SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 6, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Acosta, Saxe, Moskowitz, Gesmer, JJ.

1758 Deep Woods Holdings LLC, Index 652886/15
Plaintiff-Appellant,

-against-

Pryor Cashman LLP, et al.,
Defendants-Respondents.

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Capuder Fazio Giacoia LLP, New York (Douglas Capuder of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Frederick B. Warder III of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about February 11, 2016, which granted defendants' motion to dismiss paragraphs 3-5 and 41-53 of the complaint pursuant to CPLR 3211, unanimously reversed, on the law, with costs, and the motion denied.

Defendant Pryor Cashman LLP represented nonparty David Lichtenstein in a transaction in which Lichtenstein was to purchase $10 million worth of stock in nonparty Park Avenue Bank. Before the transaction could close, nonparty Savings Deposit

Insurance Fund of the Republic of Turkey (SDIF) sued the holder of 99% of the bank's shares and obtained a restraining order preventing any transfer of the shares (*Deep Woods Holdings, L.L.C. v Savings Deposit Ins. Fund of the Republic of Turkey*, 745 F3d 619, 621 [2d Cir 2014], *cert denied* __ US __, 135 S Ct 964 [2015]).

On June 22, 2004, Lichtenstein and SDIF entered into a stipulation, pursuant to which Lichtenstein had the right to exercise a call option to buy shares of stock in the bank for a specified sum, provided Lichtenstein exercised his right within 45 days after SDIF was able to deliver the shares. SDIF was able to deliver the shares on July 12, 2005, but Pryor Cashman did not exercise Lichtenstein's call option until November 2, 2005 (*Deep Woods*, 745 F3d at 623), and SDIF then refused to honor it.

Thereafter, Pryor Cashman recommended to Lichtenstein that he, together with nonparties Donald Glascoff, chairman of the bank, and Charles Antonucci, form plaintiff Deep Woods Holdings LLC, and that Lichtenstein assign the call option to Deep Woods, which would then sue SDIF to exercise the call option. In or about 2007, Pryor Cashman organized Deep Woods, drafted the assignment, and insisted on acting as counsel for Deep Woods in the litigation against SDIF. The assignment read in its

entirety: "In consideration of the issuance to David Lichtenstein ("Assignor") of a 75% interest in Deep Woods Holdings LLC, a Delaware limited liability company ("Deep Woods"), as described in the Deep Woods Operating Agreement dated February 6, 2007, the Assignor hereby assigns, transfers and delivers to Deep Woods his entire right, title and interest in and to the option contained in Paragraph 8 of that certain Stipulation dated June 22, 2004 between the Assignor and [SDIF]." Pryor Cashman did not draft the assignment so as to specifically assign any tort claims Lichtenstein might have in connection with the exercise of the call option to Deep Woods.

According to Mr. Glascoff, when Pryor Cashman formed Deep Woods and prepared the assignment, it acted on behalf of Lichtenstein, the other members of Deep Woods, and Deep Woods itself. Mr. Glascoff further alleges that, during this process, Pryor Cashman was silent on the issue of whether the assignment transferred tort claims, but that it was Mr. Glasscoff's understanding that it did, and, if he had understood that it did not, he would have insisted on adding any necessary language so that it did.

At the trial level, Deep Woods won $25.3 million in damages. However, the Second Circuit reversed, finding that the call

option had not been not exercised in a timely manner (*Deep Woods*, 745 F3d at 620).

After the U.S. Supreme Court denied certiorari, Deep Woods brought the instant action against Pryor Cashman, alleging, inter alia, malpractice based on Pryor Cashman's failure to exercise the call option in a timely manner. On February 11, 2016, the motion court issued the order appealed from, granting Pryor Cashman's motion to dismiss so much of the malpractice claim as was based on the failure to timely exercise the call option. The motion court found that, because the assignment Pryor Cashman had drafted did not specifically assign Lichtenstein's tort claims, and because the malpractice alleged occurred while Lichtenstein owned the call option, Deep Woods did not have standing to sue Pryor Cashman. Deep Woods now appeals.

The motion court correctly found that the subject assignment, which merely transferred the assignor's "entire right, title and interest in and to the [call] option contained in Paragraph 8 of" another contract, did not explicitly assign tort claims (*see e.g. Commonwealth of Pennsylvania Pub. Sch. Employees' Retirement Sys. v Morgan Stanley & Co., Inc.*, 25 NY3d 543, 550-551 [2015]; *Dexia SA/NV v Morgan Stanley*, 135 AD3d 497 [1st Dept 2016]). Unlike the assignment in *Banque Arabe et*

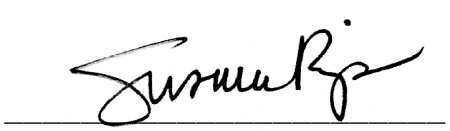
Internationale D'Investissement v Maryland Natl. Bank (57 F3d 146 [2d Cir 1995]), this assignment did not, by its terms, transfer rights to a *transaction*. The assignment is not ambiguous; even if it were (and if we therefore considered parol evidence), an unexpressed understanding does not suffice (*see Commonwealth of Pennsylvania*, 25 NY3d at 551).

However, accepting plaintiff's affidavit in opposition to defendants' motion as true, we find that plaintiff sufficiently pleaded that defendants should be equitably estopped from arguing that the assignment did not assign tort claims. Contrary to defendants' contention, estoppel can be based on silence as well as conduct (*see e.g. Rothschild v Title Guar. & Trust Co.*, 204 NY 458, 462 [1912]). Under these circumstances, where defendants drafted the assignment at a time when it represented both Lichtenstein and plaintiff, and that interpreting the assignment to exclude tort claims would mean that neither the assignor nor plaintiff, the assignee, would be able to sue defendants for malpractice for failing to exercise the call option in a timely manner, we find that the "special circumstances" exception to the

privity requirement applies (*see generally Estate of Schneider v Finmann*, 15 NY3d 306, 308-309 [2010]; *Good Old Days Tavern v Zwirn*, 259 AD2d 300 [1st Dept 1999]). To do otherwise might insulate defendants from liability for their alleged wrongdoing.

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

ENTERED: DECEMBER 6, 2016



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Tom, J.P., Renwick, Manzanet-Daniels, Gische, Webber, JJ.

1923 Thomas Grasso, et al., Index 155815/12
Plaintiffs-Respondents, 595021/14

-against-

New York University, et al.,
Defendants-Respondents.

- - - - -

New York University, et al.,
Third-Party Plaintiffs-Respondents,

-against-

Commodore Construction Corp.,
Third-Party Defendant-Respondent.

- - - - -

Commodore Construction Corp.,
Second Third-Party Plaintiff-Respondent,

-against-

Thomas J. Donnelly, Inc.,
Second Third-Party Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Joan A. Madden, J.), entered on or about September 18, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed November 16, 2016,

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

ENTERED: DECEMBER 6, 2016

CLERK

Sweeny, J.P., Acosta, Andrias, Manzanet-Daniels, Webber, JJ.

2088 In re Ericka Bolt, Index 653285/14
Petitioner-Respondent,

-against-

The New York City Department of Education,
Respondent-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Melanie West of counsel), for appellant.

Law Offices of Richard J. Washington, P.C., New York (Richard J. Washington of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Joan M. Kenny, J.), entered April 28, 2015, which granted the petition to vacate an arbitrator's opinion and award, dated October 15, 2014, terminating petitioner's employment with respondent based on her misconduct, and denied respondent's cross motion to dismiss the petition, unanimously modified, on the law, to confirm the Arbitrator's determination that petitioner is guilty as charged in Specifications 2 and 3(a), (b), (c) and (d), and to remand the matter to respondent for imposition of a lesser penalty, and otherwise affirmed, without costs.

Notwithstanding the existence of conflicting testimony, the Arbitrator's findings of misconduct on Specifications 2, 3(a), (b), (c) and (d) are supported by adequate evidence and are not

irrational (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). However, while we confirm the Arbitrator's finding, based on the testimony of three students, that petitioner "directly or indirectly," assisted several students on a standardized English Language Arts exam, we find that under the circumstances presented here the penalty of termination shocks our sense of fairness (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 234 [1974]).

"[A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved" (*Pell*, 34 NY2d at 234).

While petitioner's behavior in suggesting to several students that some of their answers might be wrong demonstrated a lapse in judgment, petitioner did not provide the students with the correct answers and there is no evidence that the incident was anything but a one-time mistake (*see Matter of Diefenthaler v Klein*, 27 AD3d 347, 349 [1st Dept 2006] ["we find it shocking to the conscience that these long-standing and well-regarded employees have been terminated for such an isolated error of judgment"]). Prior to her termination in October 2014, petitioner, a tenured teacher who had worked for respondent since 2003, had an unblemished record and, as the OSI investigator testified, was considered to be a good teacher (*see Matter of Solis v Department of Educ. of City of N.Y.*, 30 AD3d 532, 532 [2d Dept 2006] [termination disproportionate "(i)n light of, among other things, the petitioner's otherwise unblemished 12-year record as a teacher"]). Moreover, the record is devoid of evidence that would suggest petitioner could not remedy her behavior.

Matter of Carangelo v Ambach (130 AD2d 898 [3d Dept 1987], *lv denied* 70 NY2d 609 [1987]), cited by the dissent, does not mandate a different result. In *Carangelo*, the teacher was found guilty of failing to properly safeguard his students' Regents

examinations, failing to accurately grade them and altering answers. The evidence indicated that of 705 answers on 15 examinations, 79 were altered. The teacher admitted that it was apparent that the answers had been changed by someone other than the students and that he did nothing about it, and the District's expert opined that it was highly probable that the teacher made 76 of the 79 changes (*id.* at 899). In affirming the penalty of termination, the Third Department found that "[a]ltering the answers given on an examination, or even ignoring alterations obviously not made by the student, amounts to a serious breach of a teacher's obligations" (*id.* at 900). Here, petitioner pointed out to several students that certain answers on their exams might be wrong and suggested they take another look at them. She did not alter any of her student's answers or advise them what the correct answers were.

Nor does *Matter of Carlan v Board of Educ. of Lawrence Union Free School Dist.* (128 AD2d 706 [2d Dept 1987]), cited in the Arbitrator's report, mandate the penalty of termination. In *Carlan,* the petitioner was found "guilty of some 53 charges and

specifications concerning, inter alia, repeated and continuous neglect of duty, insubordination, failure to prepare and grade certain final examinations, and manipulation of students' test scores" (*id.* at 707).

All concur except Sweeny, J. who dissents in part in a memorandum as follows:

SWEENY, J. (dissenting in part)

I concur with the majority that there is no basis to overturn the factual findings reached by the Arbitrator.

I disagree that the matter should be remanded for imposition of a lesser penalty. The majority is in error to say the penalty of termination is so shocking to the conscience that it must be vacated.[1]

The majority has accepted the Arbitrator's findings wherein he found credible the testimony of three separate students that petitioner assisted them and other students by pointing out a number of answers to be changed in a statewide English proficiency exam. Where I depart from the majority is their attempt to, for example, compare an employee neglecting to do carpentry work in a lavatory (*Matter of Diefenthaler v Klein*, 27 AD3d 347 [1st Dept 2006]) to a teacher who violated the integrity of a school examination.

In a case with a fact pattern similar to this, the Third Department found "petitioner's offense goes to the heart of one

[1]I agree with the majority that the seminal cases such as *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County* (34 NY2d 222 [1974]) clearly set out the heavy burden to vacate an arbitrator's penalty determination. I disagree to their application herein.

of the most integral aspects of the education process: integrity in conducting examinations" (*Matter of Carangelo v Ambach* 130 AD2d 898 [3d Dept 1987], *lv denied* 70 NY2d 609 [1987]).

The Arbitrator found, and the majority does not challenge, that petitioner "[c]ommitted insubordination by assisting students during the administration of the statewide exams when she was expressly directed not to do so." He further found "that [petitioner] was the authority figure for these students, who were approximately ten years old at the time the incident occurred, and that she had the responsibility to set a good example for her students to emulate. [T]he message that her conduct conveyed to these young students, that cheating is permitted, was completely inappropriate and more than harmful. . . . [H]er actions demonstrated a lack of integrity and irrevocably comprised her ability to serve as a role model for students."

That petitioner had a previously unblemished record is not compelling, especially with the facts herein (*see Russo v NYC Dept. of Educ.*, 25 NY3d 946 [2015]; *Altsheler v Board. of Educ. of Great Neck Union Free School Dist.* 62 NY2d 656 [1984]; *Matter of Montanez v Department of Educ. of the City of N.Y.*, 110 AD3d

487 [1st Dept. 2013]).[2]

Although the majority may feel a lesser penalty is more appropriate, as students and parents have the right to believe the testing process is fairly administered, it cannot be said that the penalty shocked one's sense of fairness (*Pell* at 234).

I would reverse the lower court and reinstate the arbitration decision along with the penalty of termination.

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

ENTERED: DECEMBER 6, 2016

CLERK

[2]The majority's reliance in *Matter of Solis v Department of Educ. of City of N.Y.* (30 AD3d 532 [2d Dept 2006]) is not helpful as the underlying act the teacher committed in that case was not explained.

Renwick, J.P., Saxe, Gische, Webber, JJ.

2372 The People of the State of New York, Ind. 1866/14
Respondent,

-against-

Deon K.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 5, 2015, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him to a term of one year, unanimously modified, as a matter of discretion in the interest of justice, to the extent of adjudicating defendant a youthful offender, and otherwise affirmed.

We find the sentence excessive to the extent it did not include youthful offender treatment.

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2373 In re Scott A. Rubenstein, Index 100403/15
Petitioner-Appellant,

-against-

Metropolitan Transportation Authority, et al.,
Respondents-Respondents.

Davis & Ferber, LLP, Islandia (Alex J. Kaminski of counsel), for appellant.

Bee Ready Fishbein Hatter & Donovan, LLP, Mineola (Andrew K. Preston of counsel), for respondents.

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered July 24, 2015, which denied the petition seeking to annul respondents' determination, dated November 20, 2014, denying petitioner's application for accidental disability retirement, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The court did not err in declining to transfer the proceeding pursuant to CPLR 7804(g). First, because the hearing before a hearing officer was not transcribed or recorded, the hearing was not a quasi-judicial hearing which would implicate substantial evidence review under CPLR 7803(3) (*see Matter of Milt-Nik Land Corp. v City of Yonkers*, 24 AD3d 446, 447 [2d Dept

2005]). In any event, there were no material factual disputes regarding the nature, circumstances, and causation of petitioner's injuries, and thus no contested issues of substantial evidence to resolve (*see Matter of Rosenkrantz v McMickens*, 131 AD2d 389 [1987]). The only question presented in the court below was whether, based on the uncontested facts, respondents acted arbitrarily, abused their discretion, or committed an error of law, in concluding that petitioner's injuries were not sustained while he was "in service," and thus that he did not qualify for accidental disability retirement.

The court properly found that respondents rationally determined that petitioner's injuries – which occurred thirty minutes before his tour of duty was to begin, and before he had commenced his duties, in the MTA Police Department parking lot – were not sustained while he was "in service" (*see Matter of Cantello v Regan*, 154 AD2d 867 [3rd Dept 1989]; *Matter of Okon v Regan*, 185 AD2d 438 [3rd Dept 1992]). The facts here are readily distinguishable from those in *Matter of De Zago v New York State Police & Fireman's Retirement Sys.* (157 AD2d 957 [3rd Dept 1990]), relied on by petitioner, where, although the injuries occurred fifteen minutes before the starting time of the petitioner's tour, the court found that they were sustained in

the line of duty because the petitioner was in uniform at the time, and actually performing police duties pursuant to a longstanding procedure in that department that required that officers report to work fifteen to thirty minutes before their tours of duty began for "pretour preparations." Accordingly, the court below correctly found that respondents' determination was not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2374 In re Yasmine F.,

A Child Under The Age of
Fourteen Years, etc.,

Junior F.,
Respondent-Appellant,

Edwin Gould Services for Children,
Petitioner-Respondent.

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Larry S. Bachner, Jamaica, for appellant.

John R. Eyerman, New York, for respondent.

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

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Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about July 17, 2015, which, upon a finding of permanent neglect, terminated respondent father's parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7][a]). The record shows that the agency made diligent efforts to encourage and strengthen the parental relationship, including developing an

appropriate service plan and monitoring the father's compliance therewith, and regularly meeting with the father (*see Matter of Deime Zechariah Luke M. [Sharon Tiffany M.]*, 112 AD3d 535, 536 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]). The agency was not obligated to seek modification of the orders of protection prohibiting visitation or contact by the father. The father did not appeal from the orders and cannot now dispute their propriety. At any rate, the agency was justified in not seeking modification in view of the child's desire not to see her father.

The record also demonstrates that the father failed to plan for the child's future for the requisite period. Although he complied with the recommended service plan, he nonetheless failed "to gain insight into [his] parenting problems" or take responsibility for the issues that prompted foster care placement in the first place (*Matter of Leroy Simpson M. [Joanne M.]*, 122 AD3d 480, 480 [1st Dept 2014]; *see Matter of Janell J. [Shanequa J.]*, 88 AD3d 512 [1st Dept 2011]).

The court properly found that adoption was in the child's best interests (*see Matter of Latesha Nicole M.*, 219 AD2d 521 [1st Dept 1995]). The child is happy in her foster home and desires adoption, while the father continues to be aggressive and deny responsibility for his harmful conduct. Under these

circumstances, a suspended judgment was not warranted (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]). Nor was it improper to separate the child from her half-siblings, with whom she lived for only two years and whom she never expressed a desire to see (*see e.g. Matter of S. Children,* 210 AD2d 175, 176 [1st Dept 1994], *lv denied* 85 NY2d 807 [1995]).

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2375 Holly Schiebl, Index 20100/14
Plaintiff-Respondent,

-against-

Senior Care Emergency Medical Services,
Defendant-Appellant,

"Jane Doe," etc., et al.,
Defendants.

_____

Gallo Vitucci & Klar, New York (Yolanda L. Ayala of counsel), for appellant.

Forde & Associates, Eastchester (Christopher Glass of counsel), for respondent.

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Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered on or about January 16, 2015, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Senior Care Emergency Medical Services (Senior Care) for summary judgment dismissing the complaint as against it, and granted plaintiff's cross motion for leave to amend the complaint to add Senior Ride Transportation Services, LLC (Senior Ride) as a named defendant, unanimously reversed, on the law, without costs, Senior Care's motion granted, and plaintiff's cross motion denied. The Clerk is directed to enter judgment accordingly.

In this action for personal injuries sustained when an ambulette driver allegedly assaulted plaintiff, the motion court

properly found that questions existed as to whether Senior Care was the alter ego of Senior Ride, the employer of the ambulette driver. However, the affidavits of managers from both companies and the personnel file established that, at most, the employee had been disciplined in the past for rudeness and verbal abuse toward clients, and the companies had no notice of any physically violent propensities. In opposition, plaintiff failed to offer evidence that the companies knew, or had reason to be aware of, the employee's propensity to engage in the type of physically assaultive conduct that led to plaintiff's injuries (*see Coronado v 3479 Assoc. LLC*, 128 AD3d 496 [1st Dept 2015]).

We have considered all other claims and find them unavailing.

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2376 Wendy Siegfried, Index 101662/12
Plaintiff-Appellant,

-against-

West 63 Empire Associates, LLC, et al.,
Defendants-Respondents.

_____

Law Office of Bryan J. Swerling, P.C., New York (Bryan J. Swerling of counsel), for appellant.

Callahan & Fusco, LLC, New York (Christopher G. Fusco of counsel), for West 63 Empire Associates, LLC and the Chetrit Group, LLC, respondents.

Carroll McNulty Kull LLC, New York (Michael R. Scheider of counsel), for CGM EMP, LLP, respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered on or about August 12, 2014, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff alleges that she was injured when she tripped and fell on an interior stairway platform in a building owned by defendant the Chetrit Group, LLC and managed by defendant West 63 Empire Associates LLC (collectively the Chetrit Group). Defendant CGM EMP, LLC (CGM) owned and managed the restaurant in the building where plaintiff intended to dine. The record demonstrates that

even though the lease granted the Chetrit Group the right of reentry, the complaint and bill of particulars fail to allege that the complained-of condition constituted a design defect that violated a specific statutory safety provision, and plaintiff presented no evidence in opposition to establish that such a defect proximately caused the accident (*see Del Rosario v 114 Fifth Ave. Assoc.*, 266 AD2d 162 [1st Dept 1999]; *Quinones v 27 Third City King Rest.*, 198 AD2d 23 [1st Dept 1993]).

Furthermore, CGM established its entitlement to judgment as a matter of law by submitting evidence that the platform on which plaintiff tripped was open and obvious and not inherently dangerous (*see Philips v Paco Lafayette LLC*, 106 AD3d 631 [1st Dept 2013]). Plaintiff improperly raised the optical confusion theory for the first time in response to defendants' respective motions for summary judgment, and it was not alleged in her complaint or bill of particulars (*see Atkins v Beth Abraham Health Servs.*, 133 AD3d 491, 492 [1st Dept 2015]; *Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]). Even if the pleadings had properly alleged that the "watch your step" sign caused plaintiff to become optically confused, her deposition testimony shows that she saw the sign before she fell and was able to see the platform after the accident, which establishes

that the area was well lit and that the platform was neither inherently dangerous nor constituted a hidden trap (*see Broodie v Gibco Enters., Ltd.*, 67 AD3d 418, 418-419 [1st Dept 2009])

Assuming plaintiff's expert affidavit is properly before this Court, it fails to raise a triable issue of fact. The expert's opinion was conclusory and not supported by references to specific, applicable safety standards or practices (*see Boatwright v New York City Tr. Auth.*, 304 AD2d 421 [1st Dept 2003]).

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2379 The People of the State of New York, Ind. 3606/10
Respondent,

-against-

Roger Reid,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Cassandra Mullen, J.), entered June 19, 2014, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure from defendant's presumptive risk level three to level two (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). Defendant's speculative argument that he was not in a position to see that the 10-year-old victim was a child, since he touched her buttocks while hiding underneath a subway bench, is belied by his plea allocution. The remaining mitigating factors cited by defendant were outweighed by the seriousness of the underlying offense, defendant's recidivism, and his two prior

level three adjudications (*see People v Reid*, 86 AD3d 438 [1st Dept 2011]; *People v Reid*, 49 AD3d 338 [1st Dept 2008], *lv denied* 10 NY3d 713 [2008]; *see also People v Corian*, 77 AD3d 590 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]).

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2381 Stephane Cosman Connery, et al., Index 401336/05
Plaintiffs-Respondents,

-against-

Burton S. Sultan,
Defendant-Appellant.

_____

Burton S. Sultan, appellant pro se.

Jacobs & Burleigh, LLP, New York (Arthur J. Jacobs of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 26, 2016, which, inter alia, granted plaintiffs' motion to direct the Department of Finance to turn over to plaintiffs funds that defendant had deposited to stay the enforcement of a judgment, and denied defendant's motion pursuant to CPLR 5015 to vacate the judgment, unanimously affirmed, with costs.

Defendant's argument that the motion court lacked jurisdiction to enforce the stipulation of settlement is barred by the doctrine of law of the case (*see Jacoby & Meyers, LLP v Flomenhaft*, 137 AD3d 547 [1st Dept 2016]). In a prior appeal, this Court concluded that the court had jurisdiction (*Connery v Sultan*, 126 AD3d 525 [1st Dept 2015], *lv dismissed* 26 NY3d 991 [2015]). The documents upon which defendant now claims to rely

in support of this argument do not establish the existence of a fully executed stipulation of discontinuance, and, in any event, were in defendant's possession at the time of the prior appeal.

Given that, as the motion court observed, both sides in this long and contentious litigation have pursued aggressive tactics and maintained conflicting positions, we conclude that sanctions against defendant are not appropriate.

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

ENTERED: DECEMBER 6, 2016

CLERK

Saxe, J.P., Richter, Gische, Webber, JJ.

2382 The People of the State of New York, Ind. 8099/88
Respondent,

-against-

Dutvall Guzman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Andrew J. Zapata of counsel), for respondent.

_____

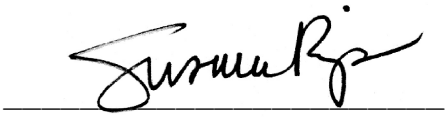
Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on August 5, 2015, which adjudicated defendant a risk level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points for defendant's age at the time of the underlying sexual offense and for his unsatisfactory conduct while confined. In any event, regardless of whether defendant's correct point score is 135 or 115 points, he remains a level three offender, and we find no basis for a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the risk assessment instrument or outweighed by the egregiousness of the underlying crime.

The court properly designated defendant a sexually violent offender because he was convicted of an enumerated offense, and the court lacked discretion to do otherwise (*see People v Bullock*, 125 AD3d 1 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]). There is no exception for a person such as defendant who was convicted of an enumerated offense and sentenced as a juvenile offender under Penal Law § 70.05, and his argument that he is constitutionally entitled to such an exception is unavailing.

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

ENTERED: DECEMBER 6, 2016



CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

1383-
1384

In re Zaya Faith Tamarez Z.,

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

Madelyn Enid T., et al.,
Respondents-Appellants,

The Children's Aid Society,
Petitioner-Respondent.

_____

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

Law Office of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for Erady Z., appellant.

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

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the child.

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about March 9, 2015, which, upon findings of permanent neglect, terminated respondents' parental rights to the subject child and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The determination that the child was permanently neglected by her biological parents is supported by clear and convincing

evidence (*see* Social Services Law § 384-b[7][a]). The agency engaged in diligent efforts to encourage and strengthen respondents' relationship with the child by developing an individualized plan tailored to fit their respective situations and needs, including multiple referrals for domestic violence counseling, parenting skills, individual counseling, visitation and random drug testing (*see e.g. Matter of Adam Mike M. [Jeffrey M.]*, 104 AD3d 572, 573 [1st Dept 2013]). Despite these diligent efforts, the parties failed to attend or benefit from the services offered, and continued to deny responsibility for the conditions that led to the child's removal (*see id.*; *Matter of Irene C. [Reina M.]*, 68 AD3d 416 [1st Dept 2009]).

The mother's argument that she was afforded ineffective assistance of counsel because counsel failed to object to questions that were leading and designed to elicit hearsay responses, is unavailing. The record belies her claims and in fact demonstrates that she received meaningful representation (*see Matter of Jonathan LL.*, 294 AD3d 752 [3d Dept 2002]).

The agency was under no special obligation to treat the father more favorably because he was incarcerated for an extended period during the relevant permanent neglect period and, even when he was not in prison, he failed to engage in services or

visit the child regularly. The mother, too, was aware of the visitation schedule and routinely failed to appear (*see Matter of Emily A.*, 216 AD2d 124 [1st Dept 1995]).

The preponderance of the evidence supports the determination that termination of the parties' parental rights was in the best interests of the child (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The record shows that the child has been in a stable and loving foster home for several years, where all of her basic needs are being met and her foster mother wishes to adopt her (*see Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]). The circumstances presented do not warrant a suspended judgment.

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

ENTERED: DECEMBER 6, 2016

CLERK

CORRECTED ORDER- DECEMBER 12, 2016

Renwick, J.P., Saxe, Gische, Webber, JJ.

2387- Index 121987/00
2388 Leonard **Rosenbaum**,
Plaintiff-Respondent,

-against-

Joseph **Rosenbaum**,
Defendant-Appellant.

_____

Kurzman Eisenberg Corbin & Lever, LLP, White Plains (Michael H. Friedman of counsel), for appellant.

Wimpfheimer & Wimpfheimer, New York (Michael C. Wimpfheimer of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about August 10, 2015, awarding plaintiff the total sum of $349,636.49, unanimously affirmed, without costs. Appeal from resettled order, same court and Justice, entered August 10, 2015, which granted plaintiff's motion and cross motion, and denied defendant's cross motion, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff has the burden of demonstrating by a preponderance of the credible evidence that service was properly made on defendant pursuant to CPLR 308(2) (*see Navarro v Singh*, 110 AD3d 497, 498 [1st Dept 2013]).

The court properly concluded that defendant was served with

the complaint based on the attorney's testimony that he personally went to defendant's residence and handed defendant the summons and complaint, after defendant identified himself. The court's determination, which turned on credibility, is entitled to deference (*see Arrufat v Bhikhi*, 101 AD3d 441, 442 [1st Dept 2012]).

The court had the authority to correct the judgment to reflect the reduced ad damnum clause of the complaint because the change did not prejudice defendant or affect a substantial right (*see* CPLR 2001).

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

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2389 The People of the State of New York, Ind. 5583/03
Respondent,

-against-

Oscar Santos,
Defendant-Appellant.

_____

Wilens & Baker, New York (Daniel S. Kratka of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered August 28, 2013, which denied defendant's CPL 440.10 motion to vacate judgment, unanimously reversed, on the law, and the matter remanded for an evidentiary hearing.

This case presents factual issues requiring a hearing into whether defendant was deprived of effective assistance of counsel under *People v McDonald* (1 NY3d 109 [2003]) by way of erroneous and prejudicial immigration advice. Defendant alleges that his attorney erroneously advised him that if he pleaded guilty to a drug sale count with a sentence of probation, he would not be subject to deportation, but if he refused the plea offer, proceeded to trial and lost, he would go to prison and then be deported. Defendant's claim is corroborated, to some extent, by

statements made to present counsel by the attorney who represented defendant at the time of the plea (*see People v Rosario*, 132 AD3d 454, 455 [1st Dept 2015]). The standard "no other promises" disclaimer in defendant's plea allocution does not, as a matter of law, defeat his claim of erroneous legal advice. This case warrants a hearing at which defendant may establish the advice he actually received regarding the deportation consequences of his plea. To the extent that, in denying the motion, the court relied on defendant's delay in bringing it, we conclude that the record is undeveloped with regard to when defendant learned of the true immigration consequences of his conviction; accordingly, this is also a proper subject for the hearing.

This case also warrants a hearing on the prejudice prong of defendant's claim. Defendant made a sufficient showing to raise an issue of fact as to whether he could have rationally rejected the plea offer under all the circumstances of the case, including the serious consequences of deportation and his incentive to remain in the United States (*see People v Samuels*, __AD3d__, 2016 NY Slip Op 06423 [1st Dept 2016]; *People v Rosario*, 132 AD3d at 455). Further, defendant sufficiently alleges that if

immigration consequences had been factored into the plea bargaining process, counsel might have been able to negotiate a different plea agreement that would not have resulted in automatic deportation.

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2390 Stewart Title Insurance Company, etc.,
Plaintiff-Appellant,

-against-

Wingate, Kearney & Cullen, also known as Wingate, Kearney & Cullen, et al.,
Defendants-Respondents.

Index 154681/14

Thomas G. Sherwood, LLC, Garden City (Amy E. Abbandondelo of counsel), for appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Stewart G. Milch of counsel), for respondents.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered January 20, 2015, which granted defendants' motion to dismiss the complaint, pursuant to CPLR 3211(a)(4), on the ground that there is another action pending between the same parties for the same cause of action in Kings County, and denied plaintiff's cross motion to stay the action pending a determination of the appeal in the Kings County action, unanimously affirmed, with costs.

Two of the causes of action in the instant action are identical to the two causes of action asserted in the Kings County action, which has been reinstated on appeal (*Stewart Tit. Ins. Co. v Wingate, Kearney & Cullen*, 134 AD3d 924 [2d Dept

2015], *lv dismissed* 27 NY3d 950 [2016]). The third, brought pursuant to RPAPL 1501(4), arises out of the same facts as the other claims and asserts a closely related theory. Since in determining a motion to dismiss pursuant to CPLR 3211(a)(4), "it is inconsequential that different legal theories or claims were set forth in the two actions" (*Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 444-445 [1st Dept 2014]), the motion court properly exercised its discretion in dismissing the instant action.

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: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2391 Jamie Rios Cruz, Index 401867/11
Plaintiff-Respondent,

-against-

Mall Properties, Inc., et al.,
Defendants,

3rd & 60th Associates, L.P.,
Defendant-Appellant,

The City of New York,
Defendant-Respondent.

_____

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Ronemus & Vilensky LLP, Garden City (Lisa M. Comeau of counsel), for Jamie Rios Cruz, respondent.

Zachary W. Carter, Corporation Counsel, New York (Ryan D. Budhu of counsel), for the City of New York, respondent.

_____

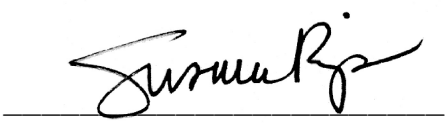
Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about March 4, 2016, which, insofar as appealed from, denied the motion of defendant 3rd & 60th Associates, L.P. (Associates) for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Associates failed to establish that plaintiff's trip and fall was caused by a defect in the curb, for which defendant City of New York may be held liable, and not by a defect in the

sidewalk abutting Associates' property or between the sidewalk and the curb, for which Associates may be held liable (*see* Administrative Code of City of NY §§ 7-210[c], 19-101[d]; *Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]; *Yousef v Kyong Jae Lee*, 103 AD3d 542 [1st Dept 2013]). In support of its motion, Associates relied on plaintiff's deposition and 50-h testimony in which he consistently testified that he fell on the sidewalk, or on a defect in between the sidewalk and the curb, referring to photographs of the location. The affidavit of Associates' expert engineer was of little probative value since he did not inspect the accident until years later, after repairs had been made (*see Sarmiento v C & E Assoc.*, 40 AD3d 524, 526-527 [1st Dept 2007]). The engineer also relied on the same photographs that plaintiff provided, which do not eliminate the possibility of a finding that plaintiff fell due to a defect in the sidewalk or between the sidewalk and the curb for which Associates is responsible.

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

ENTERED: DECEMBER 6, 2016



CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2392 The People of the State of New York, Ind. 4227/13
Respondent,

-against-

Hector Portalatin,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Anthony J. Ferrara, J.), entered on or about November 24, 2015, which adjudicated defendant a level two sexually violent sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). Defendant did not establish that his health problems would minimize the likelihood of recidivism (*see e.g. People v*

Rodriguez, 101 AD3d 630 [1st Dept 2012], *lv denied* 21 NY3d 851 [2012]), and his expression of remorse and lack of additional sex offenses were adequately taken into account by the risk assessment instrument.

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

ENTERED: DECEMBER 6, 2016

CLERK

Renwick, J.P., Saxe, Gische, Webber, JJ.

2393 The People of the State of New York, Ind. 157/14
Respondent,

-against-

Rolando Santi,
Defendant-Appellant.

_____

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

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

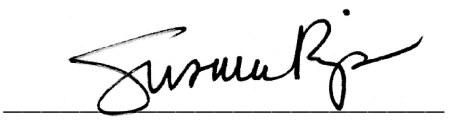
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura Ward, J.), rendered June 30, 2014,

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

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

ENTERED: DECEMBER 6, 2016



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

Renwick, J.P., Saxe, Gische, Webber, JJ.

2394N- Index 21822/16E
2394NA IME Watchdog, Inc.,
Plaintiff-Respondent,

-against-

Baker, McEvoy, Morrissey &
Moskovits, P.C., et al.,
Defendants-Appellants.

_____

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for Baker, McEvoy, Morrissey & Moskovits, P.C., appellant.

Marjorie E. Bornes, Brooklyn, for American Transit Insurance Company, appellant.

Trivella & Forte, LLP, White Plains (Arthur J. Muller, III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered April 20, 2016, which, to the extent appealed from as limited by the briefs, denied defendant Baker, McEvoy, Morrissey & Moskovits, P.C.'s motion to change venue from Bronx County to Kings County, and granted plaintiff's motion for a temporary restraining order enjoining defendants from, inter alia, excluding non-attorneys from independent medical examinations (IMEs), unanimously reversed, on the law, without costs, the motion to change venue granted, and the motion for a preliminary injunction denied. Appeal from an interim order, same court and

Justice, entered April 8, 2016, unanimously dismissed, as subsumed in the appeal from the subsequent order.

On a motion to change venue, pursuant to CPLR 510(1), "defendant's burden ... is limited to establishing that the designated county is improper" (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [1st Dept 2009]). Baker McEvoy clearly met its burden of proving that the designated county, in which none of the parties resided, was improper (CPLR 503[a]). Having designated an improper county for venue and not submitted an affidavit showing either that its designation was proper or that Baker McEvoy's designation was improper, plaintiff forfeited its right to select the venue (*see Montilla v River Park Assoc.*, 282 AD2d 389 [1st Dept 2001]; *Lynch v Cyprus Sash & Door Co.*, 272 AD2d 260, 261 [1st Dept 2000]).

In this action, plaintiff IME Watchdog, Inc. (IMEWD), a company which provides plaintiffs' personal injury firms with non-attorney "watchdogs" to accompany plaintiffs to IMEs, failed to demonstrate the elements necessary for entitlement to injunctive relief, to wit (1) a likelihood of success on the merits; (2) irreparable injury; and (3) that the balance of equities are in its favor (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839 [2005]; *Doe v Axelrod*, 73 NY2d 748, 750

[1988]).

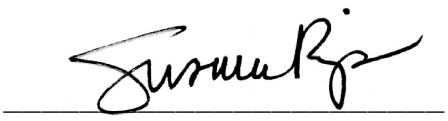
There has been no showing that the alleged tortious conduct which plaintiff seeks to enjoin, Baker McEvoy's exclusion of non-attorneys from IMEs (except under certain circumstances), exceeds its professional duty to defend its clients (*see Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]) or was tainted by fraud, collusion, malice or bad faith (*see Purvi Enters., LLC v City of New York*, 62 AD3d 508, 509-510 [1st Dept 2009]), especially since several Supreme Court decisions are in Baker McEvoy's favor on the issue of a non-attorney's presence at IMEs.

Additionally, plaintiff has not established that Baker McEvoy's conduct was without excuse and/or justification, an element of the claims for tortious interference with a contract (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]), abuse of process (*see Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 403 [1975]), and prima facie tort (*see Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 332 [1983]), or was accompanied by the use of wrongful means or motivated solely by malice, a necessary element of its cause of action for tortious interference with contract (*see Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1st Dept 1999]).

Plaintiff's claims of irreparable injury are belied by the fact that business has grown every year, and the testimony of plaintiff's three witnesses reflects that their firms' change in position, on the use of watchdogs, was made in response to adverse court rulings in their cases. The proper remedy, in those instances, would be to appeal the adverse decisions, and not commence a separate action against the attorneys who secured those rulings.

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

ENTERED: DECEMBER 6, 2016



CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2397 In re The People of the State of New York ex rel. Robert Gist, Jr., Petitioner-Appellant,

-against-

Warden, Eric M. Taylor Center, et al., Respondents-Respondents.

Index 250733/15

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

Eric T. Schneiderman, Attorney General, New York (Mark H. Shawhan of counsel), for respondents.

Judgment (denominated a decision), Supreme Court, Bronx County (Alvin Yearwood, J.), entered November 12, 2015, denying the petition for a writ of habeas corpus, and dismissing the proceeding, unanimously affirmed, without costs.

Executive Law § 259-i(3)(f)(i) provides that a final parole revocation hearing "shall be scheduled to be held within ninety days of the probable cause determination," unless a statutory exception applies. This provision was satisfied by the commencement of petitioner's final parole revocation hearing, as scheduled, on April 13, 2015, 88 days after probable cause was found, notwithstanding that the hearing was adjourned, after four parole officers had testified that day, to allow the New York State Department of Corrections and Community Supervision to call

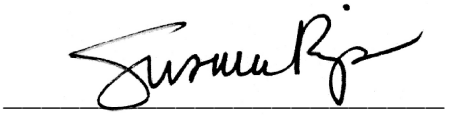
a fifth parole officer to provide further material testimony (*see e.g. People ex rel. Chesner v Warden, Otis Bantum Correctional Ctr.*, 71 AD3d 499 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]; *People ex rel. Morant v Warden, Rikers Is.*, 35 AD3d 208 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]).

In any event, even under petitioner's view that Executive Law § 259-i(3)(f)(i) requires the final hearing to be completed within 90 days of the probable cause determination, petitioner's counsel "consent[ed]" to the adjournments beyond the 90-day limit (Executive Law § 259-i[3][f][i]). Counsel's belated objection to the final adjournment was ineffective to negate counsel's previous participation in scheduling and agreeing to that date.

Petitioner's claim that he was deprived of due process is unavailing (*see Morrissey v Brewer*, 408 US 471, 488 [1972]).

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

ENTERED: DECEMBER 6, 2016



CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2398-
2398A In re Chris R.,

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

_____

George E. Reed, Jr., White Plains, for appellant.

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

_____

Orders of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about August 27, 2015, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crimes of burglary in the third degree and criminal trespass in the third degree, and placed him with the Close to Home program for a period of 12 months, unanimously affirmed, without costs.

Although they are reviewable as questions of law (*see Matter of Aaron B.*, 74 AD3d 534, 535 [1st Dept 2010]), appellant's challenges to his admission do not warrant reversal. The admission was made knowingly, intelligently and voluntarily. The court adequately explained the rights being waived as well as the

possible dispositional alternatives, and appellant's mother's allocution sufficiently incorporated appellant's allocution by reference (*see Matter of Sean B.*, 99 AD3d 433 [1st Dept 2012]). We find no conflict of interest on the mother's part that would warrant vacatur of the admission. The court was under no obligation to ask appellant why he no longer wanted a fact-finding hearing.

Appellant's challenge to his placement is moot because the period of placement has expired (*see Matter of Omari W.*, 104 AD3d 460 [1st Dept 2013]).

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

ENTERED: DECEMBER 6, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2399 Nalanee Narine, et al., Index 101035/10
Plaintiffs-Respondents,

-against-

Metropolitan Transportation Authority, et al.,
Defendants,

Shuttle Express Coach, Inc., et al.,
Defendants-Appellants.

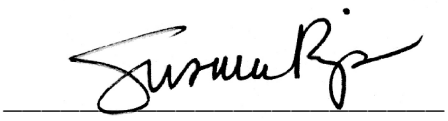
_____

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Arlene P. Bluth, J.), entered December 23, 2015,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated November 7, 2016,

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

ENTERED: DECEMBER 6, 2016



CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2402 Michael Leibman & Associates, Inc., also known as Leibman & Associates, Inc., Plaintiff-Respondent, Index 653420/12

-against-

Ultimate Combustion Co., Inc., trading as UCC Technology, et al., Defendants-Appellants.

_____

Harrington, Ocko & Monk, LLP, White Plains (Michael W. Freudenberg of counsel), for appellants.

Schwartz & Blumenstein, New York (Clifford Schwartz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about January 29, 2015, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendants failed to demonstrate conclusively that the June 6, 2009 agreement pursuant to which defendant Ultimate Combustion Co., Inc. retained plaintiff as a broker to procure a purchaser for the corporation's assets is illegal, void or unenforceable. They argue that plaintiff performed broker services in Florida without a license to do so, in contravention of Florida Statutes § 475.41. Defendants are correct that the statute applies to business brokers, as well as real estate brokers, operating

within Florida (*see Meteor Motors, Inc. v Thompson Halbach & Assoc.*, 914 So 2d 479 [Fla Dist Ct App 2005]; *see also Hendricks v Department of Bus. & Professional Regulation*, 183 So 3d 1172, 1174 [Fla Dist Ct App 2016]). However, issues of fact exist as to whether plaintiff performed any broker services in the State of Florida.

Defendants argue that the broker agreement is unenforceable because it fails to define its duration, an essential term. However, if the duration can be "fairly and reasonably fixed" by the intent of the parties and the surrounding circumstances, the court may supply it (*Haines v City of New York*, 41 NY2d 769, 772 [1977]), and an issue of fact as to the parties' intention is presented by disputed written evidence of a four-year term. An issue of fact also exists as to defendants' contention that Ultimate Combustion Co., Inc. never entered into the contract, which refers to "UCC Technology"; parol evidence is needed to determine whether the parties intended to bind Ultimate Combustion Co., Inc. (*see Korff v Corbett*, 18 AD3d 248, 251 [1st Dept 2005]).

Defendants failed to establish prima facie that they had no "meaningful choice" about entering into the agreement and that the terms were "unreasonably favorable" to plaintiff (*see Gillman*

v Chase Manhattan Bank, 73 NY2d 1, 10-11 [1988] [internal quotation marks omitted]).

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

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

ENTERED: DECEMBER 6, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2403 Benal Serin, Index 161810/13
Plaintiff-Appellant,

-against-

Soulcycle Holdings, LLC,
sued herein as Soulcycle, LLC,
Defendant-Respondent.

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent.

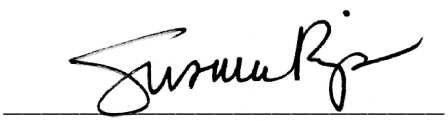
Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered October 13, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Although defendant made a prima facie showing that the spin cycle on which plaintiff was injured was not defective and that defendant had not created or had notice of any such defect, issues of fact exist as to whether defendants were negligent in failing to properly instruct plaintiff, a first-time spin cycler, in the operation of the cycle and of the nature of the risks involved (*see Scheck v Soul Cycle E. 83rd St., LLC*, 2012 NY Slip 32021[U] [Sup Ct, NY County 2012, Gische, J.]). For these same reasons, issues of fact also exist as to plaintiff's assumption

of concealed or unreasonably increased risks (*see Morgan v State of New York*, 90 NY2d 471, 485 [1997]; *Valverde v Great Expectations, LLC*, 131 AD3d 425 [1st Dept 2015]). We find plaintiff's claim is not barred by the release (General Obligations Law § 5-326).

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

ENTERED: DECEMBER 6, 2016



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Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2404 Optical Communications Groups, Inc., et al., Plaintiffs-Appellants, Index 159337/14

-against-

Rubin, Fiorella & Friedman, LLP, Defendant-Respondent.

Law Office of Victor A. Worms, New York (Victor A. Worms of counsel), for appellants.

Furman Kornfeld & Brennan LLP, New York (Andrew S. Kowlowitz of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about April 1, 2015, which, to the extent appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1), unanimously affirmed, without costs.

In this legal malpractice action, plaintiff Optical asserts that its former attorneys, Rubin, Fiorella and Friedman, mishandled the litigation of a maritime action in which it sought to recover damages caused when its submarine fiber optical cable was struck and destroyed by an anchor inadvertently released from a cargo vessel owned by Marbulk Canada, Inc. Rubin Fiorella, on behalf of Optical, brought a maritime action in federal court against the vessel and Marbulk. In the maritime action, Optical

alleged that the vessel dropped its anchor in an area designated for laying cable, and that Marbulk was therefore liable. The parties agreed that Marbulk would be liable only if the vessel was located in the designated cable area when its anchor dropped.

Marbulk successfully moved for summary judgment dismissing the complaint in the maritime action. The district court found, inter alia, that sonar data evidence submitted by plaintiff Optical showed that the vessel was outside the boundaries of the designated cable area (*Optical Communications Group, Inc. v M/V Ambassador*, 938 F Supp 2d 449 [SD NY 2013] [*Optical I*], affd. 558 Fed Appx 94 [2d Cir 2014] [*Optical II*]). The conclusion was also supported by evidence submitted by Marbulk, specifically, a screen shot of Simplified Vessel Data Radar (SVDR) data that pinpointed the location of the vessel outside the boundaries of the cable area. As indicated, that decision was affirmed on appeal by the Second Circuit.

In the instant action, plaintiff alleges that, as noted by the Second Circuit in *Optical II*, Rubin Fiorella failed to preserve an objection to the SVDR data submitted by Marbulk in support of its motion, and also failed to renew a discovery motion that had been denied without prejudice to renewal. Optical alleges that but for these failures, it would have defeated the

motion for summary judgment and ultimately prevailed in the maritime action.

The motion court properly found that the Second Circuit's order in *Optical II*, affirming *Optical I*, is documentary evidence within the meaning of CPLR 3211(a)(1), and that its holding flatly contradicts the legal conclusions and factual allegations in the complaint (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432 [1st Dept 2014]; *Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 [1st Dept 2003], *lv denied* 100 NY2d 512 [2003]).

Even assuming that Rubin Fiorella had successfully challenged the admissibility and authenticity of the SVDR data proffered by Marbulk, the district court found that plaintiff Optical's own sonar data evidence, submitted through its expert, indicated that the vessel was outside the cable field when it released its anchor. Thus, plaintiff's evidence submitted in the maritime action refutes its allegations in this action that, but for Rubin Fiorella's negligence, it would have prevailed in the maritime action (*see e.g. Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

The district court's decision also refutes Optical's allegation that, but for Rubin Fiorella's failure to conduct

further discovery, it would have prevailed in the maritime action, since that court found that the record with respect to the location of the vessel was "immutable and complete" so that "further discovery will not recreate the events underlying the anchor drop or enhance the existent evidence in any meaningful way" (*Optical I*, 938 F Supp 2d at 464; *see Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]).

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ENTERED: DECEMBER 6, 2016

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Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2405 Todd Courtney, et al., Index 108499/07
Plaintiffs-Appellants-Respondents,

-against-

18th & 8th LLC, et al.,
Defendants-Respondents-Appellants.

_____

Law Office of Aaron M. Schlossberg, P.C., New York (Aaron M. Schlossberg of counsel), for appellants-respondents.

Mauro Lilling Naparty LLP, Woodbury (Eric Z. Leiter of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 19, 2015, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the third and fourth causes of action, and denied the motion as to the first and second causes of action, and denied plaintiffs' motion for summary judgment and leave to amend the complaint to add a defendant, unanimously modified, on the law, to grant defendants' motion for summary judgment dismissing the first and second causes of action, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

The motion court correctly dismissed the third and fourth causes of action pursuant to the doctrine of law of the case. In

a prior order from which plaintiffs did not appeal, the court denied their motion for leave to amend the complaint to add those causes of action.

As to the first and second causes of action, defendants established prima facie that plaintiffs had no right to run a sewer pipe from 304 West 18th Street LLC's property to the main sewer line through defendant 18th & 8th LLC's property and that they, defendants, had a right to abate the resulting nuisance by self-help. Plaintiffs failed to raise an issue of fact in opposition. There is no documentary record of the existence of the sewer pipe on 18th & 8th LLC's property and therefore no indication that plaintiffs had been granted an express easement in the property. Nor did plaintiffs acquire an easement by prescription, since the sewer pipe was underground, and therefore the use of 18th and 8th LLC's property was not open and notorious (*see Mee Wah Chan v Y & Dev. Corp.*, 82 AD3d 942 [2d Dept 2011]). Indeed, neither plaintiffs nor defendants had any knowledge of the sewer pipe until 18th & 8th LLC's property was excavated, and the pipe was found to be the source of sewage flowing onto the property.

In the face of plaintiffs' failure to abate the condition of sewage flowing onto 18th & 8th LLC's property, despite

defendants' repeated requests, a Department of Environmental Protection inspection describing the condition as "creat[ing] a nuisance and health hazard," and the Department of Health and Mental Hygiene's issuance of a violation and assessment of a fine, defendants were entitled, after nearly two months, to take measures themselves to abate the trespass and nuisance (*see generally Turner v Coppola*, 102 Misc 2d 1043, 1046-1047 [Sup Ct, Nassau County 1980], *affd* 78 AD2d 781 [2d Dept 1980]).

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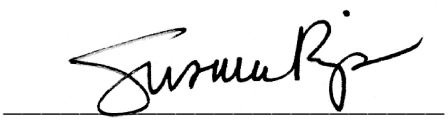

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2406 In re Melissa H.,
Petitioner-Respondent,

-against-

Shameer S.,
Respondent-Appellant.

_____

Larry S. Bachner, Jamaica, for appellant.

Proskauer Rose LLP, New York (Steven H. Holinstat of counsel), for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Annette Louise Guarino, Ref.), entered on or about October 21, 2015, which, upon granting petitioner mother's motion for summary judgment and finding that respondent father had committed the family offense of harassment in the second degree and that aggravating circumstances existed, issued a two-year order of protection against the father, unanimously modified, on the law, to strike the finding of aggravating circumstances, and otherwise affirmed, without costs.

The Family Court correctly determined that the father had committed the family offense of harassment in the second degree, warranting a two-year order of protection (*see* Family Ct Act § 842). The father's criminal conviction of harassment in the

second degree in connection with a September 20, 2011 incident "serves as conclusive proof of the underlying facts" in the family offense proceeding, "since he had a full and fair opportunity to contest the issues raised in the criminal proceeding" (*Matter of Angela C. v Harris K.*, 102 AD3d 588, 589 [1st Dept 2013]).

The father created no triable issue of fact regarding the incident (*Matter of Suffolk County Dept. of Social Servs. v James M.*, 83 NY2d 178, 183 [1994]). Although the criminal complaint and family offense petition initially had alleged that the incident occurred on September 19, 2011, the mother explained that she had been confused because the incident occurred so early in the morning, at 2:00 a.m., on September 20, 2011. The father participated in both the criminal and family offense proceedings and therefore had ample notice of the correct date and the conduct at issue, and ample opportunity to defend himself against the allegations, notwithstanding the change in the date.

The children, who were named in the family offense petition and represented by counsel at the family offense proceeding, were properly named in the order of protection. Further, the father was not denied his right to a fair trial by the delay in the proceeding. He consented to adjourn the proceeding pending

resolution of the criminal trial, and, as he acknowledged, it made sense to do so because a criminal conviction could alleviate the need for a fact-finding hearing in the family offense proceeding (*see* US Const 6th, 14th Amends; NY Const, art I, § 6). The mere fact that the offense had occurred years earlier by the time the family offense proceeding commenced does not warrant denial of the order of protection (Family Ct Act § 812[1]; *Matter of Opray v Fitzharris*, 84 AD3d 1092, 1093 [2d Dept 2011]).

The Family Court's finding of aggravating circumstances based on the conviction of harassment in the second degree is not supported by the sparse record in this summary judgment proceeding (Family Ct Act §§ 827[a][vii]; 842). Based on the documents submitted to the Family Court, the Criminal Court made no such finding, and it acquitted the father of attempted assault in the third degree, menacing, attempted criminal possession of a weapon, and attempted endangering the welfare of a child, suggesting that it may not have credited the allegations that could have constituted aggravating circumstances.

Nor is there sufficient evidence in the record to otherwise support such a finding. The father's convictions regarding three other incidents in September and October 2011 were for relatively minor crimes, and evidence of the underlying conduct is not in

the record. Further, the mother's reliance on evidence from a prior fact-finding hearing and determination is unavailing, since this Court deemed that hearing and determination "procedurally flawed and unfair" (*Matter of Melissa H. v Shameer S.*, 100 AD3d 535, 535 [1st Dept 2012]). The only other evidence the mother cites, regarding the father looking at the mother and the children while driving up next to them after the parties left the visitation agency, is not sufficient to support a finding of aggravating circumstances.

This Court lacks jurisdiction to review the father's challenges to the dismissal of his own petitions, since he did not mention the dismissal in his notice of appeal (CPLR 5515[1]; *Commissioners of the State Ins. Fund v Ramos*, 63 AD3d 453 [1st Dept 2009]).

THIS CONSTITUTES THE DECISION AND ORDER
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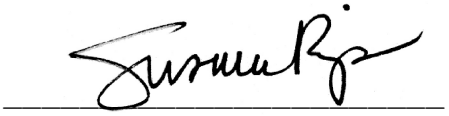

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2407 The People of the State of New York, Ind. 4358/10
Respondent,

-against-

Tasheem Morris,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. Conviser, J.), rendered April 29, 2014, as amended June 12, 2014, convicting defendant, after a jury trial, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

Even though the court should have excluded evidence that, during a phone conversation shortly before the homicide, the victim told his brother that defendant had stared at him, causing him to fear that something bad was going to happen, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence of defendant's guilt, and other

evidence established both the fact of the "staring" incident and the antagonism between defendant and the victim that provided a motive for the crime.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
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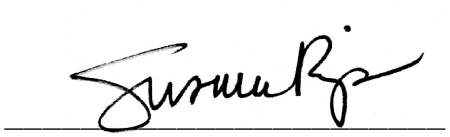

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2408 In re Charlotte E.,
Petitioner-Appellant,

-against-

Alan P.,
Respondent-Respondent.

- - - - -

Her Justice Inc., New York Legal Assistance Group and Sanctuary for Families,
Amici Curiae.

_____

Segal & Greenberg LLP, New York (Philip C. Segal of counsel), for appellant.

Alan P., respondent pro se.

Orrick, Herrington & Sutcliffe LLP, New York (René Kathawala of counsel), for amici curiae.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about July 14, 2016, which denied petitioner's objections to the Support Magistrate's order on motion, dated June 3, 2016, denying her motion to vacate a prior order of the Support Magistrate dismissing the petition, without prejudice, for failure to appear, unanimously reversed, on the facts, without costs, the motion to vacate granted, and the matter remanded for prompt resolution.

Petitioner demonstrated a reasonable excuse and a meritorious cause of action warranting vacatur of the dismissal

of the petition due to nonappearance (CPLR 5015[a][1]; *see Matter of Commissioner of Social Servs. of the City of N.Y. v Juan H.M.*, 128 AD3d 501 [1st Dept 2015]; *see also Matter of Patricia J. v Lionel S.*, 203 AD2d 979 [4th Dept 1994]). Petitioner explained that she learned on the day before the scheduled appearance date that the caregiver she had hired to stay with the parties' severely disabled child on that date was no longer available. Accordingly, she contacted the part clerk's office, via telephone and fax, explaining that she was unable to appear the next day and requesting an adjournment. While she was unable, due to computer failure, to present a copy of her letter to the court, petitioner submitted a printout of her home telephone service carrier's call log, which reflected the calls she placed to the court on the day before the scheduled appearance date.

Petitioner demonstrated the existence of a meritorious cause of action for child support enforcement by submitting an affidavit showing that respondent's child support arrears at that time exceeded $100,000 (*see e.g. Matter of Dellagatta v McGillicuddy*, 31 AD3d 549 [2d Dept 2006]). Moreover, we find, contrary to Family Court, that petitioner will be prejudiced by having to refile the petition, which seeks arrears that would then be beyond the applicable statute of limitations (*see Matter*

of Mary P. v Joseph T.P., 132 AD3d 404 [1st Dept 2015]; *see also Tauber v Lebow*, 65 NY2d 596 [1985]). Furthermore, the child will be prejudiced by further protracted proceedings (*see e.g. Matter of Sanjivini K.*, 40 NY2d 1025, 1026-1027 [1976]).

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ENTERED: DECEMBER 6, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2409-
2409A-
2409B

Index 652082/14

U-Trend New York Investment L.P., individually and derivatively on behalf of nominal defendant Hospitality Suite International, S.A. and its wholly-owned subsidiary US Suite Corp.,
Plaintiff-Respondent,

-against-

US Suite LLC, et al.,
Defendants-Appellants,

Hospitality Suite International, et al.,
Nominal Defendants-Appellants.

_____

Daley Law, P.C., New York (M. Teresa Daley of counsel), for US Suite LLC and 440 West 41st LLC, appellants.

Sankel, Skurman & McCartin, LLP, New York (Claudio Dessberg of counsel), for Aura Investments Ltd., Hospitality Suite International, S.A. and US Suite Corp., appellants.

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for respondent.

_____

Order (denominated order and judgment [one paper]), Supreme Court, New York County (Charles E. Ramos, J.), entered June 9, 2016, which directed distribution of the subject sales proceeds to plaintiff with related relief, unanimously affirmed, with costs. Appeals from order, same court and Justice, entered November 13, 2015, which granted plaintiff's motion for partial summary judgment declaring plaintiff to be the source of certain

subject funds, and from order, same court and Justice, entered April 14, 2016, which denied a defense motion for the court's recusal and related relief, unanimously dismissed, without costs, as subsumed in and superseded by, respectively, the appeal from the June 9, 2016 order.

We perceive no basis for disturbing the court's order directing distribution to plaintiff of the net proceeds of the sale of the property at issue. The court properly determined that plaintiff was entitled to those proceeds based upon loans it advanced related to the acquisition of the property, along with interest due on the loans.

The court's denial of recusal was an appropriate exercise of discretion (*see Mehulic v New York Downtown Hosp.*, 140 AD3d 417 [1st Dept 2016]).

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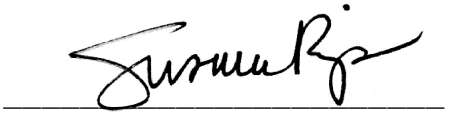

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2411 The People of the State of New York, Ind. 2883/12
Respondent,

-against-

David Sheard,
Defendant-Appellant.

_____

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

David Sheard, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Sabrina Margret Bierer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered April 3, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third degree and criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to an aggregate term of seven years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). We find no basis for disturbing the jury's credibility findings.

There is no merit to defendant's claim that he was deprived of his right to call his codefendant as a witness. The court

made it clear that it would permit the codefendant to testify if the defense wished to call him. Although defendant "vehemently" wanted his codefendant to testify on his behalf, defendant's trial counsel made a decision, in the exercise of professional judgment, not to call this witness. "If defense counsel solely defers to a defendant, without exercising his or her professional judgment, on a decision that is for the attorney, not the accused, to make because it is not fundamental, the defendant is deprived of the expert judgment of counsel to which the Sixth Amendment entitles him or her" (*People v Hogan*, 26 NY3d 779, 786 [2016] [internal quotation marks omitted]). Whether to call a witness is a strategic decision to be made by defense counsel (*see People v Smith*, 82 NY2d 731, 733 [1993]; *People v Llanos*, 13 AD3d 76 [1st Dept 2004], *lv denied* 4 NY3d 833 [2005]). Moreover, counsel had a sound reason for not calling the codefendant, who, in his plea allocution, had implicated defendant in the drug sale. To the extent defendant is claiming ineffective assistance of counsel, that claim is likewise without merit (*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.

We have considered and rejected defendant's pro se claims.

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ENTERED: DECEMBER 6, 2016

CLERK

Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2412 Laura Ledesma, Index 303152/13
Plaintiff-Respondent,

-against-

AMA Grocery, Corp., et al.,
Defendants,

KPV Realty, LLC, et al.,
Defendants-Appellants.

- - - - -

[And a Third-Party Action]

_____

Fiden & Norris, LLP, Harrison (Charles B. Norris of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 14, 2016, which denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants-appellants argue that they were out-of-possession landlords who were not responsible to maintain the area where plaintiff fell on a raised metal strip at the edge of a step at the entrance to the tenant's deli/grocery.

An out-of-possession landlord is generally not liable for negligence with respect to the condition of property after transfer of possession and control to the tenant unless the

landlord "(1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect, and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 420 [1st Dept 2011])

"Where an owner is not completely out-of-possession, it may be held liable as long as it had adequate notice of and a reasonable opportunity to repair the dangerous condition" (*Federal Ins. Co. v Evans Constr. of N.Y. Corp.*, 257 AD2d 508, 509 [1st Dept 1999]).

It was undisputed that the lease agreement made appellant landlords responsible for repairs to the interior and exterior public portion of the premises. The court properly concluded that there was an issue of fact concerning whether the metal

strip was affixed to a step that was located in the public portion of the premises, and the photographs submitted by the parties do not lay this issue to rest.

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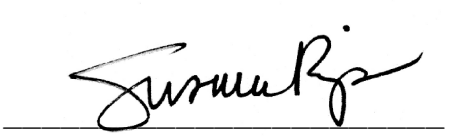

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Richter, J.P., Manzanet-Daniels, Feinman, Kapnick, Gesmer, JJ.

2414 The People of the State of New York, Ind. 4889/05
Respondent,

-against-

Akieme Nesbitt,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered January 8, 2015, convicting defendant, upon his plea of guilty, of assault in the first degree, and sentencing him, as a second violent felony offender, to a term of 20 years, unanimously modified, as a matter of discretion in the interest

of justice, to the extent of reducing the sentence to a term of 16 years, with 5 years' postrelease supervision, and otherwise affirmed.

We find the sentence excessive to the extent indicated.

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

ENTERED: DECEMBER 6, 2016

CLERK