

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 18, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Richter, Feinman, Kapnick, JJ.

13095- Ind. 2261/09

13096 The People of the State of New York,
Respondent,

-against-

Jamel Brown,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

John Raye,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York
(Eunice C. Lee of counsel), and O'Melveny and Myers LLC, New York
(Carolyn S. Wall of counsel), for Jamel Brown, appellant.

Robert S. Dean, Center for Appellate Litigation, New York (David
J. Klem of counsel), for John Raye, appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David P.
Stromes of counsel), for respondent.

Judgment, Supreme Court, New York County (Richard D.
Carruthers, J. at speedy trial motions; Bonnie G. Wittner, J. at
jury trial and sentencing), rendered July 7, 2011, as amended

November 28, 2011, convicting defendant Brown of robbery in the first and second degrees, attempted gang assault in the first degree, assault in the second degree and attempted robbery in the first degree, and sentencing him to an aggregate term of 7 years, unanimously affirmed. Judgment, same court and Justice, rendered June 30, 2011, convicting defendant Raye of the same crimes and sentencing him, as a persistent violent felony offender, to an aggregate term of 20 years to life, unanimously affirmed.

The verdict, as to all charges against both defendants, was based on legally sufficient evidence and 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, including its evaluation of the victim's background and its resolution of any inconsistencies in his account of this violent incident in which he was beaten, and stomped on the head, causing him to lose consciousness and suffer skull fractures. The sequence of events, including Brown's aggressive request for money, and the overall course of conduct of Brown, Raye, and a third participant support the inference that all three participants acted in concert with regard to each

of the crimes charged (*see People v Allah*, 71 NY2d 830 [1988]; *see also People v Smokes*, 165 AD2d 696 [1st Dept 1990], *lv denied* 76 NY2d 991 [1990]). The evidence refutes Brown's assertion that his assault on the victim was without larcenous intent and was separate from the nearly simultaneous actions of the other participants. The evidence also supports the inference that defendants intended to cause serious physical injury and came dangerously close to doing so.

Defendants failed to preserve their speedy trial claims. In response to defendants' motions, the prosecution submitted an affirmation that set forth the dates of the appearances and the reasons for the adjournments. They also indicated why they believed certain adjournments were not chargeable to the People under CPL 30.30. Defendants did not put in a reply to contest the reasoning of the People's opposition papers, and thus "failed to identify the specific legal and factual impediments" to the

exclusions asserted by the People (*People v Beasley*, 16 NY3d 289, 292 [2011]), and that obligation requires strict adherence (*id.* at 293).

We perceive no basis for reducing Brown's sentence.

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

ENTERED: NOVEMBER 18, 2014

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CLERK

stopped in traffic on the eastbound side of the street. Rivera stated that defendant, the driver of the car, was smoking a cigarette by holding it between his index finger and thumb, which led him to believe that defendant was smoking marijuana. Rivera made a U-turn and followed the car until it approached the foot of the Triboro Bridge, where he pulled it over. Rivera approached the front driver's side of the car. Rivera told defendant that he saw him smoking marijuana and asked for his driver's license, registration and insurance card. Defendant denied that he was smoking marijuana, but Rivera testified that he detected the odor of marijuana in the front of the car, although he could not state whether it was the smell of burning or unburnt marijuana. He did acknowledge that defendant did not appear to be under the influence of any intoxicants.

Meanwhile, Rivera testified that his partner, Officer Ali, who had approached the passenger's side of the car, gave him a "thumbs up" signal, which indicated that Ali had seen something justifying the removal of the car's occupants. This turned out to be an empty green glassine envelope on the front passenger-side floor. Rivera testified that when he inspected the glassine envelope later that day at the precinct, he came to believe that it had contained marijuana, based on its packaging and the fact

that it contained what appeared to him to be remnants of the drug. Rivera requested a laboratory analysis of the glassine, but never received a response. Although the officers conducted a full search of the car, they did not find any marijuana, and placed the three occupants, who had been removed from the car upon Officer Ali's thumbs-up signal, back inside.

Another team of police officers eventually arrived at the scene. Rivera and one of the officers from that team searched the trunk of the car and found two jackets. Upon inspecting the pocket of one of the jackets they found five bags of Ecstasy containing, in total, 485 pills. The three individuals were then arrested.

At the conclusion of the hearing, the court credited Rivera's testimony and denied the motion to suppress. The court found that the officer had a reasonable suspicion to stop the car after seeing the defendant smoking what he believed to be marijuana and that once he smelled marijuana in the car and Officer Ali recovered the green glassine, the officers had probable cause to search the entire vehicle, including the trunk where the Ecstasy was found.

In connection with his guilty plea, defendant purported to waive his right to appeal. However, the full extent of the

court's allocution on the waiver of the right to appeal consisted of the following exchange:

"The Court: You are also going to be required to waive your right to appeal. Do you agree to that?"

"Defendant: Yes, your Honor."

Defendant also signed a written waiver, but it was not noted on the record.

A waiver of the right to appeal is not effective unless it is apparent from the record that it was made knowingly, intelligently and voluntarily (*People v Lopez*, 6 NY3d 248, 256 [2006]). For a waiver to be effective, the record must demonstrate that the defendant has a full appreciation of the consequences of the waiver (*People v Bradshaw*, 18 NY3d 257 [2011]), including an understanding "that the right to appeal is separate and distinct from those rights automatically forfeited upon a plea of guilty (*People v Lopez*, 6 NY3d at 256).

Here, the court never adequately explained the nature of the waiver, the rights the defendant would be waiving or that the right to appeal was separate and distinct from the rights automatically forfeited upon a plea of guilty. Accordingly, the waiver was invalid and unenforceable (*People v Lopez*, 6 NY3d at 256; *People v Santiago*, 119 AD3d 484 [1st Dept 2014]). The

written waiver signed by defendant was no substitute for an on-the-record explanation of the nature of the right to appeal (see *People v Oquendo*, 105 AD3d 447 [1st Dept 2013], *lv denied* 21 NY3d 1007 [2013]). In addition, the court's statement that defendant was "going to be required" to waive his right to appeal could have misled him into believing that he had no choice but to do so (see *People v Lopez*, 6 NY3d at 257).

Turning to the merits, defendant argues that this case is controlled by *People v Grunwald* (29 AD3d 33 [1st Dept 2006]). There, this Court held that a police officer was entitled to approach the defendant and request information (a level I encounter pursuant to *People v De Bour* [40 NY2d 210 (1976)] based on his observation of the defendant smoking an unfiltered, hand-rolled cigarette, which he believed to contain marijuana, "down close to his fingers" (29 AD3d at 34). Defendant, however, mischaracterizes *Grunwald* as holding that a person's smoking what a police officer believes is marijuana can *only* justify a level I encounter. *Grunwald* says no such thing. Significantly in that case, the defendant was on foot, so a level I encounter was sufficient for the police to clarify whether the defendant was engaged in criminal activity. Indeed, it is evident from the *Grunwald* decision that the People in that case did not argue that

the defendant's activity satisfied any of the other *De Bour* levels.

Here, in sharp contrast to *Grunwald*, the police did not have the option of engaging in a level I encounter. That is because informational stops of moving automobiles are *never* permissible unless reasonable suspicion of criminal activity exists or the stop is made as part of a routine and nonpretextual traffic check (see *People v Spencer* (84 NY2d 749, 753 [1995], cert denied 516 US 905 [1995])). Further, nothing in *Grunwald* suggests that a police officer's observation of a person smoking what appears to be marijuana can never justify a traffic stop. To hold otherwise would put the public at risk, as it would prevent police officers from pulling over drivers who they reasonably believed to be driving under the influence of marijuana. Moreover, nothing in *Spencer* suggests that exigent circumstances such as a possibly impaired driver cannot serve as an exception to the rule that reasonable suspicion must exist before an officer can pull over a moving vehicle.

In any event, Officer Rivera, an experienced policeman who had participated in approximately 30 arrests involving marijuana, testified to the court's satisfaction that, in his opinion and experience, the manner in which defendant was handling the

cigarette indicated that it was a marijuana cigarette. “[M]uch weight must be accorded the determination of the suppression court with its peculiar advantages of having seen and heard the witnesses” (*People v Prochilo*, 41 NY2d 759, 761 [1977]). That Rivera was not “certain” that defendant was smoking marijuana is of no moment, since “[t]he standard for [a forcible stop is] merely reasonable suspicion, not absolute certainty or even probable cause” (*People v Herrera*, 76 AD3d 891, 895 [1st Dept 2010], *affd* 16 NY3d 881 [2011]). Under these circumstances, we find that the facts as perceived and articulated by Rivera gave rise to reasonable suspicion of criminal activity justifying a level III stop under *De Bour* (40 NY2d at 223).

We now turn to the question of whether the police were justified in searching the trunk of defendant’s car. The People contend that the search was justified under the “automobile exception” to the requirement that a warrant be obtained before a search is conducted. Pursuant to that doctrine, police may search inside a vehicle where there is probable cause to believe that contraband or evidence of a crime will be found (see *People v Galak*, 81 NY2d 463, 467 [1993]). Defendant effectively concedes that the police were entitled to search in the area of the car where Officer Rivera claims to have smelled marijuana,

but not anywhere else, and certainly not in the trunk. This, he argues, is because any grounds the police may have had to believe that the trunk contained drugs were belied by the lack of evidence that they existed anywhere else in the car.

Indeed, there was scant evidence of drugs in the car. After approaching the car, Rivera never saw the marijuana cigarette that he claimed he saw when he drove past defendant's car, and he was equivocal about whether he smelled burning or unburnt marijuana. Further, the glassine envelope that Officer Ali uncovered was empty, and it was not until later that day, after defendant and his companions were arrested, that Rivera concluded that it contained marijuana. Rivera also conceded that defendant did not appear to be under the influence. This contrasts with the two cases from this Court on which the People primarily rely, *People v Mena* (87 AD3d 946 [1st Dept 2011], *lv denied* 18NY3d 860 [2011]) and *People v Valette* (88 AD3d 461 [1st Dept 2011], *lv denied* 18 NY3d 887 [2012]). In those cases, which arose out of a single traffic stop, the defendants admitted to the police officers that they had been smoking marijuana in the car. This furnished probable cause for a search of the car, including the

trunk. Here, no such confirming facts exist. Accordingly, we find that the police lacked probable cause to search the trunk, and that the Ecstasy found there should have been suppressed.

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

ENTERED: NOVEMBER 18, 2014

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CLERK

October 19, 2005. The issue on this appeal is whether the motion court properly applied the homeowner's exemptions set forth under Labor Law §§ 240 and 241. The homeowner's exemptions preclude the imposition of the otherwise absolute statutory liability upon "owners of one and two-family dwellings who contract for but do not direct or control the work" (Labor Law §§ 240 and 241). The exemptions, however, do not "encompass homeowners who use their one and two-family premises entirely and solely for commercial purposes . . ." (*Van Amerogen v Donnini*, 78 NY2d 880, 882 [1991]). As set forth in plaintiff's brief, the issue on this appeal is whether the work he was performing at the time of the accident was for the owners' commercial use of the house.

The owners acquired title to the premises through inheritance in July 2004. They began the renovation in July 2005. Parry's deposition is unrefuted insofar as she testified that the owners renovated the house for the purpose of modernizing it and using it as their second home. As the renovation was ongoing, the house was unoccupied at the time of plaintiff's injury. The renovation reached the punch list stage in the fall of 2006. Parry testified that the owners, who never occupied the house, decided to lease it out in the spring of 2007 and did so that August.

The owners made a prima facie showing of their entitlement to the homeowner's exemption by demonstrating that their premises consist of a one-family dwelling and that they did not direct or control plaintiff's work (see *Affri v Basch*, 45 AD3d 615, 616 [2nd Dept 2007], *affd* 13 NY3d 592 [2009]). Therefore, the burden shifted to plaintiff to "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff has failed to meet this burden as his arguments before this Court and the motion court are based on unfounded speculation that the owners intended to use the house solely for commercial purposes.

The availability of the homeowner's exemption hinges upon "the site and the purpose of the work, a test which must be employed on the basis of the homeowners' intentions at the time of the injury" (*Landon v Austin*, 88 AD3d 1127, 1128 [3rd Dept 2011] [internal quotation marks omitted]). Accordingly, plaintiff and the dissent misplace their reliance on the lease, which the owners entered into almost two years after plaintiff's injury. The dissent further misplaces its reliance on Parry's testimony regarding the owners' renovation of their Manhattan apartment. This testimony is of little consequence in light of

Parry's uncontradicted testimony that the owners intended to use the premises as a second home.

Another example of plaintiff's unfounded speculation is his argument that the owners "would not have been able to rent the dilapidated house without undertaking the construction project." On the contrary, Parry testified that prior to the renovation, the house needed only minor work consisting of painting, cleaning and "a little bit of fixing up" in order for it to be rented, sold or occupied. Without contradiction, Parry also testified that the renovation entailed, among other things, the extension of the house, rewiring, plus the addition of a kitchen, a bedroom, two bathrooms, a mud room and a powder room. According to Parry the cost of the project was approximately \$750,000. The renovation, as described, was far more extensive than the relatively minor repairs that would have been needed to prepare the Bronxville house for rental as opposed to personal use.

A reversal is not warranted by the dissent's view that the owners' intention to make personal use of the premises "is not readily determinable on a motion for summary judgment." In *Thompson v Geniesse* (62 AD3d 541 [1st Dept 2009]), this Court affirmed an order granting the defendants-homeowners' motion for summary judgment. In that case, we applied the homeowner's

exemption on the basis of the homeowners' "intended occupancy" of the subject premises as a one-family dwelling (*id.* at 541-542). *Credit Suisse First Boston v Utrecht-America Fin. Co.* (80 AD3d 485 [1st Dept 2011]) and *Coan v Estate of Chapin* (156 AD2d 318 [1st Dept 1989]), which the dissent cites, stand for the distinct proposition that a party's good faith is not readily determinable on a motion for summary judgment (see e.g. *Coan* at 319). Moreover, the granting of the owners' motion in this case does not implicate the determination of issues. A court's function on a motion for summary judgment involves issue finding rather than issue determination (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). As noted above, the owners have made a prima facie showing of their entitlement to the homeowner's exemption (see *Affri*, 45 AD3d at 616). Again, plaintiff did not meet his burden of establishing the existence of material issues of fact (see *Alvarez*, 68 NY2d at 324).

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

All concur except Acosta and Gische, JJ. who dissent in a memorandum by Gische, J. as follows:

GISCHE, J. (dissenting)

I respectfully dissent and would reverse the motion court's grant of summary judgment to defendants Simon and Parry on the issue of application of the homeowners' exemption under Labor Law §§ 240(1) and 241(6).¹

Defendants own a single family home that was undergoing renovation at the time plaintiff, a workman, was injured. It is undisputed that after Simon acquired ownership of the house through inheritance, neither he nor Parry, nor any other member of their family, lived there. No one lived in the residence during the course of renovation. After the renovation was completed, the residence was rented out to a third party and used solely for commercial purposes.

Labor Law §§ 240(1) and 241(6) provide reasonable and adequate protection for workers employed at construction sites by imposing a non-delegable duty on owners, contractors, and their agents to take necessary safety precautions. Both §§ 240(1) and 241(6) exempt from liability "owners of one- and two-family dwellings who contract for but do not direct or control the work" (*Khela v Neiger*, 85 NY2d 533 [1995]). The exemption is

¹I agree with the majority's conclusion concerning the inapplicability of Labor Law § 200 and common law negligence.

inapplicable, however, to homeowners who use a one or two family house solely for commercial purposes (*Lombardi v Stout*, 80 NY2d 290 [1992]). The exemption is also inapposite where the purpose in making renovations is to prepare the property for commercial rental (*Lombardi*, 80 NY2d at 297). The burden rests on the party claiming the benefit of the exemption to show that it applies (*id.*).

In establishing their *prima facie* case, defendants asserted that at the time of accident in 2005, they had no intention of using the property commercially. While it is defendants' intended use at the time of the accident that controls the outcome of this inquiry (*Davis v Maloney*, 49 AD3d 385, 386 [1st Dept 2008]), there are sufficient facts in the record from which a trier of fact could conclude that defendants' stated intention is not credible.

To ascertain whether defendants are entitled to the homeowners' exemption necessarily requires looking into operation of defendants' thought and decision-making processes. They freely admit that at some point during the renovation they formulated an intent to use the property commercially, but claim that such intent crystalized only after plaintiff's accident. This issue, which necessarily implicates defendants' state of

mind, is not readily determinable on a motion for summary judgment (*Credit Swiss First Boston v Utrecht-American Finance Co.*, 80 AD3d 485, 487 [1st Dept 2011]). Common sense suggests that credibility determinations on issues of subjective intent are more appropriately resolved at trial (*Coan v Estate of Chapin*, 156 AD2d 318, 319 [1st Dept 1989]).

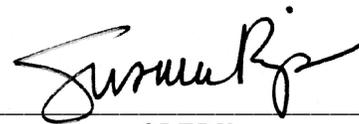
The record contains evidence calling into question defendants' intent on the date of the accident, thereby warranting the denial of summary judgment. Since inheriting the property in 2001, defendants have never resided there and it has been used exclusively for commercial purposes. After acquiring ownership, defendants undertook an extensive renovation project on their Manhattan apartment, which remained their only residence. Their deposition testimony concerning their future plans for the property was tentative, speculating that they might live there once their grade school age children were entering high school. Defendants admittedly consulted realtors, considered setting up a "dba" or corporation to hold the property, and purchased a book about renting property, all while the renovation was ongoing, although they could not say when these events actually occurred.

The defendants had numerous discussions with one another

about the prospect of renting out the property, but were unable to pinpoint when these conversations began taking place. Defendants were unable to consistently state when they actually formulated the intent to rent out the property. Initially, they claimed they were unsure, but later testified that the decision was made in the spring of 2007. Although defendants cited the unanticipated construction costs as the primary motivation for the decision to rent, written notes and spreadsheets demonstrated that their estimated costs of the renovation were near to the actual costs. All of these facts create a disputed issue regarding defendants' subjective intent, which should be decided at trial.

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

ENTERED: NOVEMBER 18, 2014

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Tom, J.P., Friedman, Feinman, Gische, Kapnick, JJ.

13140 Greenwich Insurance Company, Index 154552/12
Plaintiff-Respondent,

-against-

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

Triumph Construction Corporation, et al.,
Defendants.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for appellants.

Kaufman Dolowich & Voluck LLP, Woodbury (Eric B. Stern of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 2, 2013, which, in this action seeking, inter alia, a declaration that plaintiff is not obligated to defend defendants City of New York and New York City Economic Development Corporation (the City defendants) in underlying personal injury and property damage actions, denied the City defendants' motion to dismiss the complaint, unanimously modified, on the law, to declare that plaintiff is obligated to defend the City defendants in the underlying personal injury actions, and as so modified, affirmed, without costs.

Plaintiff's declaratory judgment action arose out of a

series of vehicular accidents alleged to have been the result of negligence in connection with construction work on an exit ramp from the Queensboro Bridge. Defendant Triumph was the contractor for The New York City Economic Development Corporation on a project entitled "Queens Plaza Streetscape Improvement Project." Triumph obtained a commercial general liability policy from plaintiff that extends coverage to the City defendants, as additional insureds, for injury arising out of the acts or omissions of Triumph or those acting on its behalf.

Plaintiff seeks to be relieved of its duty to provide a defense in the underlying actions, arguing that the alleged injuries were caused by the City defendants' negligent placement of a guard rail or "Jersey barrier" and their failure to post proper warnings, matters over which Triumph is asserted to have had no control. The City brought this motion to dismiss the declaratory action on the ground that the underlying complaints contain allegations that are potentially within the protection afforded to the additional insureds under the policy. The underlying complaints all allege defects in conditions on or about the roadway for which Triumph would have been responsible as contractor.

An insurer may obtain a declaration absolving it of its duty

to defend only when a comparison of the policy and the underlying complaint on its face shows that, as a matter of law, "there is no possible factual or legal basis on which the insurer might eventually be held to be obligated to indemnify the insured under any provision of the insurance policy" (*Servidone Constr. Corp. v Security Ins. Co. of Hartford*, 64 NY2d 419, 424 [1985] [internal quotation marks and brackets omitted]). As this Court has observed, "[T]he primary obligation of an insurer is to provide its insured with a defense" (*Recant v Harwood*, 222 AD2d 372, 373 [1st Dept 1995]), an obligation that is incurred "if facts alleged in the complaint fall within the scope of coverage intended by the parties at the time the contract was made" (*id.*, quoting *New Hampshire Ins. Co. v Jefferson Ins. Co. Of N.Y.*, 213 AD2d 325, 326-327 [1st Dept 1995]). "By contrast, the duty to indemnify requires a determination of liability" (*id.* [internal quotation marks omitted]).

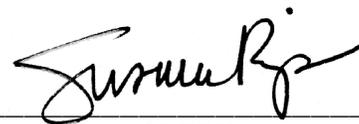
Because the underlying complaints pleaded claims that were potentially within the scope of coverage, plaintiff is obligated to defend the underlying actions. Whether plaintiff might ultimately be able to establish that its insured did not cause the injuries alleged in the underlying actions involves questions of fact yet to be resolved; it is not an issue that can be

determined as a matter of law by examination of the insurance contract. Thus, it does not afford a basis to relieve plaintiff of its duty to provide a defense (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 66 [1991]; *cf. United States Fire Ins. Co. v New York Mar. & Gen. Ins. Co.*, 268 AD2d 19 [1st Dept 2000] [policy's automobile exclusion relieved insurer of duty to defend action for damages arising out of a vehicular collision]).

We note that it is error to dismiss a declaratory judgment action merely because the plaintiff is not entitled to the declaration sought (*Lanza v Wagner*, 11 NY2d 317, 334 [1962], *appeal dismissed* 371 US 74 [1962], *cert denied* 371 US 901 [1962]). A decision on the merits warrants the issuance of a declaration (*Hirsch v Lindor Realty Corp.*, 63 NY2d 878, 881 [1984]).

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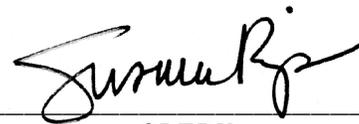
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experience in weapons detection and identification, had reasonable suspicion that defendant had an illegal type of knife. The officer saw a metallic clip attached to a knife on defendant's pocket, which he believed to be a gravity knife or switchblade, based on specific and articulable facts about the way the top of the knife looked and the way defendant was wearing it (*compare People v Brannon*, 16 NY3d 596 [2011], with *People v Vargas*, 89 AD3d 582 [1st Dept 2011]). After removing and testing the knife, and determining that it was, in fact, a gravity knife, the officer had probable cause to arrest defendant.

In light of the foregoing, we do not reach the People's other proposed ground for upholding the seizure.

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Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13488 In re Benjamin Sze-Bin W.,
Petitioner-Respondent,

-against-

Kerry S.W.,
Respondent-Appellant.

Preston Stutman & Partners, P.C., New York (Robert M. Preston of
counsel), for appellant.

Bressler Amery & Ross, P.C., New York (Kenneth M. Moltner of
counsel), for respondent.

Daniel X. Robinson, New York, attorney for the child.

Order, Family Court, New York County (Adetokunbo Fasanya,
J.), entered on or about April 23, 2014, which denied
respondent's motion to dismiss the petition for modification of
custody, unanimously reversed, on the law, without costs, the
motion granted, and the petition dismissed.

Petitioner, the noncustodial parent, failed to make the
required evidentiary showing of a change in circumstances to
warrant a hearing on the petition (*see Matter of Patricia C. v
Bruce L.*, 46 AD3d 399 [1st Dept 2007]). His submission of an
online listing showing that respondent advertised an apartment
for rent in her building is not evidence that respondent's
residence was being used as a hotel and that, as a result, the

child was dispossessed of and denied access to his living space in the apartment. Nor do petitioner's allegations that respondent hired a babysitter who scratched the child, and was fired almost two years before the petition was filed, constitute evidence of a substantial change of circumstances.

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People with more time than defendant requested in his moving papers. We decline to review these unpreserved claims in the interest of justice. Defendant's main preserved claim is his assertion that the People's declaration of readiness was illusory. However, there is no evidence that the People's statement, which was made in open court and not by way of an off-calendar certificate, failed to accurately reflect their position. The People's unreadiness at subsequent calendar calls was satisfactorily explained, and nothing in *People v Sibblies* (22 NY3d 1174 [2014]) supports a contrary conclusion. In view of our conclusion that all periods of delay following the declaration at issue should be treated as postreadiness delay, we find defendant's speedy trial arguments to be unavailing.

The People established by clear and convincing evidence that there was an independent source for an in-court identification by an undercover officer, notwithstanding identifications that the court suppressed. The trained undercover officer carefully observed defendant for the purpose of making an identification, and had an ample opportunity to observe defendant during the commission of the crime (*see e.g. People v Williams*, 222 AD2d 149 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]).

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

People v Danielson, 9 NY3d 342, 348-349 [2007])). As noted, the identification testimony of the undercover officer was reliable. Moreover, it was corroborated by persuasive circumstantial evidence linking defendant to the drug sale. Defendant's challenge to the weight of the evidence rests largely on matters that were not introduced at trial (see *People v Dukes*, 284 AD2d 236 [1st Dept 2001], *lv denied* 97 NY2d 681 [2001]), and on a challenge to the court's identification charge that is both unreserved and meritless.

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ENTERED: NOVEMBER 18, 2014

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CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, JJ.

13490-

Index 652400/12

13491 400 East 77th Owners, Inc.,
Plaintiff-Respondent,

-against-

New York Engineering Association, P.C.,
Defendant-Appellant,

Aggressive Heating, Inc., et al.,
Defendants.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (James F. O'Brien of counsel), for appellant.

Derfner & Gillett, LLP, New York (Donald A. Derfner of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered on or about August 21, 2013, which, inter alia, denied defendant New York Engineering Association P.C.'s (defendant) motion for summary judgment, unanimously affirmed, with costs. Appeal from order, (same court and Justice), entered on or about December 5, 2013, which denied defendant's motion to renew and reargue, unanimously dismissed, without costs.

Defendant, an engineering firm, failed to meet its burden of establishing entitlement to judgment as a matter of law on statute of limitations grounds. A copy of the contract between the parties is not included in the record, making it impossible

to determine whether defendant's duties were discharged, and documentary evidence, including defendant's own bid proposal, strongly indicates that defendant was hired by plaintiff not only to provide engineering design services, but also to obtain the requisite permits and approvals (see *Sendar Dev. Co. LLC v CMA Design Studio P.C.*, 68 AD3d 500, 503 [1st Dept 2009]). If so, the statute of limitations did not begin to run until December 10, 2010, when defendant filed its final report signing off on the project, and this action, which was commenced in July 2012, was filed well within the three year limitations period (see *State of New York v Lundin*, 60 NY2d 987, 989 [1983]).

Defendant also failed to show that its work was performed in accordance with good and accepted engineering standards. It relied solely on the "conclusory, self-serving statements" contained in the affidavit of its principal, with no expert or other evidence -- such as reference to specific industry standards -- "which would tend to establish, prima facie, that [the work] did not depart from the requisite standard of care" (*Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 259 AD2d 282, 284 [1st Dept 1999]; see *R.A.B. Contrs. v Stillman*, 299 AD2d 165 [1st Dept 2002]).

There being no arguments presented in the briefs regarding

the appeal from the December 3, 2013 order, the appeal is dismissed as deemed abandoned (see *Matter of Corto v Lefrak*, 155 AD2d 246, 247 [1st Dept 1999]).

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

ENTERED: NOVEMBER 18, 2014

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CLERK

and thus did not justify a frisk. Defendant did not preserve that argument, and the court did not "expressly decide[]" the issue "in response to a protest by a party" (CPL 470.05[2]; see *People v Turriago*, 90 NY2d 77, 83-84 [1997]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we find that defendant's overall conduct, including his apparent attempt to commit a burglary, gave the officers a reasonable basis to fear for their safety.

Accordingly, the officers' seizure of the weapon from the location indicated by defendant was a reasonable protective measure, regardless of whether they believed the knife to be legal or illegal (see *People v Miranda*, 19 NY3d 912 [2012]; *People v Terrance*, 101 AD3d 624 [1st Dept 2012], lv denied 20 NY3d 1065 [2013]). Accordingly, the ensuing police actions that led to the recovery of various weapons from defendant's person and from his storage locker were lawful.

The court properly exercised its discretion in denying defendant's mistrial motion, made on the ground that after the case was submitted to the jury, two jurors allegedly engaged in deliberations outside the presence of the other jurors. The court made a thorough inquiry, and the record supports its finding that the conversation between the two jurors did not fall

within the category of deliberations (see CPL 310.10; *People v Horney*, 112 AD2d 841, 843 [1st Dept 1985], *lv denied* 66 NY2d 615 [1985]).

We have considered and rejected defendant's ineffective assistance claim (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 18, 2014



CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13496- Index 107928/09
13497- 112274/09
13498 Alexis Castano,
Plaintiff-Respondent,

-against-

Daniel J. Wygand, et al.,
Defendants-Appellants,

Ana C. Villagran, et al.,
Defendants-Respondents.

- - - - -

Edward A. Nieto,
Plaintiff-Respondent,

-against-

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

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for appellants.

Alexander J. Wulwick, New York, for Alexis Castano, respondent.

John C. Buratti & Associates, New York (Laura L. Meny of counsel), for Ana C. Villagran and Edward A. Nieto, respondents.

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered February 21, 2013, which denied the City defendants' motion for summary judgment dismissing the complaints, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Appeal from order, same court and Justice, entered December 27, 2013, which to the extent appealed from as limited by the briefs, denied the City defendants' motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable order.

The City defendants in these consolidated cases presented sufficient evidence to demonstrate that there were no issues of fact concerning whether Wygand, the driver of the sanitation truck, was negligent, based on his deposition testimony, the non-hearsay portions of the police accident report, the DMV report, the Nassau County Police Case Report, and the affidavit of an accident reconstruction expert, who visited the scene, examined the sanitation truck and took detailed measurements. There was no requirement that Wygand's deposition transcript be signed by him in order to be admissible in support of the City defendants' motion because Wygand accepted its accuracy by submitting it in support of his motion for summary judgment dismissing the complaint (*see Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 [1st Dept 2013]). There was also nothing improper about submitting only excerpts of deposition transcripts in support of the motion, as long as they were not misleading.

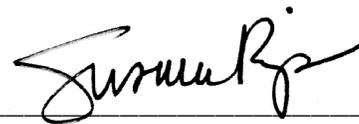
Plaintiffs failed to raise a triable issue of fact in that neither of them had any memory of the accident, and a witness to

the accident testified that the car driven by Nieto turned in front of the sanitation truck in order to access the entrance to the Meadowbrook Parkway. The unsigned deposition transcript of the witness was admissible evidence because the City defendants presented proof, upon reply, that the transcript had been submitted to the witness for signature and return and she failed to do so within 60 days (see CPLR 3116[a]).

The City defendants' appeal from the denial of their motion to reargue is dismissed since no appeal lies from a denial of reargument (see *Lopez v Post Mgt. LLC*, 68 AD3d 671 [1st Dept 2009]).

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

ENTERED: NOVEMBER 18, 2014

A handwritten signature in black ink, appearing to read "Susan R. [unclear]", written over a horizontal line.

CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13499- Index 654215/12
13499A Alfred Thomas Giuliano, etc., et al.,
Plaintiffs-Appellants,

-against-

Stephen Gawrylewski, et al.,
Defendants-Respondents.

The Catafago Law Firm, P.C., New York (Jacques Catafago of
counsel), for appellants.

Mound Cotton Wollan & Greengrass, New York (Kenneth M. Labbate of
counsel), for Stephen Gawrylewski and Loughlin Management
Partners + Co., respondents.

Dewey Pegno & Kramarsky, LLP, New York (Ariel P. Cannon of
counsel), and Kaye Scholer, LLP, New York (Jeffrey A. Fuisz of
counsel), for Denise F. Ungar Stern, Leslie F. Stern, Rita L.
Ungar Moser and Nathan F. Moser, respondents.

Orders, Supreme Court, New York County (O. Peter Sherwood,
J.), entered July 1, 2013 and August 2, 2013, which granted
defendants' motions to dismiss the complaint, unanimously
affirmed, with costs.

The court, after citing and applying the correct standard of
review (see *EBC I, Inc. v Goldman, Sachs & Co*, 5 NY3d 11, 19
[2005]), properly dismissed the breach of fiduciary duty claims
against defendants Denise F. Ungar Stern and Rita L. Ungar Moser
(collectively the defendant wives), directors of NEC Holdings

Corp. (NEC), due to plaintiffs' failure to rebut the presumptions of loyalty, prudence and good faith under the business judgment rule (see *Aronson v Lewis*, 473 A2d 805, 812 [Del Sup Ct 1984], overruled on other grounds by *Brehm v Eisner*, 746 A2d 244 [Del Sup Ct 2000]). In particular, plaintiffs failed to allege facts that support a finding of interest or lack of independence by a majority of the board members of NEC (*Orman v Cullman*, 794 A2d 5, 24-25 [Del Ch Ct 2002]). While there was no formal vote regarding the high-yield bond alternative to NEC's seeking of capital through an equity sale, plaintiffs challenge the board's "decision" refusing to pursue the high-yield alternative. The complaint alleges, without elaborating, that the defendant wives were interested directors because their husbands, defendants Leslie F. Stern and Nathan F. Moser (collectively the defendant husbands), were "affiliated" with two potential equity investors. These allegations, without more, do not suffice to state a claim that there was any disabling interest of either of the defendant wives (see *Orman*, 794 A2d at 25 n 50). Indeed, the complaint fails to allege with requisite particularity (CPLR 3016[b]) how the defendant wives were interested in pursuing equity offerings from potential bidders while forgoing the proposal of their sister, plaintiff Joan Levy, that NEC issue high-yield bonds, a

debt offering, to alleviate its financial troubles. Moreover, there are no allegations that any such interest, even if it could be imputed to the defendant wives through their husbands, would override the defendant wives' financial interest in saving NEC, as they, like plaintiff Levy, each had a beneficial ownership of 25% of NEC's equity.

The court also correctly concluded that *Revlon* duties – to seek the best available price for the sale of a company – do not apply here (see *Revlon, Inc. v MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173, 182 [Del Sup Ct 1986]). “[T]he special considerations present when [*Revlon*] duties are triggered are not present” in cases where, as here, “no change in corporate control is implicated” (*Wells Fargo & Co. v First Interstate Bancorp.*, 1996 WL 32169, *4, 1996 Del Ch LEXIS 3, *14 [Del Ch Ct, Jan. 18, 1996, Nos. Civ-A-14696-14623]). Indeed, plaintiffs repeatedly maintain that their proposed high-yield alternative would have averted a change of control of the company. Plaintiffs' argument that *Revlon* duties should nevertheless apply to the board's decision whether to pursue the high-yield alternative or to solicit equity bidders, as the latter would result in a change in control, is unavailing. Consideration of, or refusal to consider, the high-yield alternative does not warrant invocation

of the *Revlon* duties, nor would it further the purpose behind those duties – namely, to protect the financial interests of shareholders during the sale of a company (*Revlon*, 506 A2d at 182).

Given plaintiffs' failure to allege any breach of fiduciary duty against the defendant wives, the trial court properly dismissed the aiding and abetting claim against the defendant husbands (see *In re Jevic Holding Corp.*, 2011 WL 4345204, *13 [Bankr D Del, Sept. 15, 2011, No. 08-11006 (BLS)]). As plaintiffs appear to concede on appeal, there also is no viable aiding and abetting claim against the defendant wives, as they are fiduciaries and such a claim may only be alleged against nonfidiciaries (see *id.*).

The court correctly dismissed the causes of action for breach of fiduciary duty and negligence against defendant Stephen Gawrylewski, the Chief Restructuring Officer of NEC and an employee of defendant Loughlin Management Partners + Co (LM). Plaintiffs failed to adequately allege any causal connection between Gawrylewski's alleged refusal to pursue the high-yield alternative and any alleged damages (see *Laub v Faessel*, 257 AD2d 28 [1st Dept 2002]). Indeed, there were numerous uncertainties surrounding the high-yield alternative, having nothing to do with

Gawrylewski's or any other defendants' conduct. Further, given the uncertainties, plaintiffs' reliance on projections, in support of their argument that the issuance of high-yield bonds would have averted their losses, is insufficient to articulate damages (see *Kenford Co. v County of Erie*, 67 NY2d 257, 262 [1986]). As there is no viable claim against Gawrylewski, none exists against his employer, LM.

The court correctly dismissed plaintiff Joan Levy's direct claims on the ground that she lacks standing (CPLR 3211[a][3]). The alleged loss of the entire value of Levy's NEC shares is not an injury to Levy that is separate from any injury to NEC (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 [Del Sup Ct 2004]).

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

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

ENTERED: NOVEMBER 18, 2014

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CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13500-

13500A-

13500B In re Leroy Simpson M., and Others,

Dependent Children Under the
Age of Eighteen Years, etc.

Joanne M.,
Respondent-Appellant,

Jewish Child Care Association
of New York,
Petitioner-Respondent.

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

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti
of counsel), for respondent.

Daniel R. Katz, New York, attorney for the children.

Orders of disposition, Family Court, Bronx County (Marcelle
Z. Brandes, J.), entered on or about May 22, 2013, which, upon a
fact-finding determination of permanent neglect, terminated
respondent mother's parental rights to the subject children and
transferred custody and guardianship of the children to
petitioner Jewish Child Care Association of New York and the
Commissioner of Social Services of the City of New York for the
purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence that respondent failed during the relevant time period to plan for the future of the children, despite petitioner's diligent efforts to encourage and strengthen the parental relationship (see Social Services Law § 384-b [7]). The children came into care after they and their older siblings left the home to stay with relatives, disclosing that there was domestic violence in the home committed by the father of one of the children and that they feared for their safety. A finding of neglect was entered against respondent, based on findings that she used excessive corporal punishment against the children and failed to protect them from excessive corporal punishment inflicted by the father and from witnessing physical violence inflicted against her. Although respondent substantially completed the services required by her service plan, she failed over the following eight years to acknowledge the issues that caused her children to flee her home in fear, or to gain insight into her parenting problems, and thus failed to adequately plan for the children's return (see *Matter of Angelina Jessie Pierre L. [Anne Elizabeth Pierre L.]*, 114 AD3d 471, 471 [1st Dept 2014], *lv denied* 23 NY3d 901 [2014]).

The fact that respondent consistently attended supervised visitation with the children does not preclude a finding of

permanent neglect, because the record shows that she failed to plan for the children's future by taking effective steps to correct the conditions leading to their removal or to advance a realistic, feasible plan for their care (see *Matter of Nathaniel T.*, 67 NY2d 838, 841-842 [1986]; *Matter of Jonathan Jose T.*, 44 AD3d 508, 509 [1st Dept 2007]).

A preponderance of the evidence demonstrates that it was in the best interests of the children to be freed for adoption (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Mark Eric R. [Juelle Virginia G.]*, 80 AD3d 518 [1st Dept 2011]). Contrary to respondent's contention, a suspended judgment was not warranted here, because Daquan and Leroy had lived with the foster mother for most of their lives, she is equipped to handle their special needs, and they are improving in her care (see *Matter of Emily Jane Star R. [Evelyn R.]*, 117 AD3d 646, 647-648 [1st Dept 2014]; *Matter of Carol Anne Marie L. [Melissa L.]*, 74 AD3d 643, 644 [1st Dept 2010]).

Although Joshua's placement was unclear at the time of the dispositional hearing, the Family Court was not required to award respondent a suspended judgment as to that child because the

record demonstrates that she has made no progress in attaining the ability to care for him (see *Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]).

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

ENTERED: NOVEMBER 18, 2014

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Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13501- SCI 5165/09
13501A The People of the State of New York, Ind. 4928/11
Respondent,

-against-

Lauren Tighe,
Defendant-Appellant.

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

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

Appeals having been taken to this Court by the above-named
appellant from judgments of the Supreme Court, New York County
(Renee A. White, J.), rendered on or about December 13, 2011,

Said appeals 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 judgments so appealed
from be and the same are hereby affirmed.

ENTERED: NOVEMBER 18, 2014



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

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13505	Grand Manor Health Related Facility, Inc., Plaintiff-Respondent,	Index 301880/08 303440/10 900656/11
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-against-

Hamilton Equities, Inc., et al.,
Defendants-Appellants.

- - - - -

Grand Manor Health Related
Facility, Inc.,
Plaintiff-Respondent,

-against-

Hamilton Equities, Inc., et al.,
Defendants-Appellants.

- - - - -

Hamilton Equities, Inc.
Petitioner-Appellant,

-against-

Grand Manor Health Related
Facility, Inc., etc.,
Respondent-Respondent.

Macron & Cowhey, P.C., New York (John J. Macron of counsel), for appellants.

Garfunkel Wild, P.C., Great Neck (Roy W. Breitenbach of counsel), for respondents.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 21, 2013, which, insofar as appealed from as limited by the briefs, after a nonjury trial, found that

the subject lease was effectively assigned to plaintiff Grand Manor Health Related Facility, Inc. and that plaintiff effectively renewed the lease for the two contractual renewal terms, unanimously affirmed, with costs.

The trial court properly admitted into evidence an assignment document with a notarized signature dated January 3, 1989, over defendant Hamilton Equities, Inc.'s objection based on the best evidence rule. The testimony of a witness for plaintiff that he retrieved the document from the company's files, where it was plaintiff's practice to keep photocopies of outgoing correspondence, satisfies CPLR 4539(a) (*People v May*, 162 AD2d 977, 978 [4th Dept 1990], *lv denied* 76 NY2d 861 [1990]).

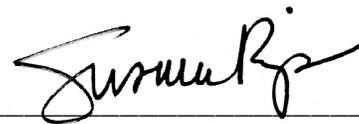
The trial court properly rejected defendants Hamilton Equities, Inc., Hamilton Equities Co., Robert Nova, and Susan Chait-Grandt's argument that the January 1989 assignment was ineffective because the named assignee did not exist until its certificate of incorporation was filed in March 1990. The assignment provisions of the lease recognized that regulatory approvals would be required to effect any assignment, and expressly acknowledged that there might be a gap between the date on which the assignment was executed and the date on which it became effective.

The trial court properly found that plaintiff substantially complied with the notice and consent procedures set forth in the assignment provisions of the lease. Moreover, given their failure to object contemporaneously and their acceptance of rent from the assignee for years afterwards, defendants waived any objection to a lack of strict compliance with those provisions (see *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]).

The trial court properly rejected defendants' contentions as to the ineffectiveness of the June and July 2000 renewals of the lease.

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

ENTERED: NOVEMBER 18, 2014

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CLERK

Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13506 Paula Cervera, Index 305699/11
Plaintiff-Appellant,

-against-

James L. Moran, et al.,
Defendants-Respondents.

Daniel E. Rausher, Brooklyn, for appellant.

Kay & Gray, Westbury (John De Oliveira of counsel), for
respondents.

Order, Supreme Court, Bronx County (Julia Rodriguez, J.),
entered May 18, 2012, which, to the extent appealed from as
limited by the briefs, denied plaintiff's motion for summary
judgment as to liability, unanimously reversed, on the law,
without costs, and the motion granted.

The fact that a vehicle is double parked "does not
automatically establish that such double parking was the
proximate cause of the accident" (*DeAngelis v Kirschner*, 171 AD2d
593, 595 [1st Dept 1991]). Here, plaintiff established her prima
facie entitlement to summary judgment by demonstrating that the
location of her vehicle merely furnished the condition or
occasion for the occurrence of the event but was not one of its

causes (see *Vazquez v Roldan*, 86 AD3d 640 [2d Dept 2011]; *Wechter v Kelner*, 40 AD3d 747 [2d Dept 2007], *lv denied* 9 NY3d 806 [2007]).

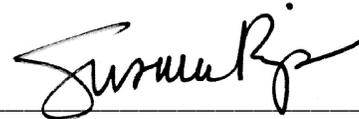
The record demonstrates that plaintiff's vehicle was double parked on a one way street. Defendants' vehicle, moving in the same direction, successfully passed plaintiff's vehicle on the left and pulled approximately three to four car lengths in front of it before stopping. One to two seconds later, defendants' vehicle drove in reverse in an erratic manner and struck the front of plaintiff's car, which was stationary at all times. According to plaintiff, while defendants' vehicle was moving in reverse towards her vehicle, she had her foot on the brake and sounded her horn. Defendants' vehicle did not stop, and plaintiff had no time to react before the collision. After the accident, the driver of defendants' vehicle told plaintiff that he was sorry, that the accident was his fault, and that he was having an argument with his passenger and had accidentally backed up into plaintiff's vehicle.

No triable issue of fact was raised in opposition as to whether the location of the plaintiff's double-parked vehicle was a proximate cause of the accident (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Although this Court has held that "a

reasonable jury could find that a rear-end collision is a reasonably foreseeable consequence of double parking for five minutes on a busy Manhattan street" (*White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008]), plaintiff's vehicle was struck in the front by a vehicle that had safely passed her before it stopped and backed up the wrong way on a one way street.

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

ENTERED: NOVEMBER 18, 2014

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Tom, J.P., Renwick, Andrias, DeGrasse, Kapnick, JJ.

13507 Jossef Kahlon,
 Plaintiff-Appellant,

Index 103028/12

-against-

Bruce Lewis,
 Defendant-Respondent.

Erica T. Yitzhak, P.C., Great Neck (Erica T. Yitzhak of counsel),
for appellant.

Order, Supreme Court, New York County (Doris Ling-Cohan,
J.), entered September 30, 2013, which denied plaintiff's motion
for summary judgment, and, upon a search of the record, granted
defendant summary judgment dismissing the complaint, unanimously
affirmed, without costs.

The motion court correctly dismissed the complaint since
plaintiff failed to particularize the alleged defamatory
statement made by defendant (*see* CPLR 3016[a]; *Khan v Duane
Reade*, 7 AD3d 311 [1st Dept 2004]). Even if we were to evaluate
the alleged statement made by defendant that was included in
plaintiff's motion papers, the statement was not defamatory as a

matter of law (see *Brian v Richardson*, 87 NY2d 46, 51 [1999];
Dillon v City of New York, 261 AD2d 34, 38-39 [1st Dept 1999]).

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

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

ENTERED: NOVEMBER 18, 2014

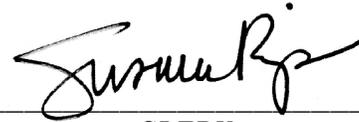
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over an extended period, and the mitigating factors cited by defendant, including his age, do not warrant a downward departure (see e.g. *People v Harrison*, 74 AD3d 688 [1st Dept 2010], lv denied 15 NY3d 711 [2010]).

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

ENTERED: NOVEMBER 18, 2014

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to review plaintiff's MRI films or reports (see *Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512 [1st Dept 2013]).

In opposition, plaintiff raised triable issues of fact through her expert's report, which included an affirmation stating that plaintiff sustained objective medical injuries and deficits of range of motion and opining that the injuries were causally related to the subject motor vehicle accident (see *Young Kyu Kim v Gomez*, 105 AD3d 415 [1st Dept 2013]; *Barhak v Almanzar-Cespedes*, 101 AD3d 564, 565 [1st Dept 2012]).

Defendants argue that plaintiff failed to present any explanation for the two-year gap in her treatment, which amounted to a cessation of treatment. However, as they first raised this issue in their reply affirmation in support of the motion, it is not properly before us (see *Mulligan v City of New York*, 120 AD3d 1156 [1st Dept 2014]).

Plaintiff failed to raise an issue of fact in opposition to defendants' prima facie showing that she did not sustain a 90/180-day injury. Defendants relied on plaintiff's affidavit

stating that she missed about two months of work and her expert physician's affirmed report stating that she returned to "limited duty" work two weeks after the accident and remained working thereafter (see *Tsamou v Diaz*, 81 AD3d 546 [1st Dept 2011]).

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

ENTERED: NOVEMBER 18, 2014

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CLERK

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

13513 Timothy Kircher, Index 100527/09
Plaintiff-Respondent,

-against-

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

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of
counsel), for appellants.

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for
respondent.

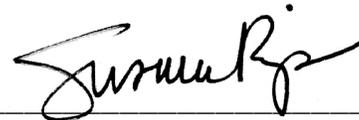
Order, Supreme Court, New York County (Jeffrey K. Oing, J.),
entered February 24, 2014, which granted plaintiff's motion for
partial summary judgment on the issue of liability on his Labor
Law § 240(1) cause of action, unanimously reversed, on the law,
without costs, and the motion denied.

The motion court correctly concluded that the flooring on
which plaintiff was working, which was comprised of wooden planks
with gaps between them seven stories above the bottom of a shaft
below, confronted plaintiff with an elevation-related hazard to
which Labor Law § 240(1) is applicable, regardless of whether the
flooring was permanent (see *Jones v 414 Equities LLC*, 57 AD3d 65,
79-80 [1st Dept 2008]; *Carpio v Tishman Constr. Corp. of N.Y.*,
240 AD2d 234, 235-236 [1st Dept 1997]). Triable issues of fact

exist, however, as to whether the work in which plaintiff was engaged when his accident occurred constituted routine maintenance or a repair covered under the statute (see *Montalvo v New York & Presbyt. Hosp.*, 82 AD3d 580 [1st Dept 2011]; see also *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]).

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

ENTERED: NOVEMBER 18, 2014

A handwritten signature in black ink, appearing to read 'Susan R. [unclear]', written over a horizontal line.

CLERK

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

13514 In re Zion Nazar H-S.,

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

 Shaniqua W.,
 Respondent-Appellant,

 Jewish Child Care Association
 of New York,
 Petitioner-Respondent.

Carol Kahn, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti
of counsel), for respondent.

Larry S. Bachner, Jamaica, attorney for the child.

Order, Family Court, Bronx County (Sarah P. Cooper, J.),
entered on or about December 18, 2013, which denied respondent
mother's motion to vacate an order of fact finding and
disposition, same court and Judge, entered on or about July 12,
2013, determining that she permanently neglected the subject
child, terminating her parental rights, and committing the
custody and guardianship of the child to petitioner agency and
the Commissioner of the Administration for Children's Services
for the purpose of adoption, unanimously affirmed, without costs.

Respondent failed to provide either a reasonable excuse for

her failure to appear at the fact finding and dispositional hearings, or a meritorious defense to the permanent neglect petition (see CPLR 5015[a]; *Matter of Evan Matthew A. [Jocelyn Yvette A.]*, 91 AD3d 538 [1st Dept 2012]). Respondent's documentation did not demonstrate that her appointment with the New York City Department of Homeless Services was scheduled in advance or that it could not have been rescheduled so that it did not occur on the same day as the hearing on the petition to terminate her parental rights. In any event, it did not excuse her from notifying her attorney or the court, especially since she knew of the date of the fact-finding hearing two months earlier (see *Matter of Lisa Marie Ann L. [Melissa L.]*, 91 AD3d 524 [1st Dept 2012]). Further, the mother's partial compliance with requisite services is insufficient to establish a

meritorious defense to the petition (see *Matter of Julian Michael G. [Jeannette G.]*, 94 AD3d 573 [1st Dept 2012]).

We have reviewed the mother's remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 18, 2014

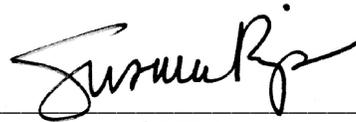
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CLERK

to be raised. However, we hold the matter in abeyance pending proof that defendant was sent a copy of counsel's brief (see *People v Pack*, 138 AD2d 269 [1st Dept 1988]).

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

ENTERED: NOVEMBER 18, 2014

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

13522 Anita Chanko, etc., et al., Index 152552/13
Plaintiffs-Respondents,

-against-

American Broadcasting
Companies Inc., et al.,
Defendants-Appellants,

Anil S. Ranawat, et al.,
Defendants.

Levine Sullivan Koch & Schulz, LLP, New York (Nathan Siegel of
counsel), for American Broadcasting Companies, Inc., appellant.

Nixon Peabody LLP, Jericho (Michael S. Cohen of counsel), for the
New York and Presbyterian Hospital and Sebastian Schubl, M.D.,
appellants.

Law Offices of Mark J. Fox, New York (Mark J. Fox of counsel),
for respondents.

Order, Supreme Court, New York County (Manuel J. Mendez,
J.), entered January 17, 2014, which, to the extent appealed
from, denied the motions of defendants American Broadcasting
Companies, Inc. (ABC), and the New York and Presbyterian Hospital
and Sebastian Schubl, M.D., to dismiss plaintiffs' fifth cause of
action for intentional infliction of emotional distress, and
denied defendant hospital and defendant doctor's motion to
dismiss plaintiffs' fourth cause of action for violation of
physician patient confidentiality, unanimously reversed, on the

law, without costs, the motions granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants' conduct in producing and televising a show depicting the medical care provided at defendant hospital that included a pixilated image of plaintiffs' decedent, who was not identified, was not so extreme and outrageous as to support a claim for intentional infliction of emotional distress (see *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013]).

Nor can plaintiffs maintain an action against defendant doctor or defendant hospital for breach of the duty not to disclose personal information, since no such information regarding plaintiffs' decedent was disclosed (*cf. Randi A.J. v Long Is. Surgi-Center*, 46 AD3d 74 [2d Dept 2007]).

In light of the foregoing, we need not reach the parties' additional arguments.

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

ENTERED: NOVEMBER 18, 2014

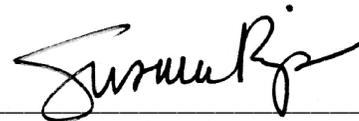


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eight years. Defendant's threat made to at least one victim in order to deter her from disclosing the abuse further justified the upward departure (see *id.*). In addition, defendant had already scored the maximum 105 points for a level two offender (see *People v Otero*, 100 AD3d 411 [1st Dept 2012], *lv denied* 20 NY3d 863 [2013]).

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

ENTERED: NOVEMBER 18, 2014

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53, 58 [2013]), which "remained a violent felony offense at the time of defendant's second violent felony offender adjudication" (*People v Bowens*, __AD3d__, 2014 NY Slip Op 06536, *1 [1st Dept 2014]; see also *People v Morse*, 62 NY2d 205, 217 [1984]; see also Penal Law §70.02[1][b]). Defendant's ex post facto argument is improperly raised for the first time in his reply brief, and is without merit in any event.

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

ENTERED: NOVEMBER 18, 2014

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CLERK

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

13525 Osqugama F. Swezey, et al., Index 155600/13
Petitioners-Respondents,

-against-

Merrill Lynch, Pierce,
Fenner & Smith Inc.,
Respondent-Respondent,

New York City Department of Finance,
Respondent,

Philippine National Bank, et al.,
Intervenors-Appellants.

- - - - -

The United States of America,
Amicus Curiae.

Mayer Brown LLP, New York (Andrew J. Calica and Charles A. Rothfeld of counsel), for appellants.

Kohn, Swift & Graf, P.C., Philadelphia, PA (Robert A. Swift of the bar of the Commonwealth of Pennsylvania, admitted pro hac vice, of counsel), and Anderson Kill, P.C., New York (Jeffrey E. Glen of counsel), for Osqugama F. Swezey and Jose Duran, respondents.

Sidley Austin LLP, New York (Daniel A. McLaughlin of counsel), for Merrill Lynch, Pierce, Fenner & Smith Inc., respondent.

Stuart F. Delery, Assistant Attorney General, U.S. Department of Justice, Washington, DC (Sharon Swingle of the bar of the District of Columbia, admitted pro hac vice, of counsel), for amicus curiae.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 13, 2014, which granted petitioners' motion to

reargue to the extent of lifting a previously imposed stay, ordering petitioners' counsel to serve the instant turnover petition on the Embassy of the Republic of the Philippines (the Republic) in Washington, D.C. and on the Philippine Consulate in New York, and giving the Republic 60 days from filing of proof of service to intervene and respond to the petition, unanimously reversed, on the law and the facts, without costs, the motion denied, the stay re-imposed, and the provisions of the order dealing with service and the Republic vacated.

When the motion court imposed a stay in this matter in February 2014, it noted, "[T]his petition cannot proceed to a final conclusion in the present landscape. . . . [B]ut for the passage of time, the issues remain unaltered since the Court of Appeals' dismissal of" Swezey's prior turnover petition (see *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 19 NY3d 543 [2012]). Only a few months later, the court lifted the stay, apparently because it felt that the Republic was "dragging their feet." This was error. In *Swezey*, the Court of Appeals said, "[I]f the Republic fails to seek enforcement of its [Philippine] judgment . . ., the time may come when the . . . class [whom petitioners represent] could again ask a New York court to reconsider the enforcement of its [U.S. federal] judgment"

against the estate of nonparty Ferdinand E. Marcos (19 NY3d at 555 [emphasis added]). The Republic did not fail to seek enforcement of its judgment; on the contrary, it moved in the Philippine Supreme Court for immediate issuance of entry of judgment.

We note that, since the order appealed from, the Sandiganbayan (Philippine anti-corruption court) has issued a writ of execution. If the Republic fails to seek enforcement of this judgment within a reasonable time, petitioners may move to lift the stay that we are re-imposing.

Regardless of whether the service ordered by the court violated 28 USC § 1608(a), it violated the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (see *Autotech Techs. v Integral Research & Dev.*, 499 F3d 737, 748 [7th Cir 2007] ["service through an embassy is expressly banned both by an international treaty to which the United States is a party (viz., the Vienna Convention on Diplomatic Relations) and by U.S. statutory law"], *cert denied* 552 US 1231 [2008]; *Sikhs for Justice v Nath*, 850 F Supp 2d 435, 441 [SD NY 2012] ["Under the Vienna (C)onvention (on Consular Relations), service of process at consular premises is prohibited"] [internal quotation marks, brackets, and ellipses

omitted]).

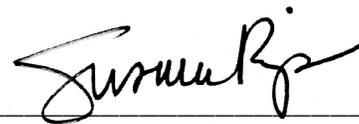
Even if, *arguendo*, service was proper (see *Federal Motorship Corp. v Johnson & Higgins*, 192 Misc 401, 403, 406-408 [Sup Ct, NY County 1948], *affd* 275 App Div 660 [1st Dept 1949], *lv dismissed* 299 NY 673 [1949], *appeal dismissed* 299 NY 793 [1949]), the motion court should not have tried to coerce the Republic - a sovereign state - to appear (see *Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 87 AD3d 119, 130-131 [1st Dept 2011] ["We think it inappropriate for the courts of New York to put the Republic to a Hobson's choice between, on the one hand, its right not to litigate in this state and, on the other hand, protecting its interest in property that (through no fault of the Republic . . .) happens to be located here"], *affd* 19 NY3d 543 [2012]; see also *Swezey*, 19 NY3d at 553 ["Since only the Republic can decide whether it should submit to New York's jurisdiction, it would be inappropriate to force the Republic to litigate in our state court system contrary to an otherwise valid invocation of the sovereign prerogative"]).

As in the prior turnover proceeding, we sympathize with petitioners. They or their decedents were the victims of human rights abuses during the Marcos regime, and they have a valid U.S. federal judgment against Marcos' estate. However, as the

Court of Appeals noted, "[T]he judgment that [petitioners] secured is against the estate of Ferdinand Marcos and it can be lawfully executed only against property that the estate legally owns. If the Arelma assets [i.e., the assets that petitioners are seeking in this turnover proceeding] belong to the people of the Philippines - as that country's highest court has declared - the class [i.e., petitioners] has no claim to that property" (*Swezey*, 19 NY3d at 555; see also *Swezey*, 87 AD3d at 132 ["however morally compelling the claim underlying a judgment may be, the judgment creditor is entitled to execute only against property that actually belongs to the judgment debtor"]).

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

ENTERED: NOVEMBER 18, 2014

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[1980]; *People v Tutt*, 38 NY2d 1011 [1976]) as to the particular issues defendant now raises. As an alternative holding, we find that the hearing record, and the reasonable inferences to be drawn therefrom, support the conclusion that defendant was lawfully seized pursuant to the fellow officer rule.

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

ENTERED: NOVEMBER 18, 2014

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choice of defenses. Thus, if the statements ultimately were not admitted, questioning the jurors regarding their ability to disregard an involuntary confession would invite the jurors to speculate as to the content of the statements and why they had not been introduced into evidence (*see People v Diaz*, 258 AD2d 356 [1st Dept 1999], *lv denied* 93 NY2d 969 [1999]).

By failing to object, or by failing to request additional relief after the court responded to an objection by issuing a curative instruction, defendant failed to preserve any of his challenges to the prosecutor's summation, and we decline to review them in the interest of justice. As an alternative holding, we find that the challenged remarks did not deprive defendant of a fair trial (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

To the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that his counsel's lack of objection during the People's summation fell below an objective standard of

reasonableness, deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], with *People v Fisher*, 18 NY3d 964 [2012]).

Defendant did not preserve his claim that, in imposing sentence, the court improperly considered a charge that resulted in an acquittal (see *People v Harrison*, 82 NY2d 693 [1993]), and we decline to review it in the interest of justice. As an alternative holding, we find that the record fails to support this assertion. We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 18, 2014


CLERK

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

13529 FSLM Associates LLC, et al., Index 104753/10
Plaintiffs-Appellants,

-against-

Arch Insurance Group, et al.,
Defendants-Respondents,

Illinois Union Insurance Company,
Defendant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Mark A. Rosen of counsel), for appellants.

Clausen Miller, P.C., New York (John P. De Filippis of counsel), for respondents.

Order and judgment (one paper), Supreme Court, New York County (Joan A. Madden, J.), entered August 1, 2013, which denied plaintiffs' motion for summary judgment, granted defendants' cross motion for summary judgment and declared that defendant insurance companies "are not obliged to provide coverage to plaintiffs for their claim for property damage allegedly sustained as a result of an incident that occurred on or about May 22, 2008, at the building located at 40 West 116th Street, New York, New York, as such claim is excluded from coverage under the policy endorsement entitled 'Exterior Insulation and Finish System Exclusion'," unanimously affirmed, without costs.

In this coverage action arising out of the collapse of a section of the exterior facade of the building, the motion court properly found that the policy exclusion for property damage "caused directly or indirectly, in whole or in part by the ... preparation [or] installation ... of an 'exterior insulation and finish system ... or use of ... coatings ... in connection with such a system" applies, precluding coverage under the policy. As the motion court found, the Parex 121 product, which the experts agree failed, causing the collapse, was applied as a coating to, among other things, level the concrete masonry wall in preparation for the installation of the exterior insulation and finish system (EIFS). Although the parties' experts agree that the Parex 121 was a coating used to level the exterior of the masonry wall, defendants' expert asserts that it was used in preparation for the installation of the Parex EIFS while plaintiffs' expert asserts that it was not an EIFS "accessory." Plaintiffs' expert, however, does not define what an accessory is, or why Parex 121 is not an accessory, rendering his assertion conclusory.

More importantly, to the extent that plaintiffs' expert's assertion may be understood to mean that the Parex 121 was not a "coating" used "in connection with" the EIFS, such an assertion

is demonstrably false given that leveling of the masonry surface was a necessary preparation for the installation of the EIFS, the literature for the EIFS and the Parex 121, both manufactured by the same company, expressly describes the product as being for this use, and the product meets the precise specifications for leveling the surface of an exterior wall in preparation for the installation of an EIFS. Notably, neither plaintiffs nor their expert have offered any other explanation for using this product to level the masonry wall surface. However, even if there had been some other purpose, it would not negate the fact that such leveling was, at least in part, mandated by the requirements for the installation of the EIFS. Thus, under the circumstances, defendants have demonstrated that the "clear and unmistakable language" of the policy exclusion applies (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1985] [internal quotation marks omitted]).

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

ENTERED: NOVEMBER 18, 2014



CLERK

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

13530 Donna Clarke, Index 301746/13
Plaintiff-Respondent,

-against-

6485 & 6495 Broadway
Apartment Inc., et al.
Defendants,

6485 Apartment Associates, Inc.,
Defendant-Appellant.

Lehrman, Lehrman & Guterman, LLP, White Plains (Mark A. Guterman
of counsel), for appellant.

Law Office of Nicholas M. Moccia, P.C., Staten Island (Nicholas
M. Moccia of counsel), for respondent.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.),
entered on or about June 4, 2013, which, to the extent appealed
from, denied defendant-appellant 6485 Apartment Associates,
Inc.'s (Associates) motion for summary judgment dismissing the
nuisance cause of action as against it, unanimously affirmed,
with costs.

Plaintiff, who lives in a cooperative apartment, alleges
that Associates, which owns shares of the apartment above her,
rented an apartment to an individual who caused a continuous
noise nuisance for a period of six months, and took no steps to
abate the nuisance despite her repeated complaints about the

condition caused by the apartment's occupants. Plaintiff's letters to Associates complained that it had previously rented other apartments to the same tenant, resulting in noise complaints by other residents of the building. As a rule, a cause of action for nuisance does not lie against a landlord who "did not create the nuisance" and who has "surrendered control of the premises" to a tenant (*Bernard v 345 E. 73rd Owners Corp.*, 181 AD2d 543 [1st Dept 1992]; *cf. Muhammad v Bucknor*, 228 AD2d 333 [1st Dept 1996]). However, Associates failed to make a prima facie showing of entitlement to summary judgment since it submitted only a conclusory affidavit stating that it was not responsible for its tenant's conduct, without submitting a copy of any lease or even identifying the tenant. It thus failed to establish either that it did not knowingly create the nuisance or that it had surrendered control of the premises to that individual.

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

ENTERED: NOVEMBER 18, 2014



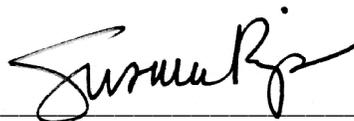
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reduce the charges (*see People v Urbaez*, 10 NY3d 773, 775 [2008]).

To the extent the existing record permits review, we find that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant asserts that his attorney rendered ineffective assistance by failing to make various motions or objections. However, these measures would have had "little or no chance of success" (*People v Stultz*, 2 NY3d 277, 287 [2004]) or of obtaining any benefit for defendant.

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

ENTERED: NOVEMBER 18, 2014

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

13532N In re Kellel B., Index 260844/11

An Infant Under Fourteen Years
of Age by his Mother and Natural
Guardian, Lomina D.,
Claimant-Respondent,

-against-

New York City Health &
Hospitals Corporation,
Respondent-Appellant.

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of
counsel), for appellant.

James Newman, P.C., Bronx (Kyle Newman of counsel), for
respondent.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.),
entered January 8, 2013, which granted claimant-respondent's
motion for leave to file a late notice of claim pursuant to
General Municipal Law § 50-e, unanimously affirmed, without
costs.

When determining whether leave to file a late notice of
claim should be granted, the court must consider "whether the
movant demonstrated a reasonable excuse for the failure to serve
the notice of claim within the statutory time frame, whether the
municipality acquired actual notice of the essential facts of the

claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense" (*Matter of Dubowy v City of New York*, 305 AD2d 320, 321 [1st Dept 2003]). Here, the motion court providently exercised its discretion in granting claimant's motion (*id.*).

Contrary to respondent's contention, the mother's assertion that she waited to file a notice of claim because she did not know until several months after the child was born that he was injured is a reasonable excuse for the delay in moving to file a late notice of claim (see *Matter of Lopez v New York City Hous. Auth.*, 225 AD2d 492, 492-493 [1st Dept 1996]; *Swensen v City of New York*, 126 AD2d 499, 500-501 [1st Dept 1987], *lv denied* 70 NY2d 602 [1987]). Moreover, respondent's experts have not disputed the assertion made by claimant's experts that periventricular leukomalacia (PVL), the injury alleged here, does not generally manifest itself until the infant fails to meet his developmental milestones, which in this case was approximately six months after the injury was inflicted, and that a layperson, such as the child's mother, would be unable to tell that he was injured (see *e.g. Matter of Minkowicz v City of New York*, 100 AD3d 1000, 1000 [2d Dept 2012]).

Claimant has demonstrated that respondent acquired actual knowledge of the facts surrounding the instant claim within 90 days or a reasonable time thereafter, because the expert affidavits of Dr. Richman and Dr. Singh establish that the records, on their face, evinced respondent's failure to provide the mother with proper labor and delivery care (see *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 448 [1st Dept 2011]; *Young v New York City Health & Hosps. Corp.*, 90 AD3d 517 [1st Dept 2011]). In particular, Dr. Richman avers in her expert affidavit that an internal monitor would not have been inserted during active labor to monitor the fetus unless there were ominous signs of fetal distress. This is supported by respondent's expert, Dr. Prince, who avers that "an internal fetal monitor was placed," but offers no opinion as to why respondent's employees would have done so in the absence of fetal distress (see *Alvarez v New York City Health & Hosps. Corp. [North Cent. Bronx Hosp.]*, 101 AD3d 464, 464 [1st Dept 2012]).

Respondent will not be unduly prejudiced by being compelled to defend this case, because it had actual notice of the underlying facts of the infant plaintiff's claim within a reasonable time after his birth, and the hospital has been in possession of the records since the alleged malpractice.

Moreover, the medical records indicate that respondent's employees were aware that the child had PVL on March 13, 2008, three months and six days after the ninety-day limitation had expired, when they performed neurological testing, and it is undisputed that respondent's employees treated him for that condition approximately three years after his birth (see *Matter of Corvera v Nassau County Health Care Corp.*, 38 AD3d 775, 776 [2d Dept 2007]). Lastly, respondent's contention that it is prejudiced because the attending ob/gyn and the certified nurse midwife responsible for the labor and delivery of the child are unavailable since they are no longer employed by the hospital is unavailing, because respondent does not assert that in the course of its investigation it had attempted to contact them and was unsuccessful (see *Matter of Speed v A. Holly Patterson Extended Care Facility*, 10 AD3d 400, 402 [2d Dept 2004]).

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

ENTERED: NOVEMBER 18, 2014



CLERK

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

13533- Ind. 5023/13
13534 In re Isa Bako, 2001/14
[M-4041 & Petitioner,
M-4677]

-against-

Hon. Melissa Jackson, etc., et al.,
Respondents.

Isa Bako, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Michelle R.
Lambert of counsel, for Hon. Melissa Jackson, respondent.

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

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: NOVEMBER 18, 2014



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
David B. Saxe
Rosalyn H. Richter
Paul G. Feinman
Barbara R. Kapnick, JJ.

13110
Ind. 1463/12

x

The People of the State of New York,
Respondent,

-against-

Sean Thomas,
Defendant-Appellant.

x

Defendant appeals from the judgment of the Supreme Court,
New York County (Juan M. Merchan, J.),
rendered June 25, 2013, convicting him, after
a jury trial, of grand larceny in the second
degree, and imposing sentence.

Law Offices of Douglas G. Rankin, P.C.,
Brooklyn (Douglas G. Rankin of counsel), for
appellant.

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

RICHTER, J.

In this appeal, we are asked to decide whether the trial court erred in denying defendant's request for a charge on the territorial jurisdiction of New York State pursuant to CPL 20.20. The evidence at trial established the following. In February 2007, defendant Sean Judson Thomas was hired as an office manager for the Manhattan location of Fritz Hansen, a Danish furniture company. Defendant's job responsibilities included writing and signing checks to pay the company's invoices. Each month, defendant prepared a report listing the checks that were written, and submitted the report, along with the respective invoices, to Nina Andersen, an accounting assistant who worked at Fritz Hansen's headquarters in Denmark. The checking account used to pay the invoices was maintained at a Manhattan branch of Nordea Bank.

In November 2011, Andersen noticed that certain invoices were missing from the materials defendant had sent her. She requested bank copies of the checks purportedly written to pay the invoices, and learned that 39 checks were made out to Judson Thomas. David Rosenkvist, defendant's supervisor, testified that he recognized the signature on the checks as that of defendant. Bank records showed that the 39 checks, totaling approximately \$230,000, were deposited into defendant's TD Bank account, and

those funds were subsequently used to pay for personal expenses.¹

Several weeks after the theft was discovered, investigators from the New York County District Attorney's Office visited defendant at his home in New Jersey. When defendant answered the door, the investigators identified themselves and told him they wanted to talk to him about a check fraud case. Defendant invited the investigators into his home, and was questioned about the incident. During the interview, defendant admitted to writing Fritz Hansen checks to himself and depositing the money into his TD Bank account. He said that he did so for "stupid reasons" and that he was going to pay back the money.

At the charge conference, defendant asked the court to instruct the jury on New York State jurisdiction pursuant to CPL 20.20. Although the People had no objection to this charge, the court nevertheless denied defendant's request. The jury convicted defendant of grand larceny in the second degree, and defendant now appeals, arguing, inter alia, that the trial court's failure to charge the jury on jurisdiction constitutes

¹ In September 2009, a personal bank account was opened at TD Bank under the name Judson Thomas. Bank documents showed that the account was opened using defendant's Social Security number. The account was initially funded with a check made out to Sean Judson Thomas that was drawn on the same bank account into which Fritz Hansen direct deposited defendant's salary. No evidence was presented as to where the TD Bank account was opened.

reversible error.

For New York State to have jurisdiction in a criminal case, "either the alleged conduct or some consequence of it must have occurred within the State" (*People v McLaughlin*, 80 NY2d 466, 471 [1992]). This territorial principle, which has its origins in early English common law (*id.* at 470), is codified in CPL 20.20, which sets forth various factual predicates for finding jurisdiction. Territorial jurisdiction "may never be waived" and must be established beyond a reasonable doubt (*id.* at 470-471). Venue, on the other hand, is a concept distinct from territorial jurisdiction, and addresses a defendant's right to be tried in the county where the crime was committed (see CPL 20.40). Because it relates only to the proper place of trial, and not to the power of the court to hear and determine the case, venue is waivable and need only be proven by a preponderance of the evidence (*McLaughlin*, 80 NY2d at 471-472).

When a defendant requests the court to instruct the jury on venue, it is error to deny the request even if the People's proof as to venue may be uncontradicted (*People v Greenberg*, 89 NY2d 553, 556 [1997]; *People v Moore*, 46 NY2d 1, 7 [1978]). Thus, "when requested to submit the issue to the jury it is doubtful whether it would ever be proper for the court to deny the request and decide the issue as a matter of law on the theory that the

People have met their burden by uncontradicted proof" (*Moore*, 46 NY2d at 7; see *People v Ribowsky*, 77 NY2d 284, 292 [1991] [where defendant contested venue, it was error not to submit the question to the jury]). These principles apply equally to the issue of territorial jurisdiction, which has a higher burden of proof and which "goes to the very essence of the State's power to prosecute" (*McLaughlin*, 80 NY2d at 471).

Moore recognized that a court may dispense with charging venue in certain limited circumstances: where the defendant concedes that venue is proper, admits the facts upon which venue is based, or fails to request the instruction (*Moore*, 46 NY2d at 7). None of these circumstances is present here. Defendant neither conceded jurisdiction nor admitted facts upon which jurisdiction was based. Indeed, defendant challenged the State's jurisdiction, moved for a trial order of dismissal on that basis, and requested a CPL 20.20 jury instruction.

Here, the court erred by denying defendant's request to instruct the jury on territorial jurisdiction, particularly in light of the equivocal evidence as to where the crime took place. As defendant points out, no evidence was presented that he wrote the checks in New York State, that the TD Bank account into which the checks were deposited was located in this State, or that the checks were processed and paid out of Nordea Bank's Manhattan

branch.

Indeed, the People do not argue on appeal that no charge on jurisdiction was required. Instead, they maintain that the court provided appropriate guidance to the jury on that issue. In support, they rely on the following portion of the charge:

“In order for you to find the defendant guilty of [grand larceny in the second degree], the People are required to prove, from all the evidence in the case, beyond a reasonable doubt . . . [t]hat on or about and between September 1, 2009 and November 30th 2011, *in the County of New York*, the defendant, Sean Thomas, wrongfully took, obtained or withheld currency from its owner” (emphasis added).

This instruction, which is simply the standard instruction for larceny, fails to explain the requirements for jurisdiction set forth in CPL 20.20. Under that statute, as relevant here, “a person may be convicted . . . of an offense . . . committed . . . by his [or her] own conduct . . . when . . . [c]onduct occurred within this state sufficient to establish . . . [a]n element of such offense.” The CJI charge on territorial jurisdiction mirrors the statutory language, and further requires the jury to determine jurisdiction before they begin deliberations on whether the People have proven the defendant guilty of the charged crime.

The italicized language above, which is included in all the CJI charges, did not inform the jury, as required, that they must

specifically find that conduct establishing an element of second degree grand larceny occurred in New York State, and thus is an insufficient substitute for the charge on jurisdiction. The People's position, if taken to its logical extreme, would lead to the absurd result that a court is never required to charge the jury on jurisdiction, and would arguably write CPL 20.20 out of all jury instructions. Furthermore, the purpose of the jurisdiction charge is to focus the jury on this question, and the standard charge on the elements of the crime does not advise the jury that they must decide the threshold jurisdictional issue before deciding anything else. Accordingly, defendant's conviction should be reversed and the matter remanded for a new trial.

Defendant's remaining challenges to the court's instructions are unavailing. No circumstantial evidence charge was required, because defendant's admission of his guilt constituted direct evidence (*see People v Guidice*, 83 NY2d 630, 636 [1994]; *People v Daddona*, 81 NY2d 990, 992-993 [1993]). Nor was defendant entitled to a claim-of-right charge (Penal Law § 155.15[1]). On this record, there is no view of the evidence that defendant had a subjective good-faith belief that he was entitled to surreptitiously write checks to himself totaling more than \$230,000 from his employer's bank account (*cf. People v Zona*, 14

NY3d 488, 493 [2010]).

The court properly denied defendant's motion to suppress the statements he made to the District Attorney's investigators. The evidence showed that defendant invited the investigators into his home and, at one point, left the room where he was being questioned. Under these circumstances, a reasonable innocent person in defendant's position would not have thought he was in custody (*see People v Yukl*, 25 NY2d 585 [1969], *cert denied* 400 US 851 [1970]).

In light of our remand, we decline to address defendant's evidentiary challenges.

Accordingly, the judgment of the Supreme Court, New York County (Juan M. Merchan, J.), rendered June 25, 2013, convicting defendant, after a jury trial, of grand larceny in the second degree, and sentencing him to a term of one to three years, with restitution in the amount of \$229,172.74, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: NOVEMBER 18, 2014


CLERK