. It is also undisputed that, when the lock worked, the door took approximately 10 to 12 seconds to close and re-lock.

Contrary to defendant's contention as to the requirements of the law, the evidence of a history of assaults in the building and the building superintendent's testimony that he sometimes heard from some residents about criminal activity on the roof, where the assault took place, raises an issue of fact whether defendant's alleged negligence in securing access to the roof was a proximate cause of plaintiff's granddaughter's injuries (*see Jacqueline S. v City of New York*, 81 NY2d 288, 293-294 [1993]).

The evidence thus precludes a finding that the assailant's actions were extraordinary and unforeseeable, so as to sever any causal relationship between defendant's alleged negligence in failing to ensure that the front entrance locks were functioning properly and the assault on plaintiff's granddaughter.

The motion court properly excused plaintiff's brief delay in submitting a signed transcript of her granddaughter's deposition testimony and providing defendant with the errata sheet (*see Binh v Bagland USA*, 286 AD2d 613 [1st Dept 2001]). The corrections in the errata sheet raise issues of credibility that cannot be

resolved on a motion for summary judgment (*see id.*).

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 17, 2014

CLERK

Renwick, J.P., Moskowitz, Degrasse, Manzanet-Daniels, Feinman, JJ.

12249 In re New York City Asbestos Litigation — Index 190281/12, 190340/12, 190360/12, 190512/12, 190129/13

- - - - -

Robert Germain, Sr.,
Plaintiff-Respondent,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Liberty Mutual Insurance Company,
Appellant.

- - - - -

Daniel E. Valensi, etc.,
Plaintiff-Respondent,

-against-

Air & Liquid Systems Corporation, as Successor by Merger to Buffalo Pumps, Inc., et al,
Defendants,

Liberty Mutual Insurance Company,
Appellant.

- - - - -

Vashtee Antle, etc.,
Plaintiff-Respondent,

-against-

A.O. Smith Water Products Co., et al.,
Defendants,

Liberty Mutual Insurance Company,
Appellant.

- - - - -

Janeed Khan,
Plaintiff-Respondent,

-against-

3M Company, Individually and
as Successor to Minnesota Mining
and Manufacturing Company, et al.,
Defendants,

Liberty Mutual Insurance Company,
Appellant.

- - - - -

Laurence Cunningham, et al.,
Plaintiffs-Respondents,

-against-

3M Company, etc., et al.,
Defendants,

Liberty Mutual Insurance Company,
Appellant.

_____

Mound Cotton Wollan & Greengrass, New York (Lloyd A. Gura of counsel), for appellant.

Belluck & Fox, LLP, New York (Seth A. Dymond of counsel), for respondents.

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Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered October 29, 2013, which denied appellant Liberty Mutual Insurance Company's motion to dismiss the complaints against Jenkins Bros., and directed service to be made on Jenkins Bros. by substituted service on Liberty Mutual, unanimously affirmed, with costs.

In this action for personal injuries allegedly due to asbestos exposure while plaintiffs were employed by Jenkins Bros., a dissolved New Jersey corporation, appellant insurance

company, Jenkins' liability insurer during the relevant time periods, maintains that Jenkins is not amenable to suit based on its bankruptcy and subsequent dissolution. The plain language of the New Jersey dissolution statute, which governs here, provides for a corporation that has been dissolved to "sue and be sued in its corporation name . . . " (NJSA § 14A:12-9[2]), and the statute places no restriction on how long a dissolved corporation maintains its capacity to be sued for its tortious conduct committed pre-dissolution (*see Hould v John P. Squire & Co.*, 79 A. 202 [N.J. 1911]; *Intl. Union of Operating Engrs., Local 68, AFLCIO v RAC Atlantic City Holdings*, __ F 3d __, 2013 WL 353211, *10, 2013 US Dist LEXIS 11413, *34 [DNJ 2013]). Thus, contrary to appellant's argument, Jenkins Bros. is amenable to suit pursuant to the laws of the state of its incorporation (*see Sinnott v Hanan*, 214 NY 454, 458-59 [1915]).

The motion court properly directed that substituted service be made on appellant. It is undisputed that service was attempted at multiple corporate addresses, to no avail, and that plaintiffs were only able to locate two *former* corporate representatives. Accordingly, substituted service on the insurer is proper and does not violate due process (*see Cives Steel Co. v Unit Builders*, 262 AD2d 164, 164 [1st Dept 1999]; *Rego v Thom Rock Realty*, 201 AD2d 270, 270 [1st Dept 1994]). Appellant

accepted premiums from Jenkins and agreed to defend and indemnify Jenkins for tortious conduct committed during the coverage periods. This coverage includes liability for conduct that may have led to injuries such as asbestos disease which carries a long latency period between exposure and manifestation of disease (*see Fusaro v Porter-Hayden Co.*, 145 Misc 2d 911, 916 [Sup Ct NY Cty 1989], *affd* 170 AD2d 239 [1st Dept 1991]). Appellant's contractual coverage obligations should not be nullified on the mere happenstance that the corporation was dissolved at the time these latent injuries manifested.

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12250 Viviene Smith, Index 302276/10
Plaintiff-Appellant,

-against-

Montefiore Medical Center, et al.,
Defendants-Respondents.

_____

Wolf & Wolf, LLP, Bronx (Jason M. Wolf of counsel), for appellant.

Hoguet Newman Regal & Kenney, LLP, New York (Richard M. Reice of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered April 9, 2013, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's cause of action alleging libel, unanimously affirmed, without costs.

Plaintiff's cause of action for libel arises out of the statements made by defendant Alma Wilson, in a report to her supervisor, wherein Wilson claimed to have witnessed plaintiff verbally and physically abuse an elderly patient. It is undisputed that the statements are protected by a qualified privilege. However, plaintiff may defeat this defense by demonstrating that defendant was motivated by malice (*see Foster v Churchill*, 87 NY2d 744, 751-752 [1996]; *Liberman v Gelstein*, 80 NY2d 429 [1992]). While an allegation of falsity is insufficient

to create an inference of malice (*see Stukuls v State of New York*, 42 NY2d 272, 279 [1977]), malice may be inferred "from a statement that is so extravagant in its denunciations or so vituperative in its character as to warrant an inference of malice" (*Herlihy v Metropolitan Museum of Art*, 214 AD2d 250, 260 [1st Dept 1995] [internal quotation marks and citation omitted]).

Here, the nature of the statements, reporting patient mistreatment, is such that, a jury could not "reasonably conclude that 'malice was the one and only cause for the publication'" (*Liberman*, 80 NY2d at 439). Indeed, plaintiff herself, when questioned about what motivation she attributed to Wilson's allegedly false report, stated, "I can't figure why she would have done something like that." Nor does the record contain evidence that the statements were made with knowledge of their probable falsity (*Liberman*, 80 NY2d at 438-39). To the contrary, the record contains evidence that after an investigation, which included testimony from a third employee corroborating Wilson's complaint about plaintiff's mistreatment of the patient, defendant Montefiore terminated plaintiff. Plaintiff's union then declined, after an investigation, to pursue arbitration on

her behalf. Thus, the motion court properly concluded that, on this record, there was no question of fact to be resolved by a jury as to whether Wilson was motivated by malice.

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12252 Princes Point LLC, etc., Index 601849/08
Plaintiff-Appellant,

-against-

AKRF Engineering, P.C.,
Defendant-Respondent,

Muss Development L.L.C., et al.,
Defendants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Todd S. Anten of counsel), for appellant.

Seyfarth Shaw LLP, New York (Eddy Salcedo and Elizabeth D. Schrero of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 28, 2012, which granted defendant AKRF Engineering, P.C.'s motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

In this action by plaintiff, a prospective buyer of real property that underwent environmental remediation performed by defendant engineering firm for the seller several years before plaintiff became a potential buyer, the complaint alleges, inter alia, causes of action for negligent misrepresentation and fraud. The cause of action for negligent misrepresentation was properly dismissed since the underlying relationship between the parties is neither "one of contract" nor one that is "so close as to be

the functional equivalent of contractual privity" (*see Ossining Union Free School Dist. v Anderson*, 73 NY2d 417, 419, 424 [1989]). The documents upon which plaintiff relies were prepared by defendant solely for the benefit of the seller and there is no evidence that defendant intended plaintiff to rely on the information (*see Sykes v RFD Third Ave. 1 Assoc., LLC*, 15 NY3d 370 [2010]). Additionally, as we held on a prior appeal, the contract for sale precluded plaintiff from relying on anything other than its own investigation and inspections of the property (110 AD3d 564 [1st Dept 2013]). Accordingly, plaintiff cannot claim reasonable reliance on any alleged misrepresentations.

Because plaintiff's reliance, if any, was unreasonable, its claim for fraud was also properly dismissed (*see Duane Thomas LLC v 62 Thomas Partners, LLC*, 300 AD2d 52 [1st Dept 2002], *lv denied* 100 NY2d 513 [2003]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12253 Joy Jeffrey, et al., Index 303789/11
Plaintiffs-Appellants,

-against-

Diana DeJesus, et al.,
Defendants-Respondents.

_____

Robert I. Gruber, P.C., Rye Brook (Robert I. Gruber of counsel), for appellants.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 10, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the issues of serious injury and liability as premature, unanimously modified, on the law, the motion denied on the merits as to the issue of liability, and otherwise affirmed, without costs.

Plaintiffs made a prima facie showing of negligence on the part of defendants, by submitting the affidavit of plaintiff driver, Shella Spencer. Spencer attested that the accident at issue occurred when defendants' vehicle struck the back of the vehicle she was operating (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

In opposition, defendants raised an issue of fact as to whether there was a nonnegligent explanation for the collision through the affidavit from their driver, Diana DeJesus, who stated that plaintiff entered the entrance ramp lane and while attempting to pass a vehicle on the right, cut her off (*see Figueroa v Cadbury Util. Constr. Corp.*, 239 AD2d 285 [1st Dept 1997]). Plaintiffs' contention that DeJesus made an inconsistent statement following the accident, as recorded in the police accident report, is not conclusive but raises an issue of credibility to be resolved by the factfinder (*see Stewart v Ellison*, 28 AD3d 252, 254 [1st Dept 2006]).

Although discovery was not complete, the motion court erred in concluding that plaintiffs' motion for partial summary judgment on the issue of liability was premature. Both drivers submitted affidavits, and defendants were able to submit facts "essential to justify opposition [to the motion]" (*see* CPLR 3212[f]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

However, that branch of plaintiffs' motion seeking summary judgment on the threshold issue of serious injury was properly denied as premature. We note that plaintiffs served their long overdue discovery responses shortly before moving for summary judgment. Accordingly, limited discovery has been conducted, and facts essential to justify opposition are within plaintiffs'

knowledge (*see* CPLR 3212[f]; *Grande v Peteroy*, 39 AD3d 590 [2nd Dept 2007]).

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

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12254 The People of the State of New York, Respondent, Ind. 2107/12

-against-

Chad Seegars, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered on or about August 30, 2012, unanimously affirmed.

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

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

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12255-
12256 In re Ebonee Annastasha F., etc.,

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

Crystal Arlene F., etc.,
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Carrieri & Carrieri, P.C., Mineola (Ralph R. Carrieri of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), attorney for the child.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Monica Drinane, J.), entered on or about October 31, 2012, which found that respondent mother permanently neglected the subject child, terminated respondent's parental rights to the child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs. Appeal from order, same court and Judge, purportedly entered "November 2012," unanimously dismissed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship, and that, despite petitioner's efforts, respondent failed to plan for the child's future during the relevant time period (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). Among other things, petitioner referred respondent for parenting skills and anger management programs, and scheduled visitation (*see e.g. Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]). Although respondent completed programs in parental skills and anger management, and attended individual therapy sessions, she behaved disruptively and violently during scheduled visitation, did not gain insight into the reasons that her child was placed in foster care, and failed to benefit from the programs she attended (*see Matter of Jaileen X.M. [Annette M.]*, 111 AD3d 502 [1st Dept 2013], *lv denied* 22 NY3d 859 [2014]).

A preponderance of the evidence supports the determination that the termination of respondent's parental rights was in the best interests of the child, who, at the time of disposition, had lived in her present foster home for two years, was well cared

for and was doing well in school, and indicated that she wanted to be adopted by her foster mother and did not want to visit with respondent (*see Matter of Darryl Clayton T. [Adele L.]*, 95 AD3d 562, 563 [1st Dept 2012]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12257 The People of the State of New York, Respondent, Ind. 3209/11 1539/11

-against-

Nelson Rejab, Defendant-Appellant.

_____

Fasulo Braverman & DiMaggio, LLP, Bronx (Sam Braverman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 20, 2012, as amended March 22, 2012, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the first degree and conspiracy in the second degree, and sentencing him to an aggregate term of 13½ years, unanimously affirmed.

Although we find that defendant did not make a valid waiver of his right to appeal, we find that the only substantive issue he raises on appeal is without merit. Defendant asserts that the court failed to address his pro se motion for assignment of counsel, in which he claimed that his retained attorney was ineffective, and that he could no longer afford to pay for counsel. Nevertheless, defendant hired a new lawyer, who

represented him at the time of the plea, and defendant does not make any complaint about the effectiveness of the new lawyer. Accordingly, defendant's claim does not survive his plea (*see People v Petgen*, 55 NY2d 529, 534-535 [1982]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12258-
12259 Index 650497/08

Mr. Ham, Inc., et al.,
Plaintiffs-Respondents,

-against-

Perlbinder Holdings, LLC,
Defendant-Appellant.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellant.

Carey & Associates LLC, New York (Michael Q. Carey of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 18, 2013, awarding plaintiffs the total sum of $180,225.57, and bringing up for review an order, same court and Justice, entered February 7, 2013, which, as limited by the briefs, granted plaintiffs' cross motion for partial summary judgment on its causes of action for breach of contract, to the extent that it awarded rescission of the parties' lease, and on its causes of action for return of the security deposit and advance rent payment, unanimously affirmed, with costs. Appeal from aforementioned order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The motion court did not misconstrue the facts in finding,

inter alia, that the owner's unanticipated renovation of the premises, including the removal of an existing kitchen and equipment, deprived plaintiff commercial tenant of its consideration and frustrated its purpose. Rescission was properly awarded because damages to allow the tenant to restore the premises would have been an insufficient remedy in light of the interminable renovations that continued to delay its ability to open for business. The limitation of remedy provision in ¶ 23 of the lease did not bar rescission pursuant to Real Property Law § 223-a, despite its "express language to the contrary" purporting to preserve the validity of the lease where the owner fails to timely deliver possession "for any reason," because such a provision is limited to circumstances beyond the owner's control and does not govern its intentional acts, such as the instant demolition and renovation (*see Matter of Daval-Ogden, LLC v Highbridge House Ogden, LLC*, 103 AD3d 422 [1st Dept 2013]). In view of the foregoing, it is unnecessary to consider whether the tenant also properly relied on Real Property Law § 227 and whether the protection under that statute was waived in the lease.

We agree with the owner that the tenant's duty to submit final plans for its work was subject to a condition precedent, given that the tenant work could not commence "unless and until"

the owner gave its final approval to such plans (*see Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co.*, 18 NY3d 765, 771-772 [2012]). However, it is a "familiar" principle that a party may not rely on performance of a condition where that party has frustrated such performance (*see Sibbald v Bethlehem Iron Co.*, 83 NY 378, 384 [1881]; *Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 534 [2012]; *Nader & Sons, LLC v Shavolian*, 113 AD3d 432, 434 [1st Dept 2014]), and we find, on this record, that the owner's continuing renovations prevented the tenant from submitting its final plans.

Refund of the security deposit and advance rent were properly awarded pursuant to General Obligations Law § 7-103. Although the owner was not entitled to recovery, we note that any debts owed by the tenant could not be offset against such funds (*see Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 [1st Dept 2009]).

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

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

ENTERED: April 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12260-
12261 United States Fire Insurance Company, et al.,
Plaintiffs-Respondents,

-against-

ACE American Insurance Company, et al.,
Defendants-Appellants.

[And a Third-Party Action]

Index 304364/11
84169/08

_____

O'Connor Redd, LLP, Port Chester (Joseph M. Cianflone of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, Mineola (Amol N. Christian of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered October 16, 2012, which, to the extent appealed from as limited by the briefs, denied defendants FICA Transportation, Inc., S.L. Benfica Transportation, Inc. and Krasdale Foods, Inc.'s (the FICA defendants) pre-answer motion to dismiss plaintiffs' fourth cause of action in their declaratory judgment complaint, unanimously affirmed, with costs. Order, same court and Justice, entered November 5, 2012, which granted plaintiffs' motion to consolidate the aforementioned declaratory judgment action with a related third party action, unanimously affirmed, with costs.

The motion court correctly denied the FICA defendants' motion to dismiss the fourth cause of action. In or about May 2002, plaintiff Rose Trucking Corp. and defendant FICA Transportation entered into an agreement by which FICA was to transport Rose Trucking's trailers to supermarkets in the New York, New Jersey and Connecticut area. As part of this agreement, FICA Transportation agreed to provide $1 million of insurance coverage. The policy obtained by FICA named Rose Trucking as an additional insured and provided $1 million of coverage, subject to a $250,000 deductible. In light of this provision, the fourth cause of action states a cognizable claim by seeking a declaration that because the FICA defendants were contractually obligated to provide $1 million dollars in insurance, with no mention of a deductible, they must pay any deductible owed by Rose Trucking (*see e.g. Inner City Redevelopment Corp. v Thyssenkrupp El. Corp.*, 78 AD3d 613 [1st Dept 2010]).

The IAS court also properly consolidated the third party action with the declaratory judgment action. The third party action deals with the related issue of whether FICA Transportation can be liable for a failure to procure insurance in the agreed upon amount. The FICA defendants have not shown that any prejudice results from consolidation (*see e.g. Matter of*

Progressive Ins. Co. [*Vazquez-Countrywide Ins. Co.*], 10 AD3d 518 [1st Dept 2004]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12263 Catherine A. Butler, et al., Index 305153/12
Plaintiffs-Respondents,

-against-

Iskra Petrova, et al.,
Defendants,

Kim S. Cottrell, et al.,
Defendants-Appellants.

_____

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellants.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered September 23, 2013, which denied the motion of defendants Kim S. Cottrell and Frank Elam for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In this three-car chain collision, defendants Cottrell and Elam established entitlement to judgment as a matter of law. Cottrell submitted an affidavit wherein she stated that the vehicle she was driving was stopped behind plaintiffs' vehicle at a red light when a third vehicle, operated by defendant Iskra Petrova and owned by defendant Peter K. Petrova, rear-ended her vehicle, causing it to move forward and collide into the rear of plaintiffs' vehicle (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st

Dept 2010]; *Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]).

In opposition, neither plaintiffs nor the Petrova defendants raised a triable issue of fact. Indeed, plaintiff Catherine Butler submitted an affidavit wherein she detailed the accident in a manner that was consistent with Cottrell's version. Furthermore, denial of the motion as premature was improper since "[t]he mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient to deny such a motion" (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12264 Shelly M. Whitfield-Ortiz, Index 150118/12
Plaintiff-Appellant,

-against-

The Department of Education
of the City of New York, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Jonathan A. Popolow of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered December 12, 2012, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion to dismiss the discrimination, hostile environment, and retaliation claims under the State and City Human Rights Laws (HRL) (Executive Law § 290 *et seq.*; Administrative Code of City of NY § 8-101 *et seq.*), and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Construing the complaint liberally, presuming its factual allegations to be true, and according it the benefit of every possible favorable inference (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]), plaintiff

failed to adequately plead that she was subjected to an adverse employment action (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). Indeed, none of the allegations listed in the complaint rises to the level of an actionable adverse employment action (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 306-307 [2004]). Accordingly, the motion court properly dismissed her discrimination claims.

Plaintiff also failed to adequately plead discriminatory animus, which is fatal to both her discrimination and hostile environment claims (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Indeed, the complaint contains no allegations of any comments or references to plaintiff's age or race made by any employee of defendants. Nor does it contain any factual allegations demonstrating that similarly situated individuals who did not share plaintiff's protected characteristics were treated more favorably than plaintiff (*see id.*). The complaint's conclusory allegations of a hostile environment are insufficient to state a claim under either the State or City HRL (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 80 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]; *Forrest*, 3 NY3d at 310-311).

The court also properly dismissed plaintiff's retaliation claims, as she failed to plead any facts regarding when the

alleged retaliatory incidents occurred or how those incidents were causally connected to any protected activity (*see Williams v New York City Hous. Auth.*, 61 AD3d 62, 71-72 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009]). She also did not state the substance of her alleged complaints, to whom she allegedly complained, or when such complaints were made.

The motion court properly denied the cross motion to amend the complaint, because the proposed amendment failed to correct the deficiencies in the original complaint (*see Sharon Ava & Co. v Olympic Tower Assoc.*, 259 AD2d 315, 316 [1st Dept 1999]). In addition, to the extent the proposed amendment contained allegations concerning incidents that occurred before January 25, 2011, the court properly found that those claims were time-barred (*see* Education Law § 3813[2-b]).

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

ENTERED: APRIL 17, 2014

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12265 The People of the State of New York, Ind. 1371/08
Respondent,

-against-

David Ortiz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Marcy Kahn, J.), rendered on or about February 26, 2010,

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 17, 2014

CLERK

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

Friedman, J.P., Acosta, Andrias, DeGrasse, Freedman, JJ.

10844 The People of the State of New York, Ind. 6388/09
Respondent,

-against-

Gerald DeGerolamo,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered February 8, 2011, reversed, on the law, and the matter remanded for a new trial.

Opinion by Acosta, J. All concur except Andrias and Freedman, JJ. who dissent in an Opinion by Andrias, J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Richard T. Andrias
Leland G. DeGrasse
Helen E. Freedman, JJ.

10844
Ind. 6388/09

_____x

The People of the State of New York,
Respondent,

-against-

Gerald DeGerolamo,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered February 8, 2011, convicting him, after a jury trial, of robbery in the second degree, and imposing sentence.

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

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

ACOSTA, J.

At issue in this case is the propriety of the trial court's decision to admit evidence of a different crime, under *People v Molineux* (168 NY 264 [1901]), where evidence of intent was not ambiguous (assuming the jury believed the complainant), and there was insufficient indicia of similarity to fall within the "common scheme or plan" exception. Defendant was charged with robbery in the second degree and related offenses in connection with a December 26, 2009 incident in which he allegedly sprayed complainant David Cushman in the face with mace, and stole a ring he had previously negotiated to purchase from Cushman. On June 14, 2010, defendant was charged with grand larceny in the second degree and related offenses in connection with an incident in which he allegedly stole rings worth more than $90,000 from complainant Mary Nguyen by tricking her into placing the rings in a pouch and then replacing them with others before leaving the pouch with her. Over defendant's objection, the court allowed the People to introduce evidence of defendant's theft of Nguyen's rings as *Molineux* evidence at defendant's trial for the Cushman robbery. We find that the court erred in allowing Nguyen's testimony to be admitted and that the error requires reversal and a new trial.

In 2007, David Cushman spent $30,000 on an engagement ring.

When the engagement was called off, Cushman attempted to re-sell the ring to a jewelry store. Unsatisfied with the price he was offered, Cushman advertised the ring for sale on Craigslist in June 2009. Defendant responded to the ad, and after speaking on the phone with Cushman several times over the next two weeks, defendant asked Cushman to show the ring to him and his girlfriend. Cushman met defendant in a parking lot adjacent to the docks where defendant said his girlfriend kept her boat. Defendant and Cushman waited for defendant's girlfriend for about 15 minutes, but she never showed up, and they left. Approximately two weeks later, defendant asked Cushman to meet him at Maimonides Hospital, where, defendant claimed, he was visiting his sick mother. Cushman arrived at around 7:30 p.m., but when defendant did not show up, Cushman left him a voicemail telling him to "leave [him] alone."

In August 2009, defendant sent a text message to Cushman that he would have the money to buy the ring that week, but subsequently sent a message that he did not have the money. Finally, in December 2009, defendant contacted Cushman again about buying his ring, and promised to pay a non-refundable $3,000 deposit. Defendant asked Cushman to meet his "daughter" at a jewelry store to have the ring appraised. Cushman followed defendant into the vestibule of an apartment building. According

to Cushman, while they waited for the elevator, defendant asked him if he had the ring. When Cushman removed the ring from a box, defendant maced Cushman in the face. As Cushman struggled to breathe, defendant pushed him against the wall, ripped the ring from his hand, and ran out the door. Cushman managed to grab onto defendant's jacket outside and was able to subdue him until the police arrived.

According to defendant, however, it was Cushman who sprayed a substance into defendant's eyes and then hit the top of his head with a bat or some other blunt object. Police were called to the scene, where they separated the two men and arrested defendant.

Pursuant to the court's *Molineux r*uling, Mary Nguyen testified that in mid-September 2009, she met with a man, who she said was defendant and who called himself "Joey," to sell him her wedding rings. He told her that he was a jewelry dealer and that his mother was in the hospital. The two met around lunchtime in Nguyen's apartment. About two weeks later, they met again at lunchtime in a restaurant. Defendant told Nguyen that his buyer for the rings would meet them at the restaurant, but nobody showed up.

About a week and a half later, defendant an Nguyen met again at the same restaurant. Nguyen's boyfriend followed them to the

restaurant and sat alone at the bar. A woman invited by defendant also attended the meeting, which lasted about half an hour. Defendant told Nguyen that he wanted to introduce her to his buyer as his girlfriend, and he asked to carry her rings in a zippered black pouch "to make it look really legitimate." Nguyen gave defendant her rings, which he put in his pouch. In the restaurant, they met with another woman, and defendant showed the woman a diamond ring that was not Nguyen's. A few minutes later, defendant excused himself to go to the bathroom, leaving his pouch on the table. When defendant sent her a text message saying that his stomach felt "awful," Nguyen grabbed the pouch, which proved to contain pieces of costume jewelry, but not her rings. Nguyen's boyfriend checked the bathroom, but it was empty. Nguyen called the police, but she never recovered her rings.

In its final charge, the court instructed the jury that the People contended that the evidence that defendant had stolen rings from Nguyen was "so similar" to the charged incident that it constituted a "common plan or scheme," and that the evidence was "offered on the issue of defendant's intent to steal in the instant case."

It is well established that "[e]vidence of similar uncharged crimes has probative value, but as a general rule it is excluded

for policy reasons because it may induce the jury to base a finding of guilt on collateral matters or to convict a defendant because of his past" (*People v Alvino*, 71 NY2d 233, 241 [1987]). Exceptions to the rule were established in *People v Molineux* (168 NY 264 [1901]; *see People v Resek*, 3 NY3d 385, 390 [2004] ["under our *Molineux* jurisprudence, we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions"]). *Molineux* evidence must tend to establish a legally relevant and material issue, and its probative value must outweigh its potential prejudice to the defendant (*Alvino*, 71 NY2d at 242). At issue in this case are two of the exceptions addressed in *Molineux*: evidence offered on the issue of intent and evidence of "common plan or scheme" (160 NY at 297, 305).

Where intent is at issue but cannot be readily inferred from the commission of the act itself, evidence of prior criminal acts may be used to establish it (*Alvino*, 71 NY2d at 242). Where, however, proof of the act demonstrates that the defendant acted with the requisite state of mind, *Molineux* evidence should not be admitted (*id.*). Here, proof of defendant's actions is sufficient to demonstrate that he acted with the requisite intent. Spraying someone in the face with mace, grabbing the person's ring and running can only indicate an intent to steal the ring. If the jury believed Cushman's testimony, then it would have to infer

that defendant intended to steal the ring from him.

Citing to *People v Ingram*, the dissent correctly notes that *Molineux* evidence may be used "[w]hen defendant's criminal intent cannot be inferred from the commission of the act or when defendant's intent or mental state *in doing the act* is placed in issue (71 NY2d at 479 [emphasis added]). But as noted above, if the jury believed complainant's version, defendant's intent is obvious from the commission of the act. There is nothing in the way defendant *did the act* (assuming complainant's version) that would place the intent to steal at issue. In this regard, I disagree with the dissent's assertion that "the chain of events leading up to the robbery created ambiguities as to defendant's intent." On the contrary, the People's evidence left no ambiguity as to defendant's intent.[1] As the dissent notes,

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[1]In *People v Ingram* (71 NY2d 474 [1988]) and *People v Alvino* (71 NY2d at 233), the defendants' intent was ambiguous because, among other things, even accepting the People's witnesses' testimony as true, it was possible that the defendants were telling the truth (*see also People v Mobley*, 176 AD2d 211, 211 [1st Dept 1991] ["defendant's own theory of the case was that proof of intent to steal . . . was equivocal"]). In *People v Hernandez* (71 NY2d 245), decided with *Alvino*, where the defendant was charged with selling and possessing a controlled substance, "[e]vidence of uncharged crimes was legally admissible on the People's case to prove that defendant possessed drugs because defendant's possession of the drugs, standing alone, did not provide a clear indication of whether he held the drugs for sale or for his own use" (71 NY2d at 245). Uncharged crimes were also admissible on the sale charges because, "[f]aced with the strong likelihood that the jury would infer from the evidence, and

"There is ample case law to support the proposition that uncharged crimes evidence may be used to support testimony that otherwise might be unbelievable or suspect" (quoting *People v Steinberg*, 170 AD2d 50, 73-74 [1991], *affd* 79 NY2d 673 [1992]). However, that is not the case here.

Nor was Nguyen's testimony admissible under the common plan or scheme exception, which requires that "there exist[] a single inseparable plan encompassing both the charged and the uncharged crimes" (*People v Fiore*, 34 NY2d 81, 85 [1974]). "There must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations'" (*id.*, citation omitted). Indeed, the Court of Appeals noted that "courts have been particularly cautious in permitting proof of uncharged criminal acts to establish a common scheme or plan" (*id.*). Evidence that is merely indicative of a modus operandi is not sufficient. "[A] modus operandi alone is not a common scheme; it is only a

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particularly his possession of 21 glassines, that he was a seller," the defendant testified that he was a drug addict and a petty thief and introduced prior convictions to prove his defense that the glassines were for his personal use (*id.*). As the Court noted, "By doing so, he reframed the dispute before the court and affirmatively attempted to convince the jury of his innocence not just in this instance but because his entire history was inconsistent with guilt" (*id.* at 247). Thus, "[t]he People were entitled to rebut that testimony by evidence of prior crimes suggesting otherwise" (*id.*).

repetitive pattern" (*id.* at 87). What is generally required is evidence of "uncharged crimes committed in order to effect the primary crime for which the accused has been indicted" (*id.* at 85).

In this case, the similarities between the presently charged robbery of Cushman and the robbery testified to by Nguyen – that both incidents involved expensive jewelry listed on Craigslist and that phone conversations were had – evidence only "a repetitive pattern" (*Fiore*, 34 NY2d at 87). The alleged robbery of Nyugen was not committed to effect the robbery of Cushman (*id.* at 85).

The error in admitting Nguyen's testimony was not harmless. Nguyen's testimony comprised a significant portion of the People's case. The prosecutor emphasized its significance in both his opening statement and his summation. For instance, in his opening, the prosecutor briefly summarized Cushman's allegations and then told the jury that:

> "December 26, 2009 was not the first time that this defendant ran a scam on someone posting an ad on Craig's list [sic] for expensive jewelry. And so, another witness that I anticipate that you will hear from is Mary Nguyen.
>
> "She will also walk you through her interaction with this defendant. Like a David Cushman experience, she placed on Craig's

> list for the sale of her two expensive rings due to her impending divorce [sic]."

The prosecutor then detailed the ways in which Nguyen's alleged interactions with defendant were like David Cushman's interactions with him, and introduced the theme that defendant was a person who committed multiple Craigslist scams.

In summation, the prosecutor argued:

> "What the credible evidence shows is that on December 26th 2009, this defendant, right there, tried to swindle David Cushman out of his $35,000 engagement ring . . . Just like the swindle with Mary Nguyen, this defendant just so happened to bring fake jewelry with him on the day when he completed this crime after months of contact with David Cushman. Just like he swindled with [sic] Mary Nguyen, this defendant's actions were planned, they were calculated, and they were morally [] bankrupt."

Later, he said:

> "Perhaps the most compelling testimony that you heard of this defendant's guilt came when Mary Nguyen testified before you. If you had any doubt whosoever [sic] that the defendant intended to steal David Cushman's engagement ring on December 26th, 2009, certainly Mary Nguyen's testimony makes very clear that this defendant scammed her the very same way he tried to scam David Cushman."

The comment that "the most compelling testimony" as to defendant's guilt of the charged crime against Cushman was Nguyen's testimony about an unrelated incident demonstrates that the prosecutor was well aware of the devastating nature of this

evidence. Thus, notwithstanding the strength of the other evidence, it cannot be said that the error was harmless.

In view of our conclusion, we do not reach defendant's remaining contentions.

Accordingly, the judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered February 8, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of 5 ½ years, followed by five years' postrelease supervision, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Andrias and Freedman, JJ.
who dissent in an Opinion by Andrias, J.

ANDRIAS, J. (dissenting)

Defendant stands convicted of robbery in the second degree in connection with an incident in which he allegedly sprayed complainant David Cushman in the face with mace and stole a diamond ring that Cushman had advertised for sale on Craigslist for $35,000. Before trial, defense counsel indicated that defendant wished to testify, and he suggested during the *Molineux* hearing that the defense would be that after defendant and Cushman fought, Cushman fabricated the robbery accusation against him. At trial, the defense was that Cushman, out of frustration and anger, assaulted and maced defendant after defendant had strung him along for several months with respect to the purchase of the ring, which gave Cushman a motive to fabricate the robbery accusation to avoid being charged with assault. In furtherance of this defense, before the *Molineux* evidenced was admitted, defense counsel asked Cushman on cross-examination if he had become frustrated with defendant during their dealings and whether he had maced defendant. Thereafter, defendant testified that he had "[n]o intention of robbing" Cushman and that it was Cushman who sprayed defendant with mace and assaulted him.

The majority reverses the conviction on the ground that the trial court erred in admitting, under *People v Molineux* (168 NY 264 [1901]), evidence of a prior larceny in which defendant

allegedly stole rings worth more than $90,000 from complainant Mary Nguyen that Nguyen had advertised on Craigslist.[1] In so ruling, the majority adopts the position that there can be no ambiguity as to defendant's intent because it is inherent in his actions "[i]f the jury believed Cushman's testimony." However, in this classic *Molineux* case, where defendant presented a different version of the events, the People were entitled to introduce evidence on their direct case anticipatory of the defense that defendant would advance at trial that tended to disprove his claim that he had no intention of stealing the diamond ring from Cushman. Intent is an element of the crime that defendant explicitly and repeatedly placed in issue, and the trial court properly found that the probative value of the Nguyen larceny evidence exceeded any potential for prejudice. Accordingly, I dissent, and would affirm the judgment.

"[T]he familiar *Molineux* rule states that evidence of a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific

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[1]Defendant was charged with grand larceny in the second degree and other larceny-related counts in the Nguyen case. When the People moved to consolidate the two cases, defendant opposed on the ground that he wished to testify in this case, whereas he intended to exercise his Fifth Amendment rights in the Nguyen case. The court conducted consolidated pretrial hearings, but severed the cases for trial.

material issue in the case, and tends only to demonstrate the defendant's propensity to commit the crime charged" (*People v Cass*, 18 NY3d 553, 559 [2012]). "On the other hand, evidence relevant to prove some fact in the case, other than the defendant's criminal propensity, is not rendered inadmissible simply because it may also reveal that the defendant has committed other crimes" (*People v Allweiss*, 48 NY2d 40, 46-47 [1979]). Thus, evidence of a defendant's uncharged crimes or prior misconduct is admissible where it is directly relevant to a material issue in the case, other than the defendant's propensity to commit the crime charged, and its probative value outweighs its potential for undue prejudice to the defendant (*Cass*, 18 NY3d at 560).

> "Determining whether the probity of such evidence exceeds the prejudice to the defendant is a delicate business, and as in almost every case involving *Molineux* or *Molineux*-type evidence, there is the risk that uncharged crime testimony may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value. Yet this case-specific, discretionary exercise remains within the sound province of the trial court, which is in the best position to evaluate the evidence."

(*People v Morris*, 21 NY3d 588, 596-597 [2013] [internal quotation marks and citations omitted]; *see also People v Gillyard*, 13 NY3d 351, 355 [2009] ["The balancing of probative value against

potential prejudice is entrusted to the trial court's discretion"]).

"A commonly used, though nonexhaustive, list names five so-called *Molineux* exceptions--i.e., purposes for which uncharged crimes might be relevant: 'to show (1) intent, (2) motive, (3) knowledge, (4) common scheme or plan, or (5) identity of the defendant'" (*People v Arafet*, 13 NY3d 460 [2009], quoting *People v Alvino*, 71 NY2d 233, 242 [1987]). "When defendant's criminal intent cannot be inferred from the commission of the act or when defendant's intent or mental state in doing the act is placed in issue, . . ., proof of other crimes may be admissible under the intent exception to the *Molineux* rule" (*People v Ingram*, 71 NY2d 474, 479 [1988]; *People v Alvino*, 71 NY2d at 242-243 [other conduct may be admissible evidence "when proof of the act falls short of demonstrating that the defendant acted with a particular state of mind and where proof of a prior act is relevant to that issue"]).

"Robbery is defined as 'forcible stealing' (Penal Law § 160.00); larceny is an element of robbery (*People v Pagan*, 19 NY3d 91, 96 [2012]). "A person steals property and commits larceny when, with the intent to deprive another of property or to appropriate the same to himself . . . he wrongfully takes, obtains or withholds such property from an owner thereof" (Penal

Law § 155.05[1]). Thus, to convict a defendant of robbery, the People must prove that he or she acted with the intent to take property from the owner thereof (*People v Green*, 5 NY3d 538, 543 [2005]).

The majority finds that defendant's criminal intent can readily be inferred from Cushman's description of the crime, and that *Molineux* evidence should not be admitted to bolster the uncertain credibility of the complaining witness. However, this is not your garden variety robbery where someone sticks a gun in the victim's face, and the jury either believes the complainant's version of the facts or does not. Defendant's larcenous scheme took place over many weeks and whether defendant was a legitimate buyer who intended to flip the diamond ring and earn a quick profit, whether he planned to steal the ring from Cushman by trickery, and whether he planned to take the ring by force are all ambiguities in the People's evidence. The fact that at the last second defendant impulsively panicked and assaulted Cushman and allegedly seized the ring does not eliminate the fact that defendant put his larcenous intent at issue through his cross-examination of Cushman and his own extensive testimony about his real intent or lack thereof. Defendant testified that he, not Cushman, was the victim, and his final acts, as described by Cushman, in and of themselves might

not have been enough to resolve any doubts in the jurors' mind about his intent to steal. Thus, the court properly admitted evidence of the uncharged larceny committed by defendant under similar circumstances as probative of defendant's larcenous intent, a contested element of the crime (*see People v Mobley*, 176 AD2d 211 [1st Dept 1991], *lv denied* 78 NY2d 1128 [1991]]).

Particularly, there was a significant number of common factors in both crimes, including that defendant had multiple phone conversations and meetings with each victim in the same neighborhood in Manhattan to arrange his supposed purchase of the jewelry they advertised on Craigslist, told both victims that his mother was in the hospital when he needed an excuse for leaving a meeting, arranged meetings with them at which a promised third party never showed up, and displayed fake jewelry to them. Although the evidence that defendant took Nguyen's rings by sleight of hand does not tend to establish that his meeting with Cushman was for the purpose of robbery, it was probative of defendant's larcenous intent, and tended to dispel the notion that there was an innocent explanation for defendant's conduct (*see People v Chi Yuan Hwang*, 2 AD3d 245, 246 [1st Dept 2003], *lv denied* 2 NY3d 738 [2004]; *People v Taylor*, 71 AD3d 1467, 1468 [4th Dept 2010] ["evidence was also relevant to rebut the defense that defendant had a legitimate reason for his presence in the

office where the instant crimes occurred"], *lv denied* 15 NY3d 757 [2010]). Indeed, what could be more relevant than the Nguyen larceny to explain that defendant's extensive interactions with Cushman were in furtherance of his intent to steal Cushman's ring, rather than the typical arm's-length negotiations between a true buyer and seller?

The majority ignores the facts that whether defendant actually committed the acts complained of is an issue in the case and that the Ngyuen larceny tended to disprove defendant's version of events, including his claim that he had no intent to steal the ring from Cushman and that he was the true victim. As set forth above, the chain of events leading up to the robbery created ambiguities as to defendant's intent, and the earlier incident tended to place the trial evidence in context (*see People v Martinez*, 53 AD3d 508 [2d Dept 2008], *lv denied* 11 NY3d 791 [2008]; *People v Bourne*, 46 AD3d 1101, 1103 [3d Dept 2007], *lv denied* 10 NY3d 762 [2008]; *People v Figueroa*, 195 AD2d 477 [2d Dept 1993], *lv denied* 82 NY2d 753 [1993]). Defendant testified that he, not Cushman, was the victim, and his final acts, as described by Cushman, in and of themselves might not have been enough to resolve any doubts in the jurors' mind about

defendant's intent to steal (*see People v Wilson*, 100 AD3d 1045, 1047-1048 [3d Dept 2012], *lv denied* 22 NY3d 998 [2013] [the defendant put his intent in issue, during cross-examination of a witness, by attempting to portray the witness as the true drug dealer]).

Further,

> "[e]vidence of uncharged crimes is not barred merely because the People are able to establish their case without it; they are entitled to present all the admissible evidence available to them . . . There is ample case law to support the proposition that uncharged crime evidence may be used to support testimony that otherwise might be unbelievable or suspect."

(*People v Steinberg*, 170 AD2d 50, 73, 74 [1st Dept 1991], *affd* 79 NY2d 673 [1992]; *see also People v Galarza*, 59 AD3d 365, 366 [1st Dept 2009], *lv denied* 12 NY3d 853 [2009]). While the majority believes that this is not such a case, defendant was severely beaten by Cushman, who was also handcuffed and arrested when the police arrived at the scene.

Nor should the evidence be excluded merely because it was detrimental to defendant. "If the evidence has substantial probative value and is directly relevant to the purpose--other than to show criminal propensity--for which it is offered, the probative value of the evidence outweighs the danger of prejudice

and the court may admit the evidence" (*People v Cass*, 18 NY3d at 560). Here, the probative value of the evidence outweighed any potential for undue prejudice, which was minimized by the court's suitable limiting instructions, which at all times made clear that the *Molineux* evidence was admitted as proof of defendant's larcenous intent (*see People v Morris*, 21 NY3d at 598]). The fact that the larceny victim cried while testifying is irrelevant to the propriety of the court's ruling, and her demeanor did not independently warrant a mistrial. Finally, even if the court's admission of the *Molineux* evidence was error, it was harmless since there is no significant probability that the jury would have acquitted defendant if the *Molineux* evidence had been excluded (*see People v Parker*, 50 AD3d 330, 332 [1st Dept 2008], *lv denied* 10 NY3d 962 [2008]), given, among other things, the strength of the other evidence and defendant's testimony in which he conceded his willingness to be untruthful when it benefitted him.

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

ENTERED: APRIL 17, 2014

CLERK