SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 4, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Acosta, Richter, Gische, JJ.

15045 In re State of New York, Petitioner-Respondent, Index 250519/08

-against-

David S. (Anonymous), Respondent-Appellant.

_____

The Feinman Law Firm, White Plains (Steven N. Feinman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Judith Vale of counsel), for respondent.

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Order, Supreme Court, Bronx County (Dineen Ann Riviezzo, J.), entered December 17, 2013, which, in this proceeding brought pursuant to article 10 of the Mental Hygiene Law (MHL), upon a jury finding that respondent is a detained sex offender who suffers from a mental abnormality, determined, following a dispositional hearing, that respondent is a dangerous sex offender requiring confinement in a secure treatment facility, unanimously reversed, on the law, without costs, and the matter remanded for a new trial.

Respondent, a recidivist sex offender with two convictions for violent sexual felonies, was adjudicated as a sex offender requiring civil management under article 10 of the Mental Hygiene Law based on the diagnosis of the State's experts that he suffers from antisocial personality disorder (ASPD) in combination with sexual preoccupation and sexual deviance (*cf. Matter of State of New York v Donald DD.*, 24 NY3d 174 [2014] [a diagnosis of ASPD alone did not support a civil management adjudication]). Such an adjudication requires proof by clear and convincing evidence that respondent suffers from a "mental abnormality," defined as a "condition, disease or disorder . . . that predisposes him . . . to the commission of conduct constituting a sex offense and that results in [his] having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03[i]).

On appeal, respondent argues that we should reverse the adjudication and dismiss the petition because the evidence presented at trial was insufficient to support the jury's finding that he suffers from a mental abnormality within the meaning of the statute. He further argues, in the alternative, that, even if the evidence was sufficient, he is entitled to a new trial because Supreme Court erred in allowing the State's experts to testify about two of his sexual offense arrests that did not

result in convictions. While the first argument is unavailing, the second one has merit.

With regard to the sufficiency of the evidence, respondent maintains that the State presented no evidence that sexual preoccupation is a mental disorder founded upon scientifically valid criteria and generally accepted in the psychiatric community. This claim is not preserved, because respondent neither requested a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) nor sought to exclude the expert's testimony that respondent suffered from this disorder (*see Donald DD.*, 24 NY3d at 187 [declining to reach issue of whether diagnosis of paraphilia NOS has received general acceptance in the psychiatric community, because no *Frye* hearing was requested or held]; *Maiorani v Adesa Corp.*, 83 AD3d 669, 673 [2d Dept 2011] [the plaintiff failed to preserve for appellate review claim regarding certain testing methodology by not requesting a *Frye* hearing]; *People v Hinspeter*, 12 AD3d 617 [2d Dept 2004] [claim that the People failed to establish that child sexual abuse accommodation syndrome is generally accepted in the psychiatric community is unpreserved for appellate review, because the defendant did not request a *Frye* hearing], *lv denied* 4 NY3d 764 [2005]; *People v Gallup*, 302 AD2d 681, 684 [3d Dept 2003] [the

defendant's claim that the People failed to establish a proper scientific foundation for field sobriety test is unpreserved, because he did not request a *Frye* hearing or object to the testimony about the test], *lv denied* 100 NY2d 594 [2003]).

Respondent failed to preserve his remaining claims that the trial evidence was legally insufficient to support the jury's verdict. In order to challenge the sufficiency of the evidence on appeal, a party must first have moved for a directed verdict under CPLR 4401 (*D.B. Zwirn Special Opportunities Fund, L.P. v Brin Inv. Corp.*, 96 AD3d 447 [1st Dept 2012]; *Phillipps v New York City Tr. Auth.*, 83 AD3d 473 [1st Dept 2011]; *Santiago v New York City Hous. Auth.*, 268 AD2d 203 [1st Dept 2000]; *see also Miller v Miller*, 68 NY2d 871 [1986)]. Here, respondent never moved before the trial court for a directed verdict or otherwise challenged the legal sufficiency of the evidence. Thus, his claims are unpreserved for appellate review, and we decline to reach them.

Although respondent's challenge to the sufficiency of the State's evidence is unpreserved, the order under review must be reversed because the court erred in allowing the State's experts, in explaining the basis for their opinions, to testify regarding two sets of sex offense charges against respondent that did not

result in convictions (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95 [2013]). In *Floyd Y.*, the Court held that hearsay basis evidence satisfies due process only if it is demonstrated to be reliable and its probative value outweighs its prejudicial effect (*id.* at 109). Here, one set of charges resulted in an acquittal, and so was categorically precluded from providing the basis for reliability (*id.* at 110). The second group of charges, which resulted in dismissal, also failed to meet the reliability threshold, because they were unaccompanied by indicia that respondent committed the charged acts notwithstanding the lack of a conviction (*see id.*). Accordingly, a new trial is required.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

16727-
16728 Index 101786/11

Robert Rubin,
Plaintiff-Respondent,

-against-

Adrian George,
Defendant-Appellant,

Rashid Niang, also known as
Jacob Niang,
Defendant.

_____

LeClairRyan, P.C., New York (Barry A. Cozier of counsel), for appellant.

Jeffrey I. Klein, White Plains, for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered August 29, 2014, as amended September 16, 2014, after a nonjury trial, which, to the extent appealed from, granted plaintiff a judgment of foreclosure, ordered that the mortgaged premises be sold in one parcel at public auction, and struck defendant's defenses and counterclaims, including the affirmative defense of usury, unanimously affirmed, without costs.

A loan transaction is usurious under criminal law when it imposes an annual interest rate exceeding 25% (Penal Law § 190.40; *see also Blue Wolf Capital Fund II, L.P. v American*

Stevedoring, Inc., 105 AD3d 178, 184 [1st Dept 2013] [finding that the effective rate of interest, 36.09%, exceeded the legal rate]). The amount charged, taken or received as interest includes any and all amounts paid or payable, directly or indirectly, by any person to or for the account of the lender in consideration for making the loan or forbearance, excepting certain costs and fees (General Obligation Law § 5-501(2); *see also Blue Wolf Capital Fund II*, 105 AD3d at 183). Here defendant failed to meet his burden of proving usury by clear and convincing evidence (*Freitas v Geddes Sav. & Loan Assn.*, 63 NY2d 254, 261 [1984]).

The trial court fairly interpreted the evidence (*see Garza v 508 W. 112th St., Inc.*, 71 AD3d 567, 567 [1st Dept 2010]) to credit the brokerage agreement document found on the computer and in the file of the closing law firm as the one which was actually used in 2007; that document recorded the brokerage fee as $27,000, not the purported $250,000. Further, the findings

rest in large measure on witness credibility (*see Thoreson v Penthouse Intl.*, 179 AD2d 29, 31 [1st Dept 1992], *affd* 80 NY2d 490 [1992]), which the trial court, as factfinder, was in the best position to determine.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

95 The People of the State of New York, Ind. 1301/12
Respondent,

-against-

Frederick Delacruz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (James Wen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered April 9, 2013, convicting defendant, upon his plea of guilty, of robbery in the third degree, and sentencing him to a term of 2⅓ to 7 years, unanimously affirmed.

Since the record is silent as to the circumstances leading to defendant's decision to enter a plea of guilty to the top count of the indictment accompanied by the maximum lawful sentence, and as to the content of defendant's consultations with counsel on this subject, defendant's claim that he received no benefit from his plea, and his related ineffective assistance of counsel claim, are unreviewable on direct appeal (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of these claims may

not be addressed on appeal. In the alternative, his suggestion that his decision to enter this plea was the product of mental illness rests on speculation.

Defendant's unpreserved challenges to the validity of his plea allocution do not come within the narrow exception to the preservation requirement (*see People v Lopez*, 71 NY2d 662, 665 [1988]), and we decline to review them in the interest of justice. As an alternative holding, we find that the plea was knowing, intelligent and voluntary. There is nothing in the record to suggest that defendant's ability to make a valid plea was impaired in any way by his mental condition. Although defendant stated that he had stopped receiving an antidepressant about a month before the plea, this could have been the result of a medical decision to discontinue this medication, and there is no indication that defendant needed an antidepressant to understand the proceedings. In any event, the court specifically elicited defendant's assurance that the absence of the medication had no effect on his comprehension.

Regardless of whether defendant made a valid waiver of his right to appeal, we reject his suppression and excessive sentence claims.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

96 The People of the State of New York, Ind. 9148/89
Respondent,

-against-

J.G.,
Defendant-Appellant.

_____

The Legal Aid Society, New York (Robert Newman of counsel), and Kaye Scholer LLP, New York (Paula Ramer of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered July 3, 2014, which, to the extent appealed from, denied defendant's motion for an order conditionally sealing the record of a judgment of conviction of the same court (Joseph A. Mazur, J.), rendered April 22, 1991, unanimously affirmed, without costs.

Because defendant's 1991 felony drug conviction was not a conviction that "resulted in the defendant's participation in [a] judicially sanctioned drug treatment program," (CPL 160.58[2]), he was not entitled to conditional sealing of the records of that conviction, notwithstanding that he successfully completed drug treatment on a later conviction and the court sealed the records

of that conviction. The quoted language specifically limits sealing to the particular case in which a defendant completes drug treatment. "Moreover, as a matter of statutory construction, the Legislature's creation of a [provision for sealing prior misdemeanors] implies that [prior felonies] are not [in]cluded" (*Matter of Jonathan V.*, 55 AD3d 273, 277 [1st Dept 2008], *lv denied* 11 NY3d 713 [2008]). Since the 1991 conviction was for a felony, the court correctly determined that it had no discretion to seal the records of that conviction, and it properly limited its sealing order to the records of the 2000 conviction upon which defendant did complete drug treatment. We have considered and rejected defendant's remaining arguments.

We note that the People do not raise any issue of appealability, and we assume, without deciding, that the order is appealable as a civil order relating to a criminal matter (*see People v M.E.*, 121 AD3d 157, 159 [4th Dept 2014]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

97-
98 In re Bianca J.,
Petitioner-Respondent,

-against-

Dwayne C.A.,
Respondent-Appellant.

_____

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

Bianca J., respondent pro se.

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Order, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about January 7, 2014, which denied respondent's objections to an order, entered on or about October 30, 2013 (Support Magistrate Karen D. Kolomechuk), dismissing his petition for a downward modification of a November 23, 2011 child support order, unanimously affirmed, without costs.

Respondent has failed to preserve for appellate review his contention that the Support Magistrate harbored a bias against him (*see* CPLR 5501; *Matter of Gina C. v Augusto C.*, 116 AD3d 478, 479 [1st Dept 2014], *lv denied* 23 NY3d 905 [2014]), and we decline to review his claim in the interest of justice. As an alternative holding, we find respondent's contention unfounded. We note that he has failed to cite to an actual ruling which

demonstrated bias (*see Anderson v Harris*, 68 AD3d 472, 473 [1st Dept 2009]). The court properly exercised its discretion in denying respondent's motion for an adjournment (*see Matter of Anthony M.*, 63 NY2d 270, 283 [1984]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

99 In re Kimberly Fusco, Index 100606/14
Petitioner-Appellant,

-against-

Teachers' Retirement System of the
City of New York, et al.,
Respondents-Respondents.

_____

Chet Lukaszewski, P.C., Lake Success (Chester Lukaszewski of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered on or about February 10, 2015, denying the petition brought pursuant to CPLR article 78 to annul respondents' determination, dated April 7, 2014, which denied petitioner's application for accidental disability retirement benefits, unanimously affirmed, without costs.

The determination that petitioner was not disabled by back pain or leg pain allegedly resulting from a fall while she walked up the steps at school, while at work, was supported by some credible evidence (*see Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 145 [1997]; *Matter of Borenstein v New York City Employees'*

Retirement Sys., 88 NY2d 756, 760 [1996]). Such evidence included the examination of petitioner by respondent's Medical Board and its review of conflicting medical evidence from petitioner's treating physicians, as well as petitioner's acknowledgment that she could independently perform daily life activities such as bathing, dressing, and driving (*see Matter of Mininni v New York City Employees' Retirement Sys.*, 279 AD2d 428 [1st Dept 2001], *lv denied* 96 NY2d 722 [2001]; *Matter of Dabney v New York City Employees' Retirement Sys.*, 256 AD2d 86 [1st Dept 1998]). The disability finding of the Social Security Administration, rendered after the subject determination, is not dispositive of the Medical Board's disability determination (*see id.; see also Matter of Barden v New York City Employee's Retirement Sys.*, 291 AD2d 215 [1st Dept 2002]).

Furthermore, petitioner failed to show that any disability was the result of an accident. There is a lack of evidence that petitioner's fall was caused by anything other than her own misstep while ascending the stairs to the school (*see Matter of Starnella v Bratton*, 92 NY2d 836, 839 [1998]; *Matter of Devers v Kelly*, 127 AD3d 640 [1st Dept 2015], *lv denied* 26 NY3d 905 [2015]).

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

Moskowitz, J.P., Richter, Feinman, Gische, JJ.

100 Michael Barr, Index 159781/14
Plaintiff-Respondent,

-against-

Liddle & Robinson, LLP, et al.,
Defendants-Appellants.

_____

Braff, Harris, Sukoneck & Maloof, New York (Michael Goldenberg of counsel), for appellants.

Garvey Schubert Barer, New York (Alan A. Heller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 2, 2015, which denied defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff alleges that he would not have lost his contractual right to certain deferred compensation if his attorneys had not acted negligently in speaking to the Wall Street Journal, in violation of the non-disparagement provision of the contract. These allegations state a cause of action for legal malpractice (*see Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 49-50 [2015]). The documentary evidence submitted by defendants fails to establish a defense as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). As the motion court found, neither the arbitration

award nor the subsequent opinions submitted by defendants unequivocally contradict plaintiff's claim that, but for defendants' alleged negligent conduct, he would not have lost his contractual benefit. Moreover, it does not matter whether the arbitration decision was reached on the merits or under a procedural bar to considering the deferred compensation issue in the arbitration.

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

101 Bilal A. Kone, Index 653082/11
Plaintiff-Respondent,

-against-

Garden State Life Insurance Company,
Defendant-Appellant.

_____

Law Offices of Andrew J. Frisch, New York (Andrew J. Frisch of counsel), for appellant.

Wilkofsky, Friedman, Karel & Cummins, New York (Mark L. Friedman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered December 18, 2014, which, inter alia, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action alleging breach of contract and bad faith arising from defendant's failure to pay the proceeds of a life insurance policy, the record does not permit a determination as a

matter of law that plaintiff failed to present defendant with due proof of the insured's death, as required by the policy.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

102 The People of the State of New York, Ind. 5606/99
Respondent,

-against-

Jazzmond Foy,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered July 12, 2012, resentencing defendant to an aggregate term of 25 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621

[2011]). We perceive no basis for reducing the term of postrelease supervision.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

103 R.B. Conway & Sons, Inc., Index 111994/10
Plaintiff,

-against-

New York City Department of Parks
and Recreation, et al.,
Defendants,

Primer Construction Corp., et al.,
Defendants-Appellants,

Victor A. Gordon, P.E., P.C.,
Defendant-Respondent.

_____

Canfield Madden & Ruggiero LLP, Garden City (Liliya Abramchayeva of counsel), for appellants.

_____

Judgment, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 7, 2015, to the extent it brings up for review an order, same court and Justice, entered June 23, 2014, which, among other things, upon a search of the record, sua sponte dismissed defendants-appellants' (the Primer Construction defendants') cross claim for contribution against defendant Victor A. Gordon, P.E., P.C., unanimously reversed, on the law, without costs, and the cross claim reinstated.

The motions before Supreme Court did not raise any issue with respect to the Primer Construction defendants' cross claim for contribution against Gordon, a nonmoving party. Accordingly,

Supreme Court lacked the authority to search the record and dismiss that cross claim (*see Castlepoint Ins. Co. v Moore*, 109 AD3d 718, 719 [1st Dept 2013]; *see also Dunham v Hilco Constr. Co.*, 89 NY2d 425, 429-430 [1996]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

106-
107 Index 308964/10
83732/11

Jose Carlos DaSilva,
Plaintiff-Respondent,

Structural Preservation
Systems, LLC, et al.,
Defendants-Appellants,

-against-

Everest Scaffolding, Inc.,
Defendant-Respondent.

- - - - -

Structural Preservation
Systems, LLC,
Third-Party Plaintiff-Appellant,

-against-

Greenline Industries, Inc.,
Third-Party Defendant-Respondent.

_____

Barry, McTiernan & Moore LLC, New York (Laurel A. Wedinger of counsel), for appellants.

Law Offices of Lawrence P. Biondi, Garden City (Lisa M. Comeau of counsel), for Jose Carlos DaSilva, respondent.

Wade Clark Mulcahy, New York (Cheryl D. Fuchs of counsel), for Everest Scaffolding, Inc, respondent.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Greenline Industries, Inc., respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 22, 2014, which granted plaintiff's motion for partial summary judgment on his Labor Law

§ 240(1) claim as against defendants Structural Preservation Systems, LLC (SPS) and ASN Roosevelt Center LLC, Archstone Communities, and Archstone-Smith Communities, LLC (collectively, Archstone), and granted defendant Everest Scaffolding, Inc.'s motion for summary judgment dismissing the cross claim for contractual indemnification, and order, same court and Justice, entered on or about December 15, 2014, which denied SPS and Archstone's motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims as against them and on SPS's third-party claim for contractual indemnification, unanimously affirmed, without costs.

Plaintiff established prima facie that his accident was proximately caused by a violation of Labor Law § 240(1) through his testimony that he fell off a scaffolding frame onto a scaffolding platform when the scaffolding moved while he was attempting to remove a staple from a plastic covering on the building exterior while propping himself up on a cross-brace of the frame; he had climbed onto the cross-brace because the staple was about six feet above his reach when he stood on the platform (*see Fanning v Rockefeller Univ.*, 106 AD3d 484 [1st Dept 2013]; *cf. Ellerbe v Port Auth. of N.Y. & N.J.*, 91 AD3d 441, 442 [1st Dept 2012] [summary judgment denied plaintiff where issue of fact

existed whether he "simply lost his footing while climbing a properly secured, non-defective extension ladder that did not malfunction"]). SPS and Archstone's recalcitrant worker defense, based on plaintiff's failure to use a ladder, is unavailing in the absence of any evidence that plaintiff knew he was expected to use a ladder (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]) or that there was a "practice" of workers obtaining ladders themselves because it was "easily done" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 10-11 [1st Dept 2011]).

In light of the foregoing, the Labor Law § 241(6) claim as against SPS and Archstone and the Labor Law § 200 and common-law negligence claims as against Archstone are academic (*see Fanning*, 106 AD3d at 485). The Labor Law § 200 and common-law negligence claims as against SPS are not academic since they are relevant to the indemnification issues on appeal. Summary dismissal of those claims is precluded by triable issues of fact as to whether SPS exercised supervisory control over the work, which were raised by its foreman's testimony about SPS's direction of the work and daily inspections of the scaffolding. Triable issues of fact also exist as to whether SPS had constructive notice that the scaffolding was likely to shake while in use.

Summary dismissal of SPS's third-party claim for contractual

indemnification is precluded by SPS's "fail[ure] to establish as a matter of law its own freedom from any negligence beyond the statutory liability" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Archstone's argument that it is also entitled to contractual indemnification by third-party defendant is not properly before us since it is not included in the table of contents or as a point heading in the argument in SPS and Archstone's main brief, as required by this Court's rules (Rules of App Div, 1st Dept [22 NYCRR] § 600.10[d][2][i] and [iv]).

SPS and Archstone's contractual indemnification claim against Everest, the subcontractor that installed the scaffolding, was correctly dismissed in the absence of any evidence of negligence on Everest's part in the performance of its work (*see Brown v Two Exch. Plaza Partners*, 146 AD2d 129, 136 [1st Dept 1989], *affd* 76 NY2d 172 [1990]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

108 In re Lakiyah M.,

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

Shacora M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about January 7, 2015, which, to the extent appealed from as limited by the briefs, brings up for review an order of fact-finding, same court and Judge, entered on or about September 4, 2014, which determined, after a hearing, that respondent mother had neglected her child, unanimously affirmed, without costs.

A preponderance of the evidence established that there was a substantial probability that respondent's untreated psychiatric condition and substance abuse problems would place the child at

imminent risk if she were released to respondent's care (*see Matter of Liarah H. [Dora S.]*, 111 AD3d 514, 515 [1st Dept 2013]; Family Ct Act § 1012[f]). While evidence of a parent's mental illness, standing alone, is not a basis for a finding of neglect, the finding of neglect was appropriate here since respondent displayed a lack of insight into the effect of her illness on her ability to care for the child (*see Matter of Jalacia G. [Jacqueline G.]*, 130 AD3d 402, 403 [1st Dept 2015]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

109 Pinhas Zahavi, etc., Index 151635/13
Plaintiff-Respondent-Appellant,

-against-

JSBarkats PLLC, sued herein
as JS Barkats, et al.,
Defendants-Appellants-Respondents.

_____

JSBarkats, PLLC, New York (Marc J. Block of counsel), for appellants-respondents.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered April 9, 2015, awarding plaintiff interest at the statutory rate of 9% on a previously awarded principal sum, to the extent it brings up for review an order, same court and Justice, entered December 5, 2014, which, inter alia, granted plaintiff's motion to resettle a prior order, unanimously affirmed, and appeal from said judgment, to the extent it brings up for review an order, same court and Justice, entered April 16, 2014, which, inter alia, denied plaintiff's motion for partial summary judgment on his claim for an additional sum, unanimously dismissed, with costs.

Supreme Court acted within its authority in resettling an

order to award interest owed to plaintiff (*see e.g. Williams v City of New York*, 111 AD3d 420 [1st Dept 2013]; *Matter of New York State Urban Dev. Corp. [Alphonse Hotel Corp.]*, 293 AD2d 354 [1st Dept 2002]). The court properly determined that the period of interest should commence from the date on which plaintiff established that defendants lacked any good faith basis for retaining the principal sum in escrow and therefore were no longer entitled to the protection of Judiciary Law § 497(5), and could not be considered stakeholders within the meaning of CPLR 1006(f). It is of no consequence that defendants received no benefit from the money because it was held in their IOLA account (*see Toledo v Iglesia Ni Christo*, 18 NY3d 363, 369 [2012]).

Plaintiff's appeal from the judgment is dismissed since it concerns the claim he voluntarily discontinued pursuant to CPLR 3217(b).

We have considered all other claims and find them to be unavailing.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

110 Rosalina Alves, Index 110947/10
Plaintiff-Appellant,

-against-

Ghazaryan Petik,
Defendant,

Vital Transportation, Inc.,
Defendant-Respondent.

_____

Shapiro Law Offices, PLLC, Bronx (Jason S. Shapiro of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Jonathan Mazer and Niall D. O'Murchadha of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered October 22, 2014, which, insofar as appealed from, in this action for personal injuries sustained by plaintiff pedestrian when she was struck by a vehicle operated by defendant Ghazaryan Petik, granted the motion of defendant Vital Transportation, Inc. (Vital) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

The motion court properly found that Petik was an independent contractor of Vital, a car dispatch company. The record shows that Petik worked without a schedule, at his own convenience, was free to work for competitors, and did not

receive a fixed salary or any benefits (*see Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). Petik was responsible for his own vehicle, its maintenance, gas, and other needs, and was not required to accept any particular dispatch (*see Chaouni v Ali*, 105 AD3d 424 [1st Dept 2013]). That there was a handbook containing, inter alia, a general dress code enforced by a committee of fellow drivers, is insufficient to raise an issue of fact. At most, it "is indicative of mere incidental or general supervisory control that does not rise to the level of an employer-employee relationship" (*id.* at 425 [internal quotation marks omitted]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

111 The People of the State of New York, Ind. 1333/11
Respondent,

-against-

Arthur Ragin,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson 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 (Charles H. Solomon, J.), rendered April 9, 2013, convicting defendant, upon his guilty plea, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

The record does not cast doubt on defendant's competency to stand trial, and the court was not obligated, sua sponte, to order a new CPL article 730 examination (*see People v Tortorici*, [1999], *cert denied* 528 US 834 [1999]). Although there had been multiple psychiatric examinations with conflicting findings, the most recent report found defendant competent, and the court was able to observe him during the plea proceedings (*see People v Barnes*, 24 AD3d 248 [1st Dept 2005], *lv denied* 6 NY3d 892

[2006]). The record does not support an inference that defendant may have been going in and out of competency; instead, the psychiatric evidence before the court indicated that defendant was prone to feigning psychiatric symptoms. The plea colloquy cast no doubt on defendant's competency, and defense counsel, who was in the best position to assess defendant's capacity, did not raise the issue of defendant's fitness to proceed or request another examination (*Tortorici*, 92 NY2d at 767).

Defendant abandoned his claims of dissatisfaction with counsel when, in response to the court's inquiry into his claims, he expressly withdrew his request for new counsel and confirmed that he wanted his attorney to continue to represent him (*see People v Garvin*, 227 AD2d 130 [1st Dept 1996], *lv denied* 88 NY2d 965 [1996]). In any event, the court's inquiry into defendant's earlier claims was sufficient, and defendant failed to establish

good cause for assignment of new counsel (*see People v Porto*, 16 NY3d 93 [2010]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

112 Alyssa Perez, etc., Index 306126/11
Plaintiff-Appellant,

-against-

Gasho of Japan, Inc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Beth S. Gereg of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Meredith Drucker Nolen of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 9, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was warranted in this action where plaintiffs allege that infant plaintiff tripped over a bump in a carpet runner in defendants' restaurant. The record shows that the subject defect was trivial and not actionable, where infant plaintiff's mother described the runner as being "bunched up. . .a little," with "a little lump" (*see Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66 [2015]; *Trincere v County of Suffolk*, 90 NY2d 976 [1977]; *see also Kwitny v Westchester Towers*

Owners Corp., 47 AD3d 495 [1st Dept 2008]). There is no further detail in the record regarding the alleged defect.

Plaintiffs' remaining contentions are unavailing.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

113 Ivette Santiago-Mendez, Index 157881/13
Plaintiff-Appellant,

-against-

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

_____

Cronin & Byczek, LLP, Lake Success (Moshe C. Bobker of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

_____

Order, Supreme Court, New York County (Frank R. Nervo, J.), entered July 16, 2014, which granted defendants' motion to dismiss the complaint, unanimously modified, on the law, to deny the motion to dismiss plaintiff's non-time-barred claims for race, national origin, and gender discrimination as against defendants the City of New York, Lieutenant Ahern, and Captain Kelly, and otherwise affirmed, without costs.

Plaintiff, a Hispanic woman, was a New York City Police Department (NYPD) detective who retired in July 2012. Plaintiff filed the complaint in this action on August 28, 2013. Her allegations of matters occurring before August 28, 2010 are time-barred, since the statute of limitations for claims under both the State and City Human Rights Law (HRL) is three years (*see*

CPLR 214[2]; Administrative Code of the City of NY § 8-502[d]; *Mascola v City Univ. of N.Y.*, 14 AD3d 409, 409 [1st Dept 2005][State HRL]; *Herrington v Metro-North Commuter R.R. Co.*, 118 AD3d 544, 544 [1st Dept 2014][City HRL]). Plaintiff failed to preserve her argument that the continuous violation doctrine applies, and, in any event, the argument lacks merit (*see generally Ferraro v New York City Dept. of Educ.*, 115 AD3d 497, 497-498 [1st Dept 2014]; *see also National Railroad Passenger Corporation v Morgan*, 536 US 101, 113-114 [2002]).

It is undisputed that plaintiff sufficiently stated the first two elements of an employment discrimination claim under both the State and City HRL — namely, that she is a member of a protected class and was well qualified for her position (*see Askin v Department of Educ. of the City of N.Y.*, 110 AD3d 621, 622 [1st Dept 2013]). Plaintiff also sufficiently stated the third element — that she was adversely or differently treated (*id.*). In particular, plaintiff alleges that, after she applied for terminal leave in November 2010, Captain Kelly restricted her overtime, causing her to lose "at least 6 hours" of overtime hours and wages. "[A] decrease in wage or salary" constitutes a "materially adverse change in the terms and conditions of employment" (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295,

306 [2004] [internal quotation marks omitted]). Plaintiff's assertion that, in February 2012, she was denied promotion to "Detective 2nd Grade" also adequately alleges an adverse employment action (*see id.*).

Plaintiff sufficiently alleged the fourth element of her claim — that the adverse action was made under circumstances giving rise to an inference of discrimination (*see Rollins v Fencers Club, Inc.*, 128 AD3d 401, 401 [1st Dept 2015]; *see generally Askin*, 110 AD3d at 622). Plaintiff alleged, among other things, that Captain Kelly told a Hispanic male detective that he "should go back to landscaping" and that she was shut out of meetings because she was not part of the "Boys' Club" (*see Mihalik v Credit Agricole Cheuvreux N. Am., Inc.*, 715 F3d 102, 106, 113 [2d Cir 2012]).

The most offensive acts alleged by plaintiff with respect to her hostile work environment claim occurred between 1999 and 2002, and are therefore time-barred. To the extent plaintiff's remaining allegations — regarding the placement of Band-Aids in a "public restroom" and magazines in a "gender-neutral lounge" — are not time-barred, plaintiff fails to allege or explain how these acts are attributable to defendants.

Plaintiff does not address in her appellate brief the

dismissal of her claims against defendants NYPD, Commissioner Kelly, Lieutenant Faughan, Inspector Cully, Inspector Shea, and Captain McNally. Accordingly, we deem those issues abandoned on appeal (*see Furlender v Sichenzia Ross Friedman Ference LLP*, 79 AD3d 470, 470 [1st Dept 2010]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

114 The People of the State of New York, Ind. 593/10
Respondent,

-against-

David Thompson,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered July 11, 2013, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him, as a second felony offender, to a term of 25 years to life, unanimously modified, on the law, to the extent of reducing the mandatory surcharge to $250 and the crime victim assistance fee to $20, and otherwise affirmed.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]) with respect to the striking of two prospective jurors. The prosecutor provided race-neutral reasons for striking the first prospective juror for demeanor-based reasons and the second prospective juror based on her lack of employment and her demeanor. The court's finding

that these reasons were not pretextual is supported by the record, and this determination is entitled to great deference (*see Snyder v Louisiana*, 552 US 472, 477 [2008]; *People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). To the extent the court's recollection of the voir dire colloquies may have been imprecise, any factual errors were not essential to the court's determinations. The record also fails to support defendant's claim of disparate treatment by the prosecutor of similarly situated panelists.

The court, which suppressed defendant's initial statements as the product of a custodial interrogation, properly admitted two subsequent statements made by defendant, after having been given *Miranda* warnings, as there was a definite, pronounced break of at least four hours in the interrogation, which attenuated any taint of the suppressed statements and returned defendant to the status of one who is not under the influence of questioning (*People v Chapple*, 38 NY2d 112, 115 [1975]; *People v Davis*, 106 AD3d 144, 152-156 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]). Other factors supporting attenuation were that there were new interrogators, with the original interrogator being merely present without participating, that the initial statement was factually different from and less significant than the

subsequent statements, and that the later interrogators did not refer to the content of the initial statement.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence, including the detailed observations of a disinterested eyewitness, refuted defendant's claim of self-defense.

We perceive no basis for reducing the sentence. Based on the People's concession, we reduce the surcharge and crime victim assistance fee to conform to the statute in effect at the time of the crime.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

116 The People of the State of New York, Ind. 2413/13
Respondent,

-against-

Tavon Rosser,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ 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 (Bonnie Wittner, J.), rendered August 20, 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: FEBRUARY 4, 2016

CLERK

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

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

117 Sivan Kinberg, Index 304804/10
Plaintiff-Appellant,

-against-

Schwartzapfel, Novick, Truhowsky, Marcus, PC, etc.,
Defendant-Respondent.

_____

Sivan Kinberg, appellant pro se.

Goldberg Segalla LLP, Garden City (Brendan T. Fitzpatrick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered November 17, 2014, which granted defendant's motion to dismiss the complaint based on collateral estoppel and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendant's motion, properly treated as a motion for summary judgment (CPLR 3212[b]), is not precluded by the "single motion" rule (CPLR 3211[e]). Although defendant previously moved to dismiss on other grounds, a "pre-answer motion to dismiss based on one of the grounds set forth in CPLR 3211(a) does not effect a waiver of the other grounds set forth in CPLR 3211(a)," which can then be raised in support of a motion for summary judgment dismissing the complaint (*Hertz Corp. v Luken*, 126 AD2d 446, 448-

449 [1st Dept 1987]; *see Tapps of Nassau Supermarkets v Linden Blvd.*, 269 AD2d 306 [1st Dept 2000]).

Plaintiff asserts a cause of action for legal malpractice against defendant law firm, which represented her in the course of her prior personal injury action. That action was dismissed after plaintiff failed to comply with discovery demands in a conditional order of preclusion (*see Kinberg v Shnay*, 25 Misc3d 138[A] [App Term, 1st Dept 2009]). The order dismissing plaintiff's prior action based on her violation of the preclusion order is entitled to preclusive effect in this subsequent action (*see Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737 [1983]; *Kanat v Ochsner*, 301 AD2d 456, 458 [1st Dept 2003]; *see also Santoli v 475 Ninth Ave. Assoc., LLC*, 38 AD3d 411, 417 [1st Dept 2007]). Moreover, plaintiff's motion to vacate the order dismissing her prior action was denied for failure, inter alia, to establish the merits of her underlying personal injury claim, and that order was affirmed by the Appellate Term. Plaintiff is collaterally estopped from relitigating the merits of her underlying personal injury claim, since she had a full and fair opportunity to litigate the issue in the prior action (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *Rosenkrantz v Harriet M. Steinberg, P.C.*, 13 AD3d 88 [1st Dept 2004], *lv dismissed in*

part denied in part 5 NY3d 729 [2005]). Therefore, plaintiff is unable to establish in this action that "but for" the attorney's negligence, she would have prevailed in the underlying matter, and her legal malpractice action against defendants was properly dismissed (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]; *and see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

Saxe, J.P., Moskowitz, Richter, Feinman, JJ.

118- Index 500178/14
119-
120 In re Juliette Fairley,
Petitioner-Appellant,

-against-

Mauricette Fairley,
Respondent-Respondent.

_____

Juliette Fairley, appellant pro se.

Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP, New York (Ellyn S. Kravitz of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura Visitation-Lewis, J.), entered July 1, 2015, in favor of Susan S. Brown, Esq., Glassman & Brown, LLP, against petitioner in the sum of $11,220.00, with interest from April 7, 2015, in the amount of $235.16, and the sum of $2,932.50, with interest from April 7, 2015, in the amount of $61.46, for a total of $14,449.12, for services in her capacity as temporary co-guardian of a person alleged to be incapacited (AIP), and order, same court and Justice, entered April 8, 2015, directing petitioner to pay the sum of $2,997.50 to Summerfield Baldwin, Esq., for his services as court-appointed counsel to the AIP, and the sum of $14.50 for expenses, unanimously reversed, on the law, without costs, the

judgment vacated and the matters remanded for a hearing on the reasonableness of the fees and expenses sought by Brown and Baldwin. Appeal from order, same court and Justice, entered on or about April 7, 2015, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The court had the power to appoint counsel, a court evaluator and a special temporary guardian for the AIP (*see* MHL §§ 81.09[b][1], 81.10[c][7], 81.23[a][1]). The court also had the power to shift the fees and costs for these professionals to petitioner in that the petition was dismissed and the court found that petitioner's conduct in removing the AIP from his home state was unjustifiable. However, petitioner failed to appeal this finding and may not now challenge it in connection with this appeal of the orders awarding the professionals their fees and expenses.

The record is silent as to whether the court considered the appropriate factors in determining the reasonableness of the amounts awarded. In determining reasonable compensation, the court should consider, among other factors, "'the time commitment involved, the relative difficulty of the matter, the nature of the services provided, counsel's experience, and the results obtained'" (*see Matter of Rose BB.*, 35 AD3d 1044, 1046 [3d Dept

2006], *appeal dismissed* 8 NY3d 936 [2007]).

Moreover, petitioner was entitled to a hearing to present evidence on the reasonableness of the fees sought (*see Matter of Samuel S. [Helene S.],* 96 AD3d 954, 958 [2d Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]; *Matter of Loftman [Mae R.],* 123 AD3d 1034, 1036 [2d Dept 2014]). Petitioner argues that Brown and Baldwin's fees and expenses should be paid from the AIP's estate because the petition was not frivolous and she was not motivated by avarice. Because petitioner failed to appeal the court's December 5, 2014 order, which dismissed the petition and determined that she was required to pay Brown and the Baldwin's fees, she may not challenge this finding in this appeal. The court's April 7, 2015 order merely corrected its March 10, 2015 with respect to the fee shifting to make it consistent with the December 5, 2014 order.

In any event, the court did not improvidently exercise its discretion in holding petitioner liable for fees, costs, and expenses of the proceeding, because her conduct was unjustifiable. Accordingly, this issue cannot be litigated at the fee hearing.

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

121-
122 The People of the State of New York, Ind. 14697C/12
Respondent, Dkt. 14697C/12

-against-

Joan Solano,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William McGuire, J.), rendered on or about October 16, 2012,

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

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

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

123 In re Coquita Francois, Index 101404/13
Petitioner-Appellant,

-against-

Dennis M. Walcott, etc., et al.,
Respondents-Respondents.

_____

Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered October 6, 2014, which denied the petition seeking to annul respondents' determination terminating petitioner's employment as a probationary guidance counselor, to direct respondents to vacate petitioner's unsatisfactory rating for the 2012-2013 school year, and to reinstate her employment, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

It is well established that a "probationary employee may be discharged for any or no reason at all in the absence of a showing that [the] dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [1st Dept

2001]; *see Matter of Kolmel v City of New York*, 88 AD3d 527, 528 [1st Dept 2011]). Here, petitioner failed to demonstrate an improper basis for the termination of her probationary employment. Rather, the documentary evidence provided a rational basis for the determination that petitioner's job performance was unsatisfactory (*see Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]). Although petitioner disputed the principal's account of events and the principal's opinion of petitioner's job performance, petitioner failed to show that certain irregularities in the review process demonstrated bad faith or deprived her of a substantial right (*see Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605 [1st Dept 2014].

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

124 In re Senaya Simone J.,

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

Andrea J.,
Respondent-Appellant,

The Children's Village, Inc.,
Petitioner-Respondent.

_____

Harriette N. Boxer, New York, for appellant.

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

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about February 23, 2015, which, upon a finding of permanent neglect, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The Family Court's finding on the record that the mother permanently neglected the child was supported by clear and convincing evidence that, despite diligent efforts made by the

agency to encourage and strengthen the parental relationship, the mother failed during the relevant time period to plan for the future of the child (*see* Social Services Law § 384-b[7]). The agency arranged visitation between the mother and child and monitored the mother while she participated in various drug treatment programs (*see Matter of Danielle Nevaeha S.E. [Crystal Delores M.]*, 107 AD3d 527 [1st Dept 2013]). The agency was not required to make referrals for services that the mother was already receiving (*see Matter of Star A.*, 55 NY2d 560, 565 [1982]). Despite these efforts, the mother repeatedly relapsed into substance abuse, resulting in the child being removed from her care following a trial discharge (*see Danielle* at 528).

A preponderance of the evidence supports the Family Court's determination that termination of the mother's parental rights is in the child's best interest (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The child has lived most of her life with her foster mother, who wants to adopt her and with whom she maintains a positive relationship (*see Danielle* at 528). That the mother has made efforts to remain drug free does not warrant a different disposition (*see id.*).

We have considered the mother's remaining arguments, including that she received ineffective assistance of counsel,

and find them unavailing.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

125 Danna Novak, Index 100979/11
Plaintiff-Appellant,

-against-

St. Luke's-Roosevelt Hospital Center, Inc., et al.,
Defendants-Respondents.

_____

Danna Novak, appellant pro se.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, New York (Nancy Wright of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Louis B. York, J.), entered March 11, 2014, which granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 741 claim, her sole remaining cause of action, and dismissed the action, unanimously affirmed, without costs.

Plaintiff alleges that defendants had retaliated against her for lodging a complaint with defendant supervisors regarding the treatment of a patient. After plaintiff abandoned her post while on duty in the emergency room of defendant hospital, plaintiff's employment was terminated. After a grievance was filed by her union, an independent arbitrator, following an evidentiary hearing, determined that plaintiff's abandonment of her post violated hospital protocol and constituted misconduct warranting

a six-month suspension without pay. In this action, plaintiff alleges that defendants' reaction to her abandonment of her post was merely a pretext to retaliate against her for complaining about the patient's treatment, and that defendants' alleged retaliation violated Labor Law § 741.

Plaintiff's abandonment of her post violated the hospital's policy and was a legitimate basis to discipline her (*Rodgers v Lenox Hill Hosp.*, 251 AD2d 244, 246 [1st Dept 1998], *lv dismissed* 92 NY2d 946 [1998]). The arbitrator's finding of misconduct warranting discipline was based on substantial evidence, and plaintiff has not challenged the arbitrator's determination as biased or otherwise improper. Accordingly, that determination is "highly probative" evidence that defendants did not retaliate against her, and plaintiff has failed to proffer sufficient evidence to raise a triable issue of fact as to a causal link between her complaint to her supervisors and defendants'

discipline (*Collins v New York City Tr. Auth.*, 305 F3d 113, 115, 119 [2d Cir 2002]; *Tomasino v Mount Sinai Med. Ctr. & Hosp.*, 2003 WL 1193726, *12-13, 2003 US Dist LEXIS 3766, *34-35 [SD NY, Mar. 13, 2003, No. 97-Civ-5252(TPG)]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

127 Alexander Razinski, et al., Index 652357/13
Plaintiffs-Appellants,

-against-

136 Field Point Circle Holding Company LLC,
Defendant-Respondent.

_____

Katten Muchin Rosenman LLP, New York (Matthew D. Parrott of counsel), for appellants.

Baker Leshko Saline & Blosser, LLP, White Plains (Mitchell J. Baker of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered November 6, 2014, which, to the extent appealed from as limited by the briefs, declared that plaintiffs do not hold an equitable mortgage in the subject property, dismissed the equitable mortgage claims, and granted defendant's motion for summary judgment on its counterclaims for possession and ejectment, unanimously affirmed, without costs.

Plaintiffs presented no evidence that the deed to the subject property was held as security for a loan, pursuant to Real Property Law § 320 (*see D & L Holdings v Goldman Co.*, 287 AD2d 65 [1st Dept 2001], *lv denied* 97 NY2d 611 [2002]; *cf. Resseguie v Adams*, 55 AD2d 698, 698 [3d Dept 1976]), *affd sub nom*

Locator-Map v Adams, 42 NY2d 1022 [1977]). Contrary to plaintiffs' assertion, the Master Agreement does not show that defendant loaned them money. Rather, it shows that they assigned their option to purchase the property to defendant in return for an option acquisition payment from defendant, i.e., that the money they received from defendant was part of a sale transaction.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

128 The People of the State of New York, Ind. 116/12
Respondent,

-against-

Steve Matosevic,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered November 14, 2013, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly determined that defendant had violated his plea agreement and had thus forfeited the opportunity for a more lenient disposition. Aside from being expelled from a drug treatment program, defendant violated the no-arrest condition of his agreement. Since defendant did not dispute the validity of the new arrests, and since they constituted a proper basis for the court's finding of noncompliance, it was unnecessary for the court to inquire into defendant's complaints about the

suitability of the program and the circumstances of his termination (*see generally People v Valencia*, 3 NY3d 714 [2004]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

129 Ruben Torres, Index 151964/12
Plaintiff-Appellant,

-against-

Etilee Taxi, Inc., et al.,
Defendants-Respondents.

_____

Jaroslawicz & Jaros LLC, New York (Joshua B. Abrams of counsel), for appellant.

Thomas Torto, New York (Jason Levine of counsel), for Etilee Taxi, Inc. and Prince O. Ohanmu, respondents.

Marjorie E. Bornes, Brooklyn, for George & Haroula Taxi, Inc. and Kamal Ahmed Milon, respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about July 22, 2014, which, inter alia, granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury under Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to the claims of serious injury to the cervical and lumbar spine, and to remand the matter for consideration of that branch of the motion of defendants George & Haroula Taxi, Inc. (G & H) and Kamal Ahmed Milon seeking summary judgment on the issue of liability, and otherwise affirmed, without costs.

Defendants established, prima facie, that plaintiff did not

suffer any serious injury to his cervical spine, lumbar spine or right shoulder by submitting the affirmed reports of a neurologist, orthopedic surgeon, and radiologist who found no evidence of acute traumatic injury in those body parts, that plaintiff had a full range of motion in those body parts, and that the bulging discs in plaintiff's spine were the result of longstanding degeneration (*see Steele v Santana*, 125 AD3d 523 [1st Dept 2015]; *Rickert v Diaz*, 112 AD3d 451 [1st Dept 2013]). Defendants also demonstrated that plaintiff did not suffer a serious injury to his lower jaw through the affirmation of a dentist who found no evidence of acute traumatic injury, no pain in the temporomandibular joints, clicking, crepitus, or deviation, and opined that there was nothing to suggest that the accident caused any injury to plaintiff's lower jaw (*see Deasis v Butler*, 107 AD3d 534 [1st Dept 2013]; *Guillaume v Reyes*, 22 AD3d 803 [2d Dept 2005]).

In opposition, plaintiff raised an issue of fact as to his claim of serious injury to his cervical and lumbar spine. Plaintiff submitted the affirmation of his treating doctor who observed substantial limitations in plaintiff's cervical and lumbar range of motion, both shortly after the accident and persisting after treatment, personally reviewed the MRIs of those

parts, and opined that the injuries were traumatically induced by the accident, especially in light of plaintiff's age and lack of prior complaints of pain in those body parts (*see James v Perez*, 95 AD3d 788 [1st Dept 2012]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011])

However, plaintiff failed to raise an issue of fact as to his alleged serious injuries to his right shoulder and lower jaw. His doctor found only tendinosis and slight limitations in range of motion in plaintiff's right shoulder, which are insufficient for purposes of Insurance Law § 5102(d) (*see Moore v Almanzar*, 103 AD3d 415 [1st Dept 2013]; *Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]). Nevertheless, if plaintiff establishes at trial that his spinal injuries constitute serious injuries within the meaning of the Insurance Law, he can recover damages for all injuries proximately caused by the accident, even those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

As to the lower jaw claim, plaintiff failed to provide objective evidence to raise an issue as to whether his jaw sustained any injury. His doctor found a minimal limitation in the opening of the jaw, and his expert dentist failed to provide normal range of motion measurements to compare with plaintiff's

observed range of motion, and did not find any qualitative limitation in use of the jaw (*see Mirdita v Ash Leasing, Inc.*, 101 AD3d 480 [1st Dept 2012]; *Colon v Vincent Plumbing & Mech. Co.*, 85 AD3d 541, 543 [1st Dept 2011]).

Because the court granted defendants' motions on the threshold question of serious injury, it did not reach the merits of that branch of the motion of defendants Milon and G & H for summary judgment as to liability. Accordingly, we remand the matter for the motion court to consider that branch of the motion in the first instance.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

133 Joseph T. Stearns, Index 651057/13
Plaintiff-Appellant,

-against-

Kenny & Stearns, et al.,
Defendants-Respondents.

_____

Joseph T. Stearns, appellant pro se.

Kaufman Dolowich & Voluck, LLP, New York (Gino A. Zonghetti of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered on or about February 26, 2014, which granted defendants' motions to dismiss the "second amended complaint" asserting a claim for an accounting, unanimously affirmed, with costs.

Plaintiff, a former attorney of defendant law firm Kenny, Stearns & Zonghetti, LLC, seeks an accounting under the Partnership Law. However, because the firm was converted to a limited liability company in 2004, about five years before plaintiff withdrew from the firm, and about nine years before he commenced this action, the Partnership Law does not apply (*see* Partnership Law § 10[2]). Plaintiff has not shown that the conversion was ineffective (*see* Limited Liability Company Law

§ 1006).

Even if plaintiff asserted his accounting claim under the common law based on a breach of fiduciary duty, the claim would be barred by the applicable three-year statute of limitations. Plaintiff seeks only monetary damages and did not commence this action until almost four years after he withdrew from the firm and first requested an accounting (*see Carlingford Ctr. Point Assoc. v MR Realty Assoc.*, 4 AD3d 179, 179-180 [1st Dept 2004]).

We have considered plaintiff's remaining arguments, including his request for sanctions, and find them unavailing.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

134 The People of the State of New York, Ind. 1940/10
Respondent,

-against-

Ramon Cruz,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered October 19, 2012, as amended November 27, 2012, convicting defendant, after a jury trial, of rape in the first degree (two counts), criminal sexual act in the first degree (two counts), robbery in the second degree, and assault in the second degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. Defendant failed to preserve his contention that the January 27, adjournment was not on consent, and we decline to review it in the interest of justice. As an alternative holding, we find it unavailing. The remaining challenged periods were excludable as reasonable delay while the People were awaiting the results of

DNA analysis being conducted by the Office of the Chief Medical Examiner (*see* CPL 30.30[4][g]; *People v Robinson*, 47 AD3d 847, 848 [2d Dept 2008], *lv denied* 10 NY3d 869 [2008]; *see also People v Lathon*, 120 AD3d 1132 [1st Dept 2014], *lv denied* 24 NY3d 1085 [2014]), delay following decisions on defense motions after the People had declared readiness for trial (*see People v Moorhead*, 61 NY2d 851 [1984]; *see also People v David*, 253 AD2d 642, 645 [1st Dept 1998], *lv denied* 92 NY2d 948 [1998]; *People v Ali*, 195 AD2d 368, 369 [1st Dept 1993], *lv denied* 82 NY2d 804 [1993]), or adjournments granted upon defense counsel's consent or request (*see* CPL 30.30[4][b]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

135 Deborah Gounarides, et al., Index 301476/11
Plaintiffs-Appellants,

-against-

Yankee Stadium Corporation, et al.,
Defendants-Respondents.

_____

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

Gordan & Silber, P.C., New York (Andrew B. Kaufman of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered September 18, 2014, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted in this action where plaintiff Deborah Gounarides, an employee of nonparty Legends Hospitality LLC (Legends), fell in the Legends Club located within Yankee Stadium. At the time of her accident, the club was open, but since it was several hours before a scheduled game, the lights were off. There is no evidence in the record that defendants owned, operated, occupied, managed or controlled the area, including any responsibility for turning on the lights (*see Grullon v City of New York*, 297 AD2d 261 [1st Dept 2002]). That

was the sole responsibility of Legends, the exclusive licensee of the area (*see Peck v 2-J, LLC*, 56 AD3d 277 [1st Dept 2008].

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

136 Board of Managers of Central Park Place Condominium,
Plaintiff-Respondent,

-against-

Hubert Potoschnig, etc.,
Defendant-Appellant,

American Express Centurion B, et al.,
Defendants.

Index 118205/09

Hubert Potoschnig, appellant pro se.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Maria I. Beltrani of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Rakower, J.), entered November 3, 2014, which confirmed the special referee's recommendation to award plaintiff $89,174.48 in unpaid common charges, interest, assessments, electricity and late fees, and $144,377,68 in attorneys' fees, unanimously modified, on the law, to vacate the award of attorneys' fees, and remand the matter for a new hearing and determination of the amount of plaintiff's reasonable attorneys' fees, and otherwise affirmed, without costs.

The referee's recommendation of $89,174.48 in unpaid common charges, interest, assessments, electricity and late fees is

supported by the record (*see Domingez v Zinnar*, 130 AD3d 414, 415 [1st Dept 2015]).

However, there is no evidence in the record that the referee considered the relevant factors in determining reasonable attorneys' fees (*see Matter of Freeman*, 34 NY2d 1, 9 [1974]; *1050 Tenants Corp. v Lapidus*, 52 AD3d 248 [1st Dept 2008]), and since the hearing evidence is not, on its face, sufficient to show the reasonable amount of attorneys' fees incurred by plaintiff, the referee's recommendation as to attorneys' fees should have been rejected (*see e.g. 135 E. 57th St., LLC v 57th St. Day Spa, LLC*, 126 AD3d 471 [1st Dept 2015]). Accordingly we remand for a new hearing and determination of the amount of plaintiff's reasonable attorneys' fees.

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

137 Irene Solovey, Index 155208/13
Plaintiff-Appellant,

-against-

The Department of Education
of the City of New York,
Defendant-Respondent.

_____

David A. Bythewood, Mineola, for appellant.

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

_____

Appeal from order, Supreme Court, New York County (Frank P. Nervo, J.), entered June 11, 2014, which dismissed the action seeking a declaratory judgment on the basis that the relief sought was in the nature of mandamus and the four-month statute limitations for an article 78 proceeding had expired, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court.

Dismissal of the appeal is warranted because plaintiff omitted a complete copy of her opposition papers to defendant's motion to dismiss, which was a necessary paper upon which the order appealed was founded and should have been included in the record (*see* CPLR 5526; Rules of App Div, 1st Dept [22 NYCRR] § 600.10; *Quezada v Mensch Mgt. Inc.*, 89 AD3d 647 [1st Dept 2011]).

Without plaintiff's opposition papers, it is impossible to determine whether she opposed dismissal on statute of limitations grounds, and if so, whether her arguments were properly rejected. It is also impossible to determine whether she preserved her argument that a hearing was required to determine whether the statute of limitations should be tolled under CPLR 208 due to mental incompetency (*see Borbon v Pescoran*, 106 AD3d 594 [1st Dept 2013]).

Were we not dismissing the appeal, we would find that Supreme Court did not err in forgoing a hearing on the issue of plaintiff's competency for purposes of the tolling provision of CPLR 208. The record belies plaintiff's contention that her depression and anxiety constitute "insanity" for purposes of the tolling provision of CPLR 208. During a November 20, 2012 hearing, plaintiff testified coherently and effectively as to her understanding of the stipulation's terms and her willingness to forgo her right to a tenure hearing, and her counsel, who was present when she signed the challenged stipulation, did not mention competency at that time (*see Karczewicz v New York City Tr. Auth.*, 244 AD2d 285 [1st Dept 1997]). Moreover, the record shows that at the time she signed the stipulation, plaintiff was able to continue caring for two elderly individuals with health

problems and her teenage son, who had severe behavioral issues (*see Eisenbach v Metropolitan Transp. Auth.*, 97 AD2d 808 [2d Dept 1983], *affd* 62 NY2d 973 [1984]).

Finally, plaintiff's expert statements are inadmissible because they are unsworn (*see e.g. Concepcion v Walsh*, 38 AD3d 317, 318 [1st Dept 2007]). Even if the expert letters were sworn, neither expert's letter establishes that plaintiff was insane when she signed the November 20, 2012 stipulation because they do not state or provide any indication how her mental illness rendered her unable to function in society at that time (*see Matter of McBride v County of Westchester*, 211 AD2d 792, 794 [2d Dept 1995], *lv denied* 85 NY2d 809 [1995]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

138 The People of the State of New York, Ind. 66704/10
Respondent,

-against-

Simon Reyes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J. at suppression hearing; Richard Lee Price, J. at nonjury trial and sentencing), rendered June 20, 2012, convicting defendant of driving while ability impaired, and sentencing him to a $300 fine, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its assessment of police testimony about defendant's condition upon his arrest.

We reject defendant's various arguments for suppression or preclusion of evidence of his breathalyzer test results. In any event, any error in receiving this evidence was harmless in view

of the overwhelming evidence, independent of the breathalyzer test results, that defendant drove while his ability was at least impaired by alcohol (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

139 In re Robert Tonry, Index 100081/14
Petitioner,

-against-

William Bratton, etc., et al.,
Respondents.

_____

Brill Legal Group, P.C., New York (Peter E. Brill of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Max McCann of counsel), for respondents.

_____

Determination of respondent Police Commissioner of the City of New York, dated September 18, 2013, which dismissed petitioner from his position as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Paul Wooten, J.], entered July 11, 2014), dismissed, without costs.

The determination is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Such evidence demonstrated that petitioner engaged in numerous acts of misconduct, and there exists no basis to disturb the credibility determinations of the Deputy Commissioner of Trials (*see Matter of Berenhaus v Ward,* 70 NY2d

436, 443 [1987]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

140 Peter Jennings, Index 306342/10
Plaintiff-Appellant,

-against-

Chase Home Finance, LLC, et al.,
Defendants-Respondents,

Norman W. Leon, et al.,
Defendants.

[And a Third-Party Action]

_____

Law Office of Michael O. Adeyemi, Brooklyn (Michael O. Adeyemi of counsel), for appellant.

Dorf & Nelson LLP, Rye (Jonathan B. Nelson of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 19, 2015, which granted defendants-respondents' motion to dismiss the complaint for failure to join a necessary party, unanimously affirmed, without costs.

Plaintiff, a feeholder of the residential property at issue, seeks, among other things, a declaratory judgment as to the rights of the parties with regard to a loan and a mortgage on the property. Third-party defendant Maryrose Mlayi, a feeholder and mortgagor of the property, is a necessary party to this action (*see* CPLR 1001[a]; *Guccione v Estate of Guccione*, 84 AD3d 867,

870 [2d Dept 2011]). Since plaintiff never sought to have Mlayi added as a defendant, Supreme Court properly dismissed the action (*see* CPLR 1003; *Telesford v Patterson*, 27 AD3d 328, 330 [1st Dept 2006]). Mlayi, who is allegedly absent from the state, could have been served by publication, if necessary (*see* CPLR 314, 315; *Contimortgage Corp. v Isler*, 48 AD3d 732, 734 [2d Dept 2008]), and is therefore subject to Supreme Court's jurisdiction. Accordingly, there is no basis for permitting the action to proceed without her (*see* CPLR 1001[b]; *Matter of East Bayside Homeowners Assn., Inc. v Chin*, 12 AD3d 370, 371 [2d Dept 2004], *lv denied* 4 NY3d 704 [2005]).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

141 The People of the State of New York, Ind. 4060/13
Respondent,

-against-

Mark Gonzalez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey Richards 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 (Edward McLaughlin, J.), rendered on or about April 8, 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.

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

ENTERED: FEBRUARY 4, 2016

CLERK

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

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

142 The People of the State of New York, Ind. 246/10
Respondent,

-against-

Rafael Canela,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul Hershan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis Boyle, J.), rendered on or about November 13, 2013,

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

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

ENTERED: FEBRUARY 4, 2016

CLERK

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

Tom, J.P., Friedman, Sweeny, Acosta, Andrias, JJ.

143N Joanne Motichka, Index 160158/13
Plaintiff-Appellant,

-against-

MP 1291 Trust, et al.,
Defendants-Respondents.

_____

Russell A. Schindler, Kingston, for appellant.

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for MP 1291 Trust, respondent.

Epstein, Becker & Green, P.C., New York (Aime Dempsey of counsel), for Eli's Bread, respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered January 17, 2014, which, after a hearing, denied plaintiff tenant's motion for a preliminary injunction, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying the motion (*see Doe v Axelrod*, 73 NY2d 748, 750 [1988]), where the evidence raises "sharp" issues of fact regarding plaintiff's noise and odor complaints, and the intent of the parties that drafted a 1999 stipulation (*Residential Bd. of Mgrs. of Columbia Condominium v Alden*, 178 AD2d 121, 123 [1st Dept 1991]; *Lehey v Goldburt*, 90 AD3d 410, 411 [1st Dept 2011]).

Plaintiff has not made the required showing for a preliminary injunction (*see Doe*, 73 NY2d at 750).

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

ENTERED: FEBRUARY 4, 2016

CLERK

Sweeny, J.P., Acosta, Richter, Manzanet-Daniels, JJ.

16045 Princes Point LLC, et al., Index 601849/08
Plaintiff-Appellant,

-against-

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

AKRF Engineering, P.C.,
Defendant.

_____

Rosenberg Calica & Birney LLP, Garden City (John S. Ciulla of counsel), for appellant.

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered June 3, 2014, to the extent appealed from as limited by the briefs, affirmed, with costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, J.P.
Rolando T. Acosta
Rosalyn H. Richter
Sallie Manzanet-Daniels, JJ.

16045
Index 601849/08

_____x

Princes Point LLC, et al.,
Plaintiff-Appellant,

-against-

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

AKRF Engineering, P.C.,
Defendant.

_____x

Plaintiff appeals from a judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered June 3, 2014, to the extent appealed from as limited by the briefs, declaring, on defendants Allied Princes Bay Co., Allied Princes Bay Co. #2, L.P. (together, APB), Muss Development L.L.C., and Joshua L. Muss's third counterclaim, that plaintiff anticipatorily breached its real estate contract with APB, entitling defendants to recover the down payment and to retain certain other payments.

Rosenberg Calica & Birney LLP, Garden City (John S. Ciulla of counsel), for appellant.

Herrick, Feinstein LLP, New York (Scott E. Mollen, Darlene Fairman and Adam J. Stein of counsel), for respondents.

ACOSTA, J.

The questions raised by this appeal are whether a prospective purchaser of real property anticipatorily breaches a contract of sale by commencing an action against the seller for rescission of the contract before the closing date, and whether, in the event of the buyer's repudiation, the seller is required to show that it was ready, willing, and able to complete the sale (by obtaining certain government approvals as a condition precedent to closing) in order to retain the deposit and certain other payments as liquidated damages. We hold that, because a rescission action unequivocally evinces the plaintiff's intent to disavow its contractual obligations, the commencement of such an action before the date of performance constitutes an anticipatory breach. As to the second question, we hold that the seller was not required to show that it was ready, willing, and able to complete the sale because the buyer's anticipatory breach relieved it of further contractual obligations.

I. Facts

The Muss family acquired a 23-acre parcel of land in Staten Island known as Princes Point in the early 1970s. The family formed two limited partnerships to own the property: defendants Allied Princes Bay Co. and Allied Princes Bay Co. #2 (collectively, APB). Defendant Joshua Muss is the general

partner of APB, and defendant Muss Development LLC is the management company that oversaw various entities and development projects in which the Muss family holds an interest, including Princes Point.

In the 1980s, the New York State Department of Environmental Conservation (DEC) declared the property an inactive hazardous waste site. To obtain a delisting of the property as a hazardous waste site, APB, Joshua Muss, and Muss Development LLC (collectively, defendants) conducted remediation work, which involved the construction of a revetment (a seawall designed to prevent erosion) along the entire shoreline of the property. The property was delisted in 2001, and defendants began to seek the government approvals necessary to develop the property (the development approvals).

In 2004, plaintiff entered into an agreement with APB to purchase the property for $35,910,000, making an initial down payment of $1,878,500. One of the conditions precedent to closing was defendants' having delivered to plaintiff the development approvals (except for any waived by the relevant city agencies). The contract provided for a closing date 30 days after the date on which defendants provided notice to plaintiff that all development approvals had been obtained, "but in no event later than the Outside Closing Date," which was defined as

18 months from the execution and delivery of the agreement by each of the parties. If, despite diligent efforts, defendants were unable to obtain all development approvals on or prior to the Outside Closing Date, either party could terminate the agreement upon 30 days' notice. In the event of termination, plaintiff would receive a refund of the deposit (and "compaction payments"[1]), and the parties would be released from the majority of their obligations. As an alternative to terminating the contract, plaintiff had the option of waiving the development approvals and closing the sale with an abatement in the purchase price.

In 2005, after Hurricane Katrina, the DEC conducted a visual inspection of the revetment, discovered problems, and called for additional work to be done. Because of the resulting increase in time and cost needed to obtain the requisite development approvals, defendants advised plaintiff that they would exercise their right to terminate the contract and return the down payment unless plaintiff agreed to amend the contract according to certain terms.

In March 2006, the parties amended their contract in writing

[1] The contract provided for the buyer to provide the seller with progressive "Compaction Payments" related to the excavation and refilling of the land.

to include the following terms: (1) extend the Outside Closing Date to July 22, 2007 (the New Outside Closing Date); (2) increase the purchase price to $37,910,000; (3) increase the down payment to $3,995,500; (4) require plaintiff to reimburse defendants for 50% of the costs related to completing the revetment work and obtaining the development approvals; and (5) require plaintiff to forbear from commencing "any legal action" against defendants in the event that the development approvals were not issued or the revetment work was not completed by the New Outside Closing Date (the forbearance provision).

Facing additional problems with the revetment, the parties extended the New Outside Closing Date on a month-to-month basis, because defendants, as stated in a May 2008 email, believed they were "on track" to receive the few remaining government approvals. The final date to which the New Outside Closing Date was extended was July 22, 2008 (the Final Outside Closing Date).

Despite the contract's forbearance provision, plaintiff commenced the instant action on June 20, 2008 - prior to the Final Outside Closing Date - claiming that it had been defrauded into entering into the contract and the 2006 amendment by defendants' alleged misrepresentation that the revetment had been built in accordance with the DEC's specifications. In effect, plaintiff sought rescission of the 2006 amendment and specific

performance of the 2004 contract (with an abatement in the purchase price to account for defendants' failure to acquire the development approvals).

All of plaintiff's causes of action have since been dismissed (*see* 94 AD3d 588, 588 [1st Dept 2012] ["(P)laintiff accepted all defects in the premises and was not relying on any assurances made by defendants as to the condition of the property"]; 110 AD3d 564 [1st Dept 2013]; 116 AD3d 574 [1st Dept 2014]). All that remained after the dismissal of plaintiff's claims was the counterclaims of defendants, who moved for partial summary judgment (on their counterclaims to declare the contract terminated, to declare that plaintiff materially breached the contract, thereby entitling defendants to retain the down payment and compaction payments, and to award defendants attorneys' fees and costs). The motion court granted the motion in its entirety, determining that the contract had expired and was terminated by its own terms, that plaintiff anticipatorily breached the contract by commencing this action, and that defendants were entitled to retain the down payment and compaction payments as liquidated damages, and referred the matter to a special referee to determine contractual attorneys' fees and costs in favor of defendants. Plaintiff appeals.

II. Discussion

a. Whether plaintiff anticipatorily breached the contract by commencing the instant action

An anticipatory breach, or repudiation, occurs when a party to a contract unequivocally communicates to its counterpart before performance is due, by a statement or voluntary affirmative act, that it will avoid performance of its contractual duties (*see Norcon Power Partners v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 [1998] ["A repudiation can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach"] [internal quotation marks omitted]). "[W]hen a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, the repudiation entitles the nonrepudiating party to claim damages for total breach" (*id.* at 462-463 [internal quotation marks omitted]). Whether a party has anticipatorily breached a contract is ordinarily a question of fact reserved for a jury, but a court may decide the issue as a matter of law when the purported repudiation is embodied in an unambiguous writing (*see Briarwood Farms, Inc. v Toll Bros., Inc.*, 452 Fed Appx 59, 61 [2d Cir 2011]).

There is an apparent absence of case law regarding whether the commencement of an action, particularly one seeking rescission, is itself an anticipatory breach. In *Auten v Auten* (308 NY 155 [1954]), the Court of Appeals addressed whether an action for separation constituted a repudiation of a prior separation agreement, but did not answer the question, because it determined that the law of England controlled (*id.* at 159).

This Court has held that an action seeking a declaratory judgment does not constitute an anticipatory breach (*see Cato Corp. v Roaman*, 214 AD2d 383 [1st Dept 1995] [tenant's action against landlord for declaration of right to sublet premises was not anticipatory breach, where tenant continued performance of paying rent while litigation was pending]). Several courts in other jurisdictions agree (*see Settlement Funding, LLC v AXA Equit. Life Ins. Co.*, 2010 WL 3825735, *11, 2010 US Dist LEXIS 104451, *33 [SD NY Sept. 30, 2010] [collecting cases]). The proposition is a rational one, because a declaratory judgment action merely seeks to define the rights and obligations of the parties. If a plaintiff succeeds in obtaining a declaratory judgment, he or she may then proceed to the performance of duties under the contract (as defined by the judgment).

An action seeking rescission of a contract is markedly different. In contrast to a declaratory judgment, a plaintiff

who succeeds in obtaining rescission can no longer perform: his or her contractual duties will have evaporated. Indeed, by bringing this action for rescission, plaintiff sought to have a court "declare the contract void from its inception and to put or restore the parties to *status quo*" (*County of Orange v Grier*, 30 AD3d 556, 557 [2d Dept 2006], quoting *Schwartz v National Computer Corp.*, 42 AD2d 123, 125 [1st Dept 1973]).

We therefore agree with the motion court that, by "commencing this lawsuit [before the Final Closing Date] and seeking the particular relief of rescission of the Amendment and abatement of the purchase price, [plaintiff] unequivocally notified the Muss defendants of its intention to renounce its contractual duties" (*see Al-Shahrani v Hudson Auto Traders, Inc.*, 89 AD3d 968, 969 [2d Dept 2011] ["by commencing this (rescission) action, (infant plaintiff) unequivocally manifested his intention to disaffirm the contract"]). Plaintiff did not simply seek to define its rights under the parties' agreement; it sought to nullify the agreement entirely. Although plaintiff argues that it only sought rescission of the 2006 amendment and specific performance of the 2004 contract, there was one amended contract which defined the parties' rights and obligations. Plaintiff

anticipatorily breached that contract by commencing this action.[2]

b. Whether defendants were required to show that they were ready, willing, and able to complete the sale

The question is whether, in the context of plaintiff buyer's anticipatory breach, defendants must show that they were ready, willing, and able to close on the sale of the property - specifically, by obtaining the development approvals as a condition precedent to closing - in order to retain the down payment and compaction payments as liquidated damages. We answer this question in the negative, primarily because plaintiff's anticipatory breach discharged defendants' future obligations (including to fulfill conditions precedent) under the contract.

"Besides giving the nonrepudiating party an immediate right to sue for damages for total breach, a repudiation discharges the nonrepudiating party's obligations to render performance in the future" (*Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 77 [1st Dept 2002] [internal citation omitted], *lv*

[2] In any event, although the parties did not frame their arguments in this way, it appears that plaintiff was in breach of the contract by commencing this action in violation of the forbearance provision. Plaintiff had certain options under the contract in the event that defendants failed to obtain the development approvals: it could have (1) terminated the contract and received a refund of its down payment, or (2) proceeded to the closing and received an abatement of the purchase price. The course plaintiff chose, however - commencing litigation against the sellers - was explicitly forbidden by the contract.

denied 100 NY2d 504 [2003]). Moreover, "[a] party will be relieved or discharged from the performance of futile acts or conditions precedent . . . upon the failure or refusal by a party to honor its obligations under their contract" (*Special Situations Fund III v Versus Tech.*, 227 AD2d 321, 321 [1st Dept 1996], *lv denied* 88 NY2d 815 [1996]; *see also Sunshine Steak, Salad & Seafood v W.I.M. Realty*, 135 AD2d 891, 892 [3d Dept 1987]; *accord Palazzetti Import/Export, Inc. v Morson*, 2001 WL 1568317, *9, 2001 US Dist LEXIS 20243, *28 [SD NY Dec. 6, 2001], *affd* 54 Fed Appx 698 [2d Cir 2002]).

The contract required defendants to obtain the development approvals as a condition precedent to closing, but defendants were absolved of that obligation upon plaintiff's anticipatory breach. Whether defendants were in fact "on track" to obtain the approvals by the closing date is of no moment; the record demonstrates that they had been engaged in significant efforts to obtain the approvals until plaintiff's repudiation, and it was possible, however unlikely, that they could have obtained the approvals before the Final Outside Closing Date (which the parties had been extending on a monthly basis). They were not required to continue to pursue the approvals after plaintiff repudiated the contract by commencing the instant action seeking rescission (*see* 4 Corbin on Contracts § 978 [1951] ["The

willingness and ability to perform need not continue after the repudiation; it is merely required that they should have existed before the repudiation and that the plaintiff would have rendered the agreed performance if the defendant had not repudiated"]). Once plaintiff commenced the instant action, it would have been futile and wasteful for defendants to continue to seek the approvals in preparation for a closing that plaintiff was tirelessly seeking to avoid.[3]

We acknowledge that, although it appears that the "ready, willing, and able" requirement was devised exclusively to ensure that prospective purchasers of property are legally and financially able to conclude their purchases (*see* Black's Law Dictionary [10th ed 2014], ready, willing, and able), the concept has been expanded to apply to sellers of real property in some circumstances (*see e.g. Rodriguez Pastor v DeGaetano*, 128 AD3d 218, 224 [1st Dept 2015], quoting *Donerail Corp. N.V. v 405 Park LLC*, 100 AD3d 131, 138 [1st Dept 2012]; *Reid v I Grant Inc.*, 94 AD3d 500 [1st Dept 2012]).

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[3] Our decision is unaffected by defendants' concession in a 2011 affidavit by their counsel that they continued to seek but had been unable to obtain the approvals, because defendants were not required to do so after plaintiff's repudiation. Whether they continued pursuing the approvals with the hope that plaintiff or a third party would ultimately purchase the property is of no consequence here.

However, we have not previously considered whether a seller must make such a showing in the context of a buyer's anticipatory beach. *Pastor* and *Donerail* dealt with circumstances in which a time-of-the-essence closing date occurred and one party defaulted. Here, by contrast, plaintiff (the buyer) anticipatorily breached the contract before the closing date; as a consequence, defendants' duty of future performance, and of fulfilling conditions precedent by acquiring the development approvals, was discharged. Therefore, we need not concern ourselves with the question of whether defendants would have been ready, willing, and able to perform on the Final Outside Closing Date. As a result of plaintiff's commencement of this action, the closing never occurred.[4]

Although the parties dispute which of two Court of Appeals decisions is controlling here, neither case is directly on point. *American List Corp. v U.S. News & World Report* (75 NY2d 38 [1989]) - a case on which defendants rely for the proposition that a "nonrepudiating party need not . . . tender performance nor prove its ability to perform the contract in the future" (*id.* at 44) - concerned significantly different circumstances from

[4] Although a closing date did not occur in *Reid*, it is distinguishable from this case because, like *Pastor* and *Donerail*, it did not concern an anticipatory breach.

those at bar. In that case, a magazine entered into a 10-year contract to rent mailing lists from a supplier, and repudiated the contract after only two years. This was later discussed in *Pesa v Yoma Dev. Group, Inc.* (18 NY3d 527 [2012]), a case on which plaintiff heavily relies for the proposition that defendants were required to prove their ability to close the sale. *Pesa* distinguished *American List* by the fact that the plaintiff in that long-term contract case should not have been "forced to meet the perhaps impossible burden of showing what its financial condition would have been for many years to come," whereas "[n]o comparable burden falls on the non-repudiating party" in a failed real estate transaction (*id.* at 533).

While *Pesa* more closely resembles the instant matter because it involved a real estate transaction in which one party repudiated, it does not answer the question presented here. The Court of Appeals in *Pesa* held that a buyer suing a repudiating seller was required to demonstrate its readiness, willingness, and ability to close in order to recover damages for breach of contract. As the Court noted, this requirement is reasonable because "[i]t is axiomatic that damages for breach of contract are not recoverable where they were not actually caused by the breach--i.e., where the transaction would have failed, and the damage would have been suffered, even if no breach occurred" (*id.*

at 532).

Importantly, however, *Pesa* did not rule that a buyer seeking to recover a *down payment* must make any showing of its ability to perform.[5] Nor would it have, because it is well established that although a purchaser must make a "ready, willing, and able" showing in an action for specific performance or damages where a seller has repudiated, such a showing is not required where the purchaser merely seeks the return of its down payment (*see Sunrise Assoc. v Pilot Realty Co.*, 170 AD2d 214, 215 [1st Dept 1991], citing *Zev v Merman*, 134 AD2d 555, 558-559 [2d Dept 1987], *affd* 73 NY2d 781 [1988]; *Scull v Sicoli*, 247 AD2d 852 [4th Dept 1998]). The Court of Appeals' agreement with this proposition is implied in *Pesa*'s approving citation to *Scull* (*see Pesa*, 18 NY3d at 532), a case in which the Fourth Department simultaneously held that a seller's repudiation entitled the buyers "to recover their down payments *without proof* that they were ready, willing and able to complete the transaction" and that the buyers *were required* but failed to prove that they were ready, willing, and

[5] In fact, the Court's recitation of the facts confirms that the seller had already returned the down payment *before* the buyers commenced the litigation (*id.* at 531). So, when the Court referred to a "damages suit like this one" (*id.*) in determining that the buyers were required to show they were ready, willing, and able to close the deal, it necessarily was not concerned with a buyer seeking to recover a down payment.

able to complete the sale in order to obtain specific performance or recover damages for breach of contract (247 AD2d at 853 [emphasis added]; *see also Bigler v Morgan*, 77 NY 312, 318 [1879]).

This is a sensible and reconcilable dichotomy, because a buyer who seeks the return of a down payment is advancing its restitutionary interest by attempting to recover the benefit it conferred on a repudiating seller, in order to prevent the latter's unjust enrichment; in such a case, a "ready, willing, and able" showing is not required, because the buyer is not alleging damages caused by the seller's breach (*see Sunrise Assoc.*, 170 AD2d at 215; *Scull*, 247 AD2d at 853; 28 NY Prac, Contract Law § 14:6; *In re Asia Global Crossing, Ltd.*, 404 BR 335, 340-342 [SD NY 2009]).

Conversely, where, as here, a seller seeks to retain a down payment as liquidated damages for a buyer's breach, it is not seeking restitution, because the down payment is not a benefit that the seller has conferred upon the buyer (*see* Restatement [Second] of Contracts § 370 [1981]). Rather, a seller in those circumstances is - like the buyer in *Pesa* - seeking damages that were caused by (or were "directly flowing from") the breach (*Reid*, 94 AD3d at 501; *see also Truck Rent-A-Ctr. v Puritan Farms 2nd*, 41 NY2d 420, 423-424 [1977]). This explains why, although

the *Pesa* Court did not rule that a nonrepudiating seller must make a "ready, willing, and able" showing in the face of a buyer's repudiation, we have recognized that the requirement applies to a seller seeking to retain a down payment in the absence of its counterpart's repudiation (*see Reid*, 94 AD3d at 501 [1st Dept 2012]).

Nevertheless, as discussed above, defendants in this action are not required to demonstrate their ability to close the sale, because plaintiff's anticipatory breach discharged their duty to obtain the development approvals as a condition precedent to closing. The outcome might have been different if plaintiff had defaulted on the closing date (*see Rodriguez Pastor*, 128 AD3d 218; *Donerail Corp.*, 100 AD3d 131). But we are not confronted with that situation. Plaintiff commenced this action for rescission, thereby repudiating the contract of sale before the closing date occurred and discharging defendants from their obligation to fulfill conditions precedent. Therefore, defendants were entitled to retain plaintiff's down payment and compaction payments as liquidated damages.

III. Conclusion

Accordingly, the judgment of the Supreme Court, New York County (Charles E. Ramos, J.), entered June 3, 2014, to the extent appealed from as limited by the briefs, declaring, on

defendants Allied Princes Bay Co., Allied Princes Bay Co. #2, L.P., Muss Development L.L.C., and Joshua L. Muss's third counterclaim, that plaintiff anticipatorily breached its real estate contract with APB, entitling defendants to recover the down payment and to retain certain other payments, should be affirmed, with costs.

All concur.

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

ENTERED: FEBRUARY 4, 2016

CLERK