SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**DECEMBER 23, 2014**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Saxe, Manzanet-Daniels, Gische, JJ.

13519 The People of the State of New York, Respondent, Ind. 6002/11

-against-

Jose Cruz,
Defendant-Appellant.

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Scott A. Rosenberg, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at plea; Carol Berkman, J. at sentencing), rendered on or about August 14, 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 [1st Dept 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: DECEMBER 23, 2014

CLERK

Tom, J.P., Sweeny, DeGrasse, Feinman, Gische, JJ.

13654 Norman Bloomfield, etc., Index 400082/12
Plaintiff-Appellant,

-against-

Vincent Cannavo, etc., et al.,
Defendants-Respondents.

_____

MFY Legal Services, Inc., New York (Jota Borgmann of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 19, 2013, which granted defendants' motion to dismiss the complaint for lack of standing and failure to state a cause of action, unanimously affirmed, without costs.

Plaintiff, a resident of the Surf Manor Home for Adults, brought this putative class action for a declaration that an inspection review process (IRP) whereby the New York State Department of Health (DOH) affords operators of adult care facilities the opportunity for an informal one-hour meeting with DOH staff after an inspection report is drafted, but before it is published, violates state and federal law. He contends that the IRP is not set forth in any regulations promulgated by DOH and was adopted in violation of the State Administrative Procedure Act. Plaintiff also alleges that the IRP violates the Americans

with Disabilities Act (ADA) because it discriminates against persons with disabilities who are the residents of these adult homes (*see* Social Services Law § 2[21]).

Plaintiff alleges that, between November 2009 and September 2011, he made approximately 35 complaints to DOH regarding rights violations and hazardous conditions impacting Surf Manor residents. During this period, DOH issued several inspection reports, as well as violations and corrective action orders, finding, among other things, that Surf Manor staff and independent contractors had intimidated residents and that Surf Manor had failed to implement adequate grievance procedures. Other substantiated complaints, however, did not result in any violations. Plaintiff contends that the IRP is a secretive process that hampers residents' rights because it affords the operators of adult homes an appeal process that delays their compliance with applicable law and regulations and influences the outcomes of residents' complaints.

Since plaintiff is challenging DOH's implementation of the IRP, a governmental action, he must establish that he has standing to do so by showing an "injury in fact," meaning that plaintiff will actually suffer harm by the challenged administrative action and that the injury asserted by him falls "within the zone of interests or concerns sought to be promoted

or protected by the statutory provision under which the agency has acted" (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). The alleged injury or harm must also be in some way different from that of the public at large (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 774 [1991]).

Although plaintiff alleges that the IRP process favors adult home operators by allowing them to privately address adverse findings or corrective actions DOH identifies, without any input by residents of the adult home, plaintiff does not otherwise articulate how he is disadvantaged by this process, how the outcomes of some of these investigations would have been different had residents been permitted to participate in the IRP, or that the substandard living conditions or mistreatment he complains of are attributable to DOH's implementation of the IRP. The only "injury" plaintiff alleges is that resolution of residents' complaints are delayed when an adult home operator contests the outcome of an investigation and residents are not aware of or notified that any particular complaint is subject to an IRP. These allegations are far too generalized and speculative to satisfy the "injury in fact" requirement that would confer plaintiff with standing to challenge the procedures DOH has implemented (*see Rudder v Pataki*, 93 NY2d 273, 280 [1999]). Plaintiff does not articulate any harm or injury that

he will suffer that is in some way an identifiable interest of his own, different from that of the public at large (*see Matter of Lee v New York City Dept. of Hous. Preserv. & Dev.*, 212 AD2d 453 [1st Dept 1995], *lv dismissed in part, denied in part* 85 NY2d [1995]).

Plaintiff and the members of the proposed class of adult home residents are also outside the "zone of interests" sought to be protected by the applicable statutory and regulatory framework under which the agency has acted (*Society of Plastics Indus.*, 77 NY2d at 773). DOH is vested with the authority to establish the procedures by which complaints are investigated and violations corrected (*see* Social Services Law § 461-o, 18 NYCRR § 486.2[a]). Moreover, DOH's enforcement powers are exceedingly broad, ranging from the imposition of civil penalties to the revocation, suspension or limitation of an operating certificate, after a hearing. DOH can even request that the Attorney General seek injunctive relief or criminally prosecute an operator for any violation or threatened violations of law or regulation (*see* SSL § 460-d; 18 NYCRR § 486.4[b]; *see also* 18 NYCRR §§ 486.4[b]-[h]). The governing regulatory scheme – which plaintiff does not challenge — plainly contemplates dialogue between DOH and adult home operators during the inspection process. Rather than providing for universal participation by residents in that

process, they are expressly excluded from disclosure of investigation outcomes that are being contested by the operator (*see* Social Services Law §§ 461-a[1], [2][b], [2][c]; 461-d[3][b], [c], [g]; 461-o; 18 NYCRR 486.2[o]). The IRP is, therefore, wholly consistent with the enabling statutes.

We note that plaintiff is not without personal remedies for his complaints because the Social Services Law provides adult home residents with a direct means of challenging violations of their rights by establishing a statutory "warranty of habitability" that residents of adult homes "shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health, safety or welfare," and affording residents a statutory cause of action against adult home operators for any breach of that warranty (Social Services Law §§ 461-c[2-a][a], [b]). This statutory right of action mitigates any policy concern that "to deny standing to this plaintiff would be to insulate governmental action from scrutiny" (*Society of Plastics Indus.*, 77 NY2d at 779).

We reject plaintiff's contention that DOH is required to promulgate the IRP as a rule pursuant to the State Administrative Procedure Act. The IRP is merely a mechanism for adult home operators to have a one-hour informal dialogue with DOH before the publication of an inspection report. It is a "reasonable

interpretation" of the adult home inspection regulations, not an unpromulgated rule (*see Matter of Elcor Health Servs. v Novello*, 100 NY2d 273, 279 [2003]; *Matter of Isabella Geriatric Ctr., Inc. v Novello*, 38 AD3d 356, 358 [1st Dept 2007], *lv denied* 9 NY3d 806 [2007]; *see* SAPA § 102[2][b][iv]).

The allegation that DOH discriminates against adult home residents by excluding them from participation in the IRP fails to state a cause of action under the ADA. Only adult home operators are inspected under the governing regulatory framework. Since residents are not subject to these inspections, they do not "meet[] the essential eligibility requirements" for participation in the IRP, and hence are not "[q]ualified individual[s]" within the meaning of the ADA (42 USC § 12131[2]; *see Matter of Rivera v New York City Hous. Auth.*, 60 AD3d 509 [1st Dept 2009]).

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: DECEMBER 23, 2014

CLERK

Sweeny, J.P., DeGrasse, Manzanet-Daniels, Feinman, Gische, JJ.

13716 Sandra Haulsey, Index 111382/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

Consolidated Edison Company of
New York Inc.,
Defendant,

Nico Asphalt Paving, Inc.,
Defendant-Respondent.

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

Bader Yakaitis & Nonnenmacher, LLP, New York (Jesse Young of counsel), for Sandra Haulsey, respondent.

McGaw, Alventosa & Zajac, Jericho (James K. O'Sullivan of counsel), for Nico Asphalt Paving, Inc., respondent.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered August 19, 2013, which denied the motion of defendant City of New York for summary judgment dismissing the complaint and cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The City established its entitlement to judgment as a matter of law in this action where plaintiff was injured when, while walking within a crosswalk, her foot became stuck in a pothole

causing her to fall. The City showed that it was not provided with prior written notice of the subject pothole (*see* Administrative Code of City of NY § 7-201[c][2]), and the remaining defendant's contention that plaintiff's 311 calls, permits issued to Consolidated Edison, and repair orders (FITS reports) regarding potholes in the vicinity of the accident 19 months earlier satisfied the "written acknowledgment" alternative under Administrative Code § 7-201(c)(2), is unavailing (*see e.g. Bruni v City of New York,* 2 NY3d 319 [2004]).

Plaintiff's 311 calls were insufficient to satisfy the statutory requirement, even if her complaints were reduced to writing *(see Gorman v Town of Huntington,* 12 NY3d 275, 280 [2009]), and permits issued to other parties do not show notice of the defective condition (*see Kapilevich v City of New York,* 103 AD3d 548 [1st Dept 2013]). The FITS reports were also insufficient because it was unclear whether any of the potholes that were repaired 19 months prior to the accident was the pothole that caused plaintiff's fall. Furthermore, there was no evidence that the City's repairs "immediately result[ed] in the

existence of a dangerous condition" *(Bielecki v City of New York*, 14 AD3d 301, 301 [1st Dept 2005]; *see also Rosenblum v City of New York*, 89 AD3d 439 [1st Dept 2011]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Sweeny, J.P., Renwick, DeGrasse, Clark, Kapnick, JJ.

13777 The People of the State of New York, Ind. 1464/12
Respondent,

-against-

Julen Wayne,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White, J.), rendered on or about October 9, 2012,

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

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

ENTERED: DECEMBER 23, 2014

CLERK

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

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13810 In re Philomena Brennan, Index 104122/12
Petitioner-Appellant,

-against-

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

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

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered March 26, 2013, which denied the petition seeking, inter alia, to annul respondent New York City Department of Education's determination, dated July 6, 2012, terminating petitioner's employment, and granted respondents' cross motion to dismiss the petition, unanimously affirmed, without costs.

Petitioner's termination from her position as a probationary teacher was not arbitrary and capricious or contrary to law. As a probationary teacher, petitioner was not entitled to a pre-termination hearing pursuant to New York Education Law § 3020-a (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]). Although petitioner was previously a tenured employee, she resigned from her employment in June 2007, and lost her

tenure and its attendant protections. Upon her return to employment, she failed to comply with Chancellor's Regulation C-205(29) which governs withdrawal of a resignation and restoration to tenure. Thus, she did not regain her tenured position (*see Springer v Board of Educ. of City School Dist. of City of New York*, 121 AD3d 473 [1st Dept 2014]). Although petitioner filed a written application for reinstatement and the removal of her name from the ineligibility list in 2009, at a previous Article 78 proceeding commenced in 2010, the court granted petitioner's request for removal from the list, yet declined to reinstate her tenure until petitioner took additional steps required for reinstatement. Petitioner failed to comply with the court's directive and her tenure was not constructively restored by her rehiring (*id.*).

Petitioner has not demonstrated that her unsatisfactory rating was arbitrary and capricious or made in bad faith (*Murname v Dept. of Education*, 82 AD3d 576 [1st Dept 2011]). The detailed observation reports by the principal and assistant principal, which describe petitioner's poor performance in, among other things, failing to make the objectives of the lesson evident, set appropriate goals and expectations for the class, meet the varying needs of the different student groups, and address student misbehavior, provided a rational basis for the rating.

In addition, petitioner was provided with step-by-step strategies for improvement and failed to implement them (*see Richards v Board Of Educ.*, 117 AD3d 605, 606-07 [1st Dept 2014]). While petitioner claims that her annual U-rating was deficient in that it did not list the supporting documentation that was relied on, she has failed to identify any of the documents that were allegedly omitted.

Petitioner has not established that the U-rating was made in violation of a lawful procedure or substantial right. Her claim that she did not receive a copy of the March formal evaluation until the end of the school year when there was little time to implement the recommendations, is improperly raised for the first time on appeal. In any event, it is unavailing since there is no allegation that the written report differed from the post-observation conference. Thus, she was aware of the stated deficiencies and still failed to improve (*cf. Matter of Brown v City of New York*, 111 AD3d 426, 427 [1st Dept 2013]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13811 The People of the State of New York, Respondent, Ind. 3577/09

-against-

Luis Zambrano, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

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

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Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about September 24, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure to risk level one (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors

that were not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13812 The People of the State of New York, Respondent, Ind. 4101/12

-against-

Mitchell Arteaga, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about November 7, 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 [1st Dept 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: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13813 Techo-TM, LLC, Index 651600/13
Plaintiff-Respondent,

-against-

Fireaway, Inc.,
Defendant-Appellant.

_____

Ira Daniel Tokayer, New York, for appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 7, 2014, which, to the extent appealed from as limited by letter, denied defendant's motion to dismiss the complaint for lack of subject matter jurisdiction, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The parties are foreign corporations that neither do nor are authorized to do business in New York (*see* CPLR 302), and this case does not fall under any of the exceptions permitting an action in this State by a foreign corporation against another foreign corporation (*see* Business Corporation Law [BCL] § 1314[b]). BCL § 1314(b)(4) provides for cases against a non-domiciliary that would be subject to the personal jurisdiction of this State's courts pursuant to CPLR 302. However, while New York recognizes consent as a basis for personal jurisdiction (*see* CPLR 301 and Vincent C. Alexander, Practice Commentaries,

McKinney's Cons Laws of NY, Book 7B, CPLR 301:1), it does not recognize consent as a basis for long-arm jurisdiction (*see Graham v New York City Hous. Auth.*, 224 AD2d 248 [1st Dept 1996]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13816 Mamadou S., A child by his parents and legal guardians Khalil S., and Khadiatou C., Plaintiff-Appellant, Index 24262/04

-against-

Mary Feliciano, Defendant,

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

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DeToffol & Associates, New York (David J. DeToffol of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Hanh H. Le of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered July 22, 2013, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint as against defendant The Board of Education of the City of New York (BOE), unanimously reversed, on the law, without costs, and the motion denied as to BOE.

Plaintiff, at the time an eighth grade student, was injured when he darted or was pushed into the street and was hit by a car while playing tag in front of his school. Although the driver of the car was not negligent in causing the accident (*Sakho v City of New York*, 88 AD3d 581 [1st Dept 2011]), the record presents

issues of fact as to whether defendant BOE owed a duty of care to protect the infant plaintiff from traffic hazards after he was discharged by the school bus in front of the school, five minutes before the school day would begin (*see Pratt v Robinson*, 39 NY2d 554, 560-561 [1976]; *Thai v Roman Catholic Church of St. Nicholas of Tolentine*, 34 AD3d 225 [1st Dept 2006]), and whether that duty was breached by the school's failure to provide adequate safety measures, such as traffic barricades, proximately causing the injury (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13817 José Borges, Index 570722/06
Plaintiff-Respondent,

-against-

Alfred Placeres,
Defendant-Appellant.

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Law Office of José Luis Torres, White Plains (José Luis Torres of counsel), for appellant.

Law Office of Paul O'Dwyer, P.C., New York (Paul O'Dwyer of counsel), for respondent.

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Order of the Appellate Term of the Supreme Court, First Department, entered on or about March 5, 2014, which affirmed a judgment, Civil Court, New York County (Frank P. Nervo, J.), entered September 14, 2012, after a jury trial, in plaintiff's favor, unanimously affirmed, without costs.

Defendant's motions to amend his answer to assert a statute of limitations defense and for summary judgment dismissing the complaint, made on the eve of trial eight years after the answer was served, were properly denied for lack of any excuse for the delay (*see Van Damme v Gelber*, 111 AD3d 408, 409-410 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). The motion for summary judgment did not seek relief against a party whose timely motion for summary judgment was returnable the same day, and therefore did not fall within the exception permitting a court to entertain

an untimely summary judgment motion (*see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 87-89 [1st Dept 2013]; *Genger v Genger*, 120 AD3d 1102 [1st Dept 2014]).

The charge and verdict sheet appropriately required that defendant's negligence in this attorney malpractice action be a substantial factor in causing plaintiff's harm (*see Barnett v Schwartz*, 47 AD3d 197, 204-205 [2d Dept 2007]). Contrary to defendant's contention, the gravamen of plaintiff's claim is not that defendant's departures caused plaintiff to be denied an adjusted immigration status, tantamount to losing a case, but that those departures resulted in a deportation order and the failure to vacate it due to bad advice. Defendant's argument that the damages awarded for the harm resulting from plaintiff's 14 months in detention constitute non-pecuniary damages that are not recoverable in a legal malpractice action is unpreserved.

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: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13818 The People of the State of New York, Ind. 1957/12
Respondent,

-against-

Alejandro Morales,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered on or about November 21, 2012,

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

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

ENTERED: DECEMBER 23, 2014

CLERK

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

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13819 Reynolds Brown, et al., Index 111400/08
Plaintiffs-Respondents,

-against-

New York-Presbyterian
HealthCare System, Inc.,
Defendant,

The New York Hospital Medical
Center of Queens, et al.,
Defendants-Appellants.

[And A Third-Party Action]

_____

Renzulli Law Firm, LLP, White Plains (John V. Tait of counsel), for appellants.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 18, 2014, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed in its entirety. The Clerk is directed to enter judgment accordingly.

Plaintiff Reynolds Brown was working on a flatbed trailer, when he stepped into a hole on the flatbed trailer, sinking his left leg into the hole up to his hip, and sustaining injury.

Defendants demonstrated their prima facie entitlement to summary judgment dismissing plaintiffs' Labor Law § 200 claims. The uncontroverted evidence shows that defendants neither supervised or controlled plaintiffs' work, and that they had no actual or constructive notice of the hole in the flatbed trailer which caused the accident (*Russin v Louis Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

As for the Labor Law 240(1) claim, plaintiff was working on a flatbed trailer at the time of the accident and was not exposed to any gravity-related risk arising from his work (*see Kulovany v Cerco Prods. Inc.*, 26 AD3d 224, 225 [1st Dept 2006]; *Rice v Board of Educ. of City of N.Y.*, 302 AD2d 578, 580 [2d Dept 2003], *lv denied* 100 NY2d 516 [2003]). Indeed, there is no indication, in the record, as to the manner of safety device that should have been provided to plaintiff to prevent his accident.

While plaintiffs have proffered in their pleadings and bills of particulars at least a dozen specific Industrial Code violations in support of their Labor Law § 241(6) claim, only two are contested on appeal. Accordingly, the remainder are deemed abandoned and dismissed.

Plaintiffs allege a violation of Industrial Code § 23-1.7(b)(1)(i), which pertains to hazardous openings. However, that regulation has been construed to apply to openings that

persons can fall through in their entirety (*see Messina v City of New York*, 300 AD2d 121, 123-124 [1st Dept 2002]). Accordingly, as the hole sub judice does not meet this definition, defendants should have been granted summary judgment dismissing plaintiffs' § 241(6) claim insofar as it was predicated on a violation of § 23-1.7(b)(1)(i).

Industrial Code § 23-9.2(a) pertains to "power-operated equipment." However, the flatbed trailer at issue here is not a piece of power operated equipment, and its attachment to a truck does not transform it into such (*see e.g. Tillman v Triou's Custom Homes*, 253 AD2d 254, 255, 258 [4th Dept 1999]).

As a result of plaintiff Reynolds Brown's claims being dismissed in their entirety, there is no basis for plaintiff Jennifer Brown's derivative claims.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13820 The People of the State of New York, Respondent, Ind. 3602/04

-against-

Darrel Corian, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about October 26, 2012, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly applied the presumptive override for defendant's prior felony conviction for persistent sexual abuse (Penal Law § 130.53), and properly exercised its discretion in declining to grant a downward departure. Defendant's principal arguments are similar to arguments this Court rejected on defendant's appeal from another sex offender adjudication arising

out of a similar conviction (77 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]), and we see no reason to reach a different result.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13821 The People of the State of New York, Ind. 6052/10
Respondent,

-against-

Eugene Cohen,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Arlene Goldberg, J.), rendered on or about November 17, 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: DECEMBER 23, 2014

CLERK

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

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13822 Carolyn S. Jones, Index 301694/09
Plaintiff-Respondent,

-against-

MTA Bus Company, et al.,
Defendants-Appellants.

_____

Sullivan & Brill, LLP, New York (Adam A. Khalil of counsel), for appellants.

Levine & Slavit, PLLC, New York (Leonard S. Slavit of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered November 7, 2013, which denied defendants' motion for summary judgment dismissing the complaint on the issue of liability and for failure to meet the serious injury threshold pursuant to Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that, as a result of being struck by closing doors as she was exiting an MTA bus, she suffered post-traumatic psychosis and brain injuries, as well as various injuries to her left eye, neck, right shoulder, knee, and elbow. Defendants demonstrated prima facie that plaintiff's claimed psychological and brain conditions preexisted the subject accident by submitting plaintiff's medical records (*see Knoll v*

*Seafood Express*, 17 AD3d 233 [1st Dept 2005], *affd* 5 NY3d 817 [2005]; *Shu Chi Lam v Wang Dong*, 84 AD3d 515 [1st Dept 2011]). In addition, they submitted the affirmed expert report of a neuropsychologist who, after conducting a battery of tests and reviewing plaintiff's medical records, opined that her well-documented symptoms existed prior to the incident and there was no basis for finding either that she sustained any brain injury or psychological injury as a result of the incident, or that any preexisting condition was exacerbated by the incident. Plaintiff waived any technical objection to the psychological expert's report based on the form in which it was submitted (CPLR 2106; CPLR 2309), and it was therefore improper for the court to refuse sua sponte to consider it on that ground (*Long v Taida Orchids, Inc.*, 117 AD3d 624 [1st Dept 2014]; *see Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]).

As for plaintiff's other claimed injuries, defendants met their burden by relying on plaintiff's testimony that her eye stopped hurting within weeks of the accident, and her post-accident hospital and medical records showing that she made no complaints until about five months after the accident, which was too remote in time to establish a causal relationship (*see Rosa v Mejia*, 95 AD3d 402, 404 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of

fact as to any of her claims (*see Rivera v Benaroti*, 29 AD3d 340 [1st Dept 2006]). Her primary care physician stated that she did not suffer from any psychological and brain conditions before the accident, but he did not address the prior medical records in the record. Moreover, he did not opine that those conditions were causally related to the accident. Plaintiff submitted no objective evidence supporting her other injuries and no medical opinion that they were causally related to the accident or permanent.

Since plaintiff failed to meet the serious injury threshold, it is unnecessary to consider whether defendants met their burden on the alternate ground of lack of liability.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13823 The People of the State of New York, Respondent, Ind. 2729/03

-against-

Louis Burgos, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about October 20, 2011, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure to risk level one (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant's conduct and

accomplishments while incarcerated were not so extraordinary as to warrant a departure from his presumptive risk level, given the seriousness of the underlying crime against a five-year-old child.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13824 The People of the State of New York, Dkt. 49743/11
Respondent,

-against-

Sabino Hernandez,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered August 26, 2011, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a term of 15 days, unanimously affirmed.

The court's verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the inference that when defendant swung his fist at a police

officer, he did so with, at least, the intent required for second-degree harassment under Penal Law § 240.26(1). The fact that defendant was acquitted of attempted assault, which requires a different intent, does not warrant a different conclusion.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13825 In re Madison M., and Another,

Children Under the Age
of Eighteen Years, etc.,

Nathan M., etc.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Tennille M. Tatum-Evans, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

_____

Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about October 11, 2013, which, after a fact-finding hearing, found that respondent father neglected the subject children, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act § 1012[f][i][B]). There exists no basis to disturb the court's credibility determinations (*see e.g. Matter of Niyah E. [Edwin E.]*, 71 AD3d 532 [1st Dept 2010]). The record shows that the children's out-of-court statements regarding respondent's use of violence against their mother in the children's presence, were corroborated by each other's

statements, and by the caseworker's testimony and a police officer's statement as to the injuries observed on the mother (*see Matter of Jasmine A. [Albert G.]*, 120 AD3d 1125 [1st Dept 2014]; *Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]).

Respondent's argument that, since the alleged domestic violence was an isolated incident, the finding of neglect was not based on legally sufficient evidence, is unavailing. "A single incident where the parent's judgment was strongly impaired and the child exposed to a risk of substantial harm can sustain a finding of neglect" (*Matter of Kayla W.*, 47 AD3d 571, 572 [1st Dept 2008] [internal quotation marks omitted]). In any event, the court properly discredited respondent's testimony that he does not have a history of violence against the mother, given that he admitted to pleading guilty to threatening to use physical force against the mother, and also acknowledged that there was an order of protection in effect at the time of the subject incident (*see e.g. Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]). Contrary to respondent's contention, the police observations that the children were crying is sufficient to demonstrate by a preponderance of the evidence that

their emotional well-being had been, or was in danger of becoming, impaired by the altercation they witnessed (*see Matter of Nia J. [Janet Jordan P.]*, 107 AD3d 566 [1st Dept 2013]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13826-
13827 In re Derick L.,

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

Catherine W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child.

_____

Appeal from order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about August 21, 2013, which denied respondent's application pursuant to Family Court Act § 1028 for the return of the subject child, unanimously dismissed, without costs, as moot. Appeal from order, same court and Judge, entered on or about January 7, 2013, which directed the temporary removal of the child, unanimously dismissed, without costs, as abandoned.

Respondent's appeal from the August 21, 2013 order has been rendered moot by the subsequent finding of neglect against her (*Matter of Hezekiah J. [Stacy J.]*, 117 AD3d 642 [1st Dept 2014]).

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13828 The People of the State of New York, Respondent, Ind. 454/10

-against-

Michael Simmons, Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Bonnie C. Brennan of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Juan M. Merchan, J.), entered on or about August 2, 2012, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-c), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure to risk level one (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant committed a heinous crime against a particularly vulnerable victim, and his point score did not result in an overassessment of his risk to public safety. The victim was both underage and developmentally

delayed, and regardless of whether she "consented" to the initial encounter, defendant threatened the use of violence in order to compel the victim to continue against her will.

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13829 Allstate Insurance Company, Index 304472/12
Plaintiff-Respondent,

-against-

Jean Eddy Pierre, et al.,
Defendants,

Adelaida Laga Pt, et al.,
Defendants-Appellants.

_____

The Rybak Firm, PLLC, Brooklyn (Damin J. Toell of counsel), for appellants.

Freiberg, Peck & Kang, LLP, Armonk (Yilo J. Kang of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 18, 2013, which granted plaintiff insurer's motion for summary judgment declaring that defendants-appellants are not entitled to no-fault benefits, unanimously modified, on the law, solely to declare that defendants-appellants are not entitled to no-fault benefits, and otherwise affirmed, without costs.

Plaintiff established that defendants are not entitled to no-fault benefits because their assignors failed to appear at scheduled examinations under oath (EUOs). This Court in *Unitrin Advantage Ins. Co. v Bayshore Physical Therapy, PLLC* (82 AD3d 559 [1st Dept 2011], *lv denied* 17 NY3d 705 [2011]) held that the failure to submit to requested independent medical examinations

(IMEs) constitutes a breach of a condition precedent to coverage under a no-fault policy and voids coverage regardless of the timeliness of the denial of coverage (*id.* at 560). Although the instant case involves the failure to appear at EUOs, and not IMEs, this Court's holding in *Unitrin* applies to EUOs (*see e.g. Interboro Ins. Co. v Perez*, 112 AD3d 483, 483 [1st Dept 2013]; *Seacoast Med., P.C. v Praetorian Ins. Co.*, 38 Misc 3d 127[A] [App Term, 1st Dept 2012]; *Interboro Ins. Co. v Clennon*, 113 AD3d 596, 597 [2d Dept 2014]). Defendants do not dispute that their assignors failed to appear at their first EUOs, and plaintiff established, through admissible evidence, that the assignors failed to appear at their second EUOs (*see Arco Med. NY, P.C. v Metropolitan Cas. Ins. Co.*, 41 Misc 3d 140[A], 2013 NY Slip Op 52001[U], *2 [App Term, 2d Dept 2013]; *Quality Psychological Servs., P.C. v Interboro Mut. Indem. Ins. Co.*, 36 Misc 3d 146[A], 2012 NY Slip Op 51628[U] [App Term, 2d Dept 2012]). Plaintiff also established that the statements on the record were business records (*see e.g. People v Cratsley*, 86 NY2d 81, 90-91 [1995]; *One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1, 11-12 [1st Dept 2011]). Although plaintiff was required to show (and did show) that the assignors each failed to appeared at two EUOs

(*see DVS Chiropractic, P.C. v Interboro Ins. Co.*, 36 Misc 3d 138[A], 2012 NY Slip Op 51443[U], *2 [App Term, 2d Dept 2012]), plaintiff was not required to demonstrate that the assignors' nonappearances were willful (*see Unitrin*, 82 AD3d at 561).

Defendants' argument that plaintiff failed to establish that it had mailed the EUO notices to the assignors' correct addresses is unpreserved (*see e.g. Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313, 313 [1st Dept 2000]) and unavailing (*see American Tr. Ins. Co. v Leon*, 112 AD3d 441, 442 [1st Dept 2013]). Similarly, their argument that plaintiff waived the defense of the assignors' nonappearance because plaintiff did not establish that it ever denied defendants' claims is unpreserved (*see* 276 AD2d at 313). In any event, the argument is unavailing, as defendants' own verified answer alleged that plaintiff had denied their claims.

Defendants failed to show that summary judgment is premature due to outstanding discovery (*see Interboro*, 113 AD3d at 597).

We modify the court's order solely to make a declaration in plaintiff's favor (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]; *see also QBE Ins. Corp. v Jinx-Proof Inc.*, 102 AD3d 508, 510 [1st Dept 2013]).

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

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

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13831 In re Victor Hernandez,
[M-4050] Petitioner,

-against-

New York City Department of
Corrections, et al.,
Respondents.

_____

Victor Hernandez, petitioner pro se.

Michael A. Cardozo, Corporation Counsel, New York (Martin Bowe of counsel), for respondents.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: DECEMBER 23, 2014

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13832-
13833
[M-4016
& 5058]

Index 251118/14

In re Victor Hernandez,
Petitioner,

-against-

Kirby Forensic Psychiatric
Hospital, et al.,
Respondents.

_____

Victor Hernandez, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Sania W. Khan of counsel), for respondents.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: DECEMBER 23, 2014

CLERK

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

13847 In re Morrone Restaurants, Inc., Index 100650/14
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

Jacqueline P. Flug, New York (Michael Ammirato of counsel), for respondent.

_____

In this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan B. Lobis, J.], entered July 7, 2014), the petition unanimously granted, without costs, the determination of respondent New York State Liquor Authority, dated May 28, 2014, which, after a hearing, canceled petitioner's liquor license and imposed a $1,000 bond claim, annulled, and the underlying charges dismissed.

Respondent's determination sustaining charges that petitioner sold or provided or permitted the sale or provision of alcoholic beverages to an individual under the age of 21, in violation of Alcoholic Beverage Control Law § 65(1), and failed to exercise adequate supervision over the conduct of the licensed business in violation of 9 NYCRR 48.2, is not supported by

substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The two police officers who testified on respondent's behalf never saw the alleged minor's government-issued identification, they never entered the premises, and they never saw her drinking anything. Although respondent submitted police reports containing the alleged minor's purported date of birth, respondent did not submit a copy of her identification. Further, the alleged minor did not testify or provide a sworn statement attesting to her age or that she consumed any alcoholic beverages inside petitioner's establishment. In addition, petitioner's manager testified that the establishment had a multileveled system in place to check the identification of patrons, and that he remembered that the alleged minor had not been in the establishment on the night in question. Under the circumstances, respondent failed to provide substantial evidence to support the charges (*see Matter of 25-24 Café Concerto Ltd. v New York State*

*Liq. Auth.*, 65 AD3d 260 [1st Dept 2009]; *Matter of Ridge, Inc. v New York State Liq. Auth.*, 257 AD2d 625 [2d Dept 1999]).

Given the foregoing determination, we need not reach petitioner's remaining argument regarding the imposed penalties.

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

ENTERED: DECEMBER 23, 2014

CLERK

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

13348-
13349 Warren Cole,
Plaintiff-Respondent,

-against-

Harry Macklowe, et al.,
Defendants-Appellants.

Index 650100/11

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz of counsel), for appellants.

Forman & Shapiro LLP, New York (Robert W. Forman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered October 17, 2013, and order and judgment (one paper), same court and Justice, entered January 27, 2014, affirmed, with costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Roland T. Acosta
David B. Saxe
Rosalyn H. Richter
Darcel D. Clark, JJ.

13348-
13349
Index 650100/11

_____x

Warren Cole,
Plaintiff-Respondent,

-against-

Harry Macklowe, et al.,
Defendants-Appellants.

_____x

Defendants appeal from the order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered October 17, 2013, which granted plaintiff's motion for partial summary judgment on his breach of contract claim against the corporate defendants, and from the order and judgment (one paper) of the same court and Justice, entered January 27, 2014, granting plaintiff's motion for summary judgment against defendant Harry Macklowe on the causes of action for breach of contract and violation of Debtor and Creditor Law § 273, and awarding plaintiff damages against Harry Macklowe.

Kasowitz, Benson, Torres & Friedman LLP, New York (Marc E. Kasowitz, David E. Ross, Jonathan E. Minsker and Joshua N. Paul of counsel), for appellants.

Forman & Shapiro LLP, New York (Robert W. Forman of counsel), and Allen & Miller, LLP, New York (Yoram Miller of counsel), for respondent.

ACOSTA, J.

At issue in this appeal is the interpretation of the plain language of a limited partnership agreement whereby plaintiff was obligated to sell his partnership interest upon the termination of his employment with defendant Manhattan Pacific if defendants made a proper offer to purchase it. We find that defendants failed to make a proper offer to purchase plaintiff's partnership interest upon his termination and therefore that plaintiff's obligation to sell was never triggered. Accordingly, when defendants sold the property owned by the partnership in 2008, plaintiff was entitled to his interest in the proceeds.

Defendant Macklowe is a well known developer and owner of Manhattan real estate. In 1987, he organized defendant MAK West 55th Street Associates, L.P. (MAK West 55th or the partnership) for the purpose of acquiring property at 125 West 55th Street (the property), and developing an office tower on that site. In 1998, MAK West 55th transferred the Property to 125 West 55th Street LLC (125 West LLC), another Macklowe entity.

In 1988, Macklowe's management company, Manhattan Pacific Management Co., Inc. (Manhattan Pacific), hired plaintiff, Warren Cole, an investment banker and real estate professional, who became Macklowe's "right-hand man" responsible for locating, acquiring and financing properties for Macklowe's businesses.

In 1994, Cole became a limited partner in MAK West 55th, pursuant to a limited partnership agreement (LPA), which granted him a 9% passive interest in MAK West 55th (Partnership interest), with the remaining Partnership interests held by Macklowe, his son William, and defendant MAK 55 Acquisition. The LPA provides, among other things, that no partner shall receive distributions other than as expressly provided in the LPA, and that distributions are to be made in proportion to the partners' partnership percentages.

Under section 11 of the LPA (the Buy-Sell Provision), Cole was required to sell, and Macklowe was required to buy, Cole's partnership interest upon the termination, for any reason, of Cole's employment with Manhattan Pacific.[1] Section 11.2 provides that the price

> "shall be equal to the amount that he would receive if the partnership sold all of its property for amounts equal to the amounts that [Macklowe] determines it would have received for such property in arms' length sales on the date of the Termination, satisfied all of its liabilities and other obligations and liquidated."

Section 11.3 provides that

> "[a]t the closing of the purchase . . ., which shall take

[1] Specifically, Section 11.1 states that upon termination of plaintiff's employment "he shall sell to [Macklowe] . . ., and [Macklowe] . . . shall purchase from [plaintiff], [plaintiff's] interest in the partnership at a price determined pursuant to section 11.2."

> place 90 days after the date of Termination, [Macklowe] shall deliver to [Cole] as his check in payment . . . and [Cole] . . . shall deliver to [Macklowe] such instruments . . . he shall request evidencing the transfer of [Cole's] interest in the partnership."

In April 1999, Cole resigned from Manhattan Pacific. It is undisputed that after the termination of his employment, there was no sale or purchase of his Partnership interest within 90 days of termination or thereafter.

In 2008, 125 West LLC sold the Property for $443 million, and distributed the Partnership's proceeds of $230,549,383 to Macklowe.

On January 14, 2011, Cole commenced this action asserting claims for breach of the LPA against Macklowe and MAK Acquisition for failure to distribute to Cole his 9% share of the Partnership's assets stemming from the 2008 sale, unjust enrichment against Macklowe, and violation of Debtor and Credit Law § 273 against all defendants for distributing assets to render the Partnership insolvent despite its obligation to Cole.

On August 18, 2011, defendants moved to dismiss the complaint, asserting that Cole's claim for breach of contract was barred by the statute of limitations, as well as by his own breach of the agreement.

Cole argued that his breach of contract claim was timely because it did not arise out of Macklowe's failure to purchase

his interest in 1999, but out of the Partnership's failure to distribute the proceeds from the 2008 sale owed to him based on his continuing 9% interest. He further argued that his obligation to sell was conditioned upon Macklowe's setting and tendering the purchase price, which he did not do, and that defendants had failed to complain timely that Cole breached the Buy-Sell Provision.

By order entered November 17, 2011, the court granted defendants' motion to dismiss, finding that the Partnership ceased to exist in 1998, when the Property was conveyed to another company, and that Cole's interest was extinguished when he failed to sell his shares in connection with the termination of his employment.

On October 23, 2012, this Court reversed, finding that "plaintiff's failure to sell his interest did not divest him of his partnership interest," given the absence of express language to that effect in the LPA (99 AD3d 595, 596 [1st Dept 2012]), and the fact that that interpretation of the LPA would be "absurd, not commercially reasonable and contrary to the express terms of the agreement" (*id.*).

In December 2012, defendants served their answer, including affirmative defenses asserting that Cole's claims were barred by, among other things, the doctrines of waiver, estoppel, laches,

unclean hands and unjust enrichment. Defendants also served discovery requests concerning Cole's purported interest in the Partnership, his tax returns, and his interests in other Macklowe properties.

On February 15, 2013, Cole filed a motion for partial summary judgment on his first cause of action, for breach of contract, against the MAK defendants and Macklowe, citing this Court's finding that he "continues to hold his partnership interest."[2] Specifically, Cole argued that defendants breached sections 6.1 and 12.2 of the LPA by not distributing to him 9% of the net proceeds of the 2008 sale of the Property.

In opposition, the MAK defendants argued that issues of fact remained as to their affirmative defenses, and that discovery into Cole's post-termination communications about his Partnership interest might reveal facts relevant to those affirmative defenses. Specifically, they alleged, for the first time, that in April 1999, Macklowe offered Cole $2.5 million in cash and debt forgiveness in exchange for all of Cole's remaining interests in Macklowe-controlled entities, including his Partnership interest (1999 Offer), that Cole rejected the 1999

[2] After oral argument, Cole withdrew that part of the motion seeking partial summary judgment against Macklowe on the first cause of action, for breach of the LPA, since the claim was not asserted against the individual defendant.

Offer and did not make any counteroffer, and that Macklowe subsequently informed Cole that he was rescinding all of Cole's interests.[3] Defendants argued that this conduct, along with Cole's failure to make any claim or assert any rights with respect to that interest from 1999 until 2011, constituted a breach, or an estoppel or waiver by Cole. They further submitted that this Court's decision on the motion to dismiss did not foreclose them from establishing their affirmative defenses. Finally, defendants maintained that summary judgment should not be granted until there was discovery with respect to evidence of Cole's breach of the Buy-Sell Provision or his purported continuing interest in the Partnership after it was rescinded in 1999.

In reply, Cole argued that in 1999, defendants never set or tendered the purchase price in accordance with sections 11.2 and 11.3 of the LPA, and only offered him $2.5 million for his interests in 20 Macklowe-controlled entities. Cole further argued that defendants were on notice since 2001 that he

[3] Defendants further alleged that the Partnership issued Cole a Form K-1 for the 1998 tax year reflecting that Cole no longer held an interest in the Partnership, but Cole continued to identify his Partnership interest on his tax returns from 1999 through 2010.

continued to claim his Partnership interest.[4]

On August 23, 2013, defendants moved to compel discovery. Plaintiff opposed, arguing that defendants' affirmative defenses failed as a matter of law and that none of the demanded discovery could support them.

In a decision dated September 16 2013, the court granted Cole's motion for partial summary judgment against the MAK defendants on the first cause of action, citing this Court's ruling that Cole continues to hold his 9% Partnership interest, and directed the parties to "[s]ettle order."

With respect to the facts alleged, the court noted that after Cole resigned, "Macklowe offered to purchase Cole's interest in, *inter alia*, the Partnership. However, plaintiff refused the offer . . . [and] . . . Macklowe informed plaintiff that he was rescinding plaintiff's interest." The court then found that "defendants[] breached the LPA when they failed to distribute 9% of the Partnership's assets to plaintiff upon

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[4] According to Cole, the 1999 Offer involved the resolution of other claims asserted by Cole in 1999, which arose from Macklowe's alleged breach of other agreements granting Cole a 10% interest in 19 properties Macklowe was developing. After a damages trial in 2011, Cole was awarded a judgment for $9.3 million, plus other damages awarded on appeal (*see Cole v Macklowe*, 105 AD3d 604 [1st Dept 2013]), in addition to a $3 million judgment that was previously awarded to Cole on summary judgment (*Cole v Macklowe,* 64 AD3d 480 [1st Dept 2009]).

dissolution of the Partnership in 2008 and plaintiff was damaged by failing to collect the money he was legally entitled to."

The court further found that defendants "failed to demonstrate that a triable issue of fact exists as to their affirmative defenses of waiver and estoppel," concluding that "[w]hile defendants present[ed] several instances of inaction by plaintiff, . . . they fail[ed] to identify one single affirmative act by plaintiff evidencing . . . an intent" to not claim his 9% interest, and that the "LPA created no affirmative duty on plaintiff to assert his right to his interest." In addition, the court found that

> "defendants' contention that plaintiff's failure to request K-1s for the Partnership in the nine years between his termination and commencement of this lawsuit evidences waiver of his right is unavailing as any such request would have been futile, . . . as there was no chance Macklowe would have honored such a request."

Finally, the court rejected defendants' contention that summary judgment should be denied because no discovery had taken place, finding that the requested documents "would not change the essential facts of this case, namely that plaintiff had a 9% interest in the Partnership that was neither bought nor, as, the First Department found, rescinded."

On October 17, 2013, an order was entered granting plaintiff partial summary judgment as against the MAK defendants and

awarding him damages for breach of the LPA.

On October 21, 2013, Cole filed a motion for summary judgment against Macklowe, asserting that his receipt of the proceeds of the 2008 sale constituted a breach of section 5.2 of the LPA and a fraudulent conveyance in violation of Debtor and Creditor Law (DCL) § 273.

In opposition, Macklowe asserted that, as a limited partner, he could not be liable for the Partnership's failure to make a distribution to Cole, that Cole's breach claim against him was a derivative claim that he could not bring directly, and that Cole should be estopped from asserting it.

By order entered on or about December 18, 2013, the court granted Cole's motion for summary judgment against Macklowe on his fraudulent conveyance claim in violation the DCL and on his claim that Macklowe breached the LPA, and awarded Cole damages.

A January 27, 2014 judgment was entered against Macklowe, awarding damages on his breach of contract and fraudulent conveyance causes of action.

Previously, in reversing the order granting defendants' motion to dismiss the complaint, we found that Cole could only be divested of his 9% Partnership interest in MAK West 55th via a sales transaction outlined in section 11 of the LPA, that no such

transaction occurred, and that Cole thus continued to hold his Partnership interest in 2008 when defendants sold the property constituting the Partnership's sole asset (*see* 99 AD3d 595 [1st Dept 2012]). Cole then moved for summary judgment on his claims for a 9% distribution of the Partnership proceeds for the 2008 sale, and the motion court granted the motion and awarded him damages in that amount.

The grant of summary judgment should be affirmed. Defendants' argument that the motion court found that Macklowe had performed his obligations under the LPA by making the 1999 Offer, but that Cole breached his obligations by failing to accept it or make a counter-offer, is unavailing. While the LPA does not clearly spell out all the mechanics of executing the Buy-Sell Provision, it is implicit in the structure of section 11 that the initial step was Macklowe's valuation of the Partnership interest. Macklowe was then to deliver to Cole a check in that amount at the closing, and Cole was required to sell his interest. The record makes clear that Macklowe did not comply with this particular obligation, and Macklowe has never alleged that he did. The record merely shows that in 1999 Macklowe offered Cole $2.5 million in exchange for all of his interests in various Macklowe entities without addressing the particular

partnership at issue here or making an offer based on its market value.

Indeed, even if nothing in the plain language of the LPA precluded Macklowe from making the required offer as part of a comprehensive offer to purchase all of Cole's interests, as discussed above, the 1999 Offer did not constitute a proper offer under the LPA because it did not include a clear offer to purchase Cole's Partnership interest based on a statement by Macklowe as to its market value. As this general offer did not satisfy Macklowe's Buy-Sell Provision obligations, Cole's duty to sell was never triggered, and thus his failure to take any steps to make such a sale was not a breach of the LPA.

Moreover, no further discovery is needed to evaluate whether the 1999 Offer could satisfy the LPA. Any evidence that the offer was more detailed and included a specific offer targeted to the Partnership interest based on Macklowe's assessment of its market value would be in defendants' possession, and defendants' failure to make any further allegations as to the substance of the offer clearly indicates that no such evidence exists.

Defendants contend that Cole's failure to take any steps to make a sale, combined with his 12 years of inaction after Macklowe informed him that he was rescinding the 9% interest,

gives rise to issues of fact with respect to waiver or estoppel that preclude a grant of summary judgment without further discovery. Defendants point to, among other things, the evidence that Cole failed to object or otherwise respond to the 1999 Form K-1 stating that he no longer retained his Partnership interest, his failure to assert any rights with respect to the Partnership between 1999 and 2011, including his failure to request a Form K-1 indicating his continuing interest, and his failure to claim such an interest in the other litigations against Macklowe.

Cole's inactions does not raise any issues of fact with respect to defendants' affirmative defenses because the LPA imposed no affirmative duty on Cole, even after his employment terminated, to take action to maintain his Partnership interest, which remained intact unless and until it was purchased by Macklowe pursuant to the Buy-Sell Provision of the LPA. Macklowe had no proper grounds for rescission of Cole's interest; Cole had no duty to assert his rights in the face of Macklowe's ineffective rescission. Absent a duty to speak or act, Cole's silence or inaction could not result in a waiver of his Partnership interest (*Bank of N.Y. v Murphy*, 230 AD2d 607, 608 [1st Dept 1996], *lv dismissed* 89 NY2d 1030 [1997]).

In any event, the record shows that Cole was not silent with respect to his Partnership interest after termination. His 2001 testimony indicates that he believed he continued to have the 9% interest in the Partnership, and his tax returns, some of which were produced to Macklowe in other litigation, consistently reported his ownership interest in the Partnership. Defendants cannot credibly claim that they were unaware that Cole considered his Partnership interest at least to be in dispute. The court, therefore, properly granted plaintiff summary judgment without permitting discovery on defendants' meritless affirmative defenses (*see 2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162 [1st Dept 2008], *lv denied* 11 NY3d 716 [2009]). Finally, as plaintiff continued to possess his 9% Partnership interest at the time of the 2008 sale, the court correctly awarded him damages based on a 9% distribution of the partnership proceeds for the 2008 sale.

Accordingly, the order of the Supreme Court, New York County (Cynthia S. Kern, J.), entered October 17, 2013, which granted plaintiff's motion for partial summary judgment on his breach of contract claim against the corporate defendants, and the order and judgment (one paper) of the same court and Justice, entered

January 27, 2014, granting plaintiff's motion for summary judgment against defendant Harry Macklowe on the causes of action for breach of contract and violation of Debtor and Creditor Law § 273, and awarding plaintiff damages against said defendant, should be affirmed, with costs.

All concur.

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

ENTERED: DECEMBER 23, 2014

CLERK