

The hearing court correctly determined that defendant knowingly and voluntarily waived his *Miranda* rights before each of his statements (see *People v Williams*, 62 NY2d 285, 289 [1984]). The record does not support defendant's assertion that the police implied that the investigation pertained solely to the possible criminality of the police officers who shot defendant, rather than the criminality of defendant's attempt to shoot the officers. In any event, the *Miranda* warnings administered the first day by the detective, and the second day by the prosecutor, clearly informed defendant that his statements could be used against him. None of the interrogators made any remarks of the type condemned in *People v Dunbar* (24 NY3d 304 [2014], cert denied __ US __, 135 S Ct 2052 [2015]), or that otherwise undermined the effect of the warnings. Furthermore, as the suppression court observed, the content of defendant's statements demonstrated his awareness that they could be used against him. In any event, given the generally exculpatory nature of the statements when viewed in light of the trial issues, any error in receiving the statements was harmless.

The testimony by an assistant district attorney on matters relating to grand jury procedures and lawful use of force by the police presents a more troublesome issue.

The last witness called by the People on their direct case was one of the ADAs involved in the investigation of this case. She testified, over repeated objection, about the circumstances under which police officers would be justified in using deadly force. This testimony was not merely a general outline of the defense of justification but was, in several instances, tailored to the facts of this case. For example, the ADA testified, among other things, that possession of a loaded firearm outside of one's home or place of business was a felony. She also testified that, in a situation where the police are pursuing a suspect whom they believe had committed a felony, and that suspect uses deadly physical force against them, or is armed with a deadly weapon, the police can properly use deadly physical force.

Here, defendant did not contest that he was armed with a loaded and operable firearm. His defense, however, was that he did not fire directly at the police officers pursuing him but rather fired in the air in order to scare them off.

The ADA was further allowed to testify, again over repeated objection, about the composition and the function of a grand jury and how a witness either obtains or waives immunity before that body. As with her testimony regarding the justifiable use of physical force by police officers, this testimony was both of a

general nature and specifically related to the facts of this case. For example, she testified that a grand jury consists of 16 to 23 jurors who hear testimony to "determine if there is enough evidence for us to continue on a case or if there is not." She then proceeded to explain the grand jury subpoena process and how a witness who is subpoenaed to testify obtains immunity from prosecution for his grand jury testimony. The ADA was also permitted to testify, over objection, that if the grand jurors "feel there are additional witnesses that they would like to hear from," the District Attorney can subpoena those witnesses. She concluded by observing that none of the police witnesses in this case required a subpoena to testify in the grand jury, and none obtained immunity in exchange for their testimony.

Defense counsel moved for a mistrial and in response, the People argued that this testimony was introduced in anticipation of a potential defense claim that the officers testified falsely against defendant before the grand jury in order to protect themselves from indictment for wrongfully shooting defendant. The prosecutor also argued that this testimony was necessary to show that the officer's had no reason to fabricate their testimony. The defense, however, never made either claim. The motion for a mistrial was denied.

This testimony was improper for several reasons.

Comments regarding grand jury composition and proceedings have repeatedly been held to be improper when made by a court, and the same rationale applies when made by a prosecutor (see e.g. *People v Fortt*, 35 NY2d 921, 922 [1974], *revg for reasons state by dissent* 42 AD2d 859 [2d Dept 1973]); *People v Barnes*, 93 AD2d 864, 865 [2d Dept 1983], *lv denied* 60 NY2d 589 [1983]; *People v Williams*, 57 AD2d 876 [2d Dept 1977]). Such references are "completely unnecessary and possibly misleading" (*People v Fortt*, 35 NY2d at 922).

Here, the ADA's testimony that the grand jury that indicted defendant had heard testimony, had not asked to subpoena additional witnesses, and had voted to "go forward" fall within this prohibition. It carried the clear implication that the grand jury found that the police officer witnesses had testified credibly and had heard all the evidence necessary to indicate defendant's guilt.

Moreover, this testimony "was totally irrelevant to any legitimate issue presented at the trial," and as such was improper (*People v Ashwal*, 39 NY2d 105, 110 [1976]). As noted, it was introduced in anticipation of a defense argument that the officers had testified falsely in the grand jury to justify their

actions in shooting defendant. This argument was never raised by the defense. In fact, the question of testifying without immunity in the grand jury was raised by the prosecutor during his direct examination of a police officer and was only commented on by defense after it was raised by the prosecutor.

These errors were compounded by the ADA's testimony regarding the use of deadly physical force by the police. By permitting the witness to instruct the jury on the law of justification during the People's case, and apply the law to the facts of this case, "the court improperly surrendered its nondelegable judicial responsibility" (*People v Brown*, 104 AD3d 864, 865 [2d Dept 2013]; see also *People v Stiggins*, 1 NY3d 529, 530 [2003]; *People v Bayes*, 78 NY2d 546, 551 [1991]). "The court's delegation of this critical judicial function to the [prosecutor-witness] significantly impaired the integrity of the proceedings and deprived the defendant of a fair trial" (*People v Brown*, 104 AD3d at 865).

With respect to the prosecutor's summation, many of the challenged remarks generally constituted permissible advocacy. A prosecutor, like any other advocate, is entitled to broad leeway in summation (*People v Galloway*, 54 NY2d 396, 399 [1981]; *People v Liang*, 208 AD2d 401, 401 [1st Dept 1994]). However, there are

certain well-defined limits to such advocacy. "Above all[,] he should not seek to lead the jury away from the issues by drawing irrelevant and inflammatory conclusions which have a decided tendency to prejudice the jury against the defendant" (*People v Ashwal*, 39 NY2d at 110). The prosecutor must "stay within the four corners of the evidence," may not refer to matters not in evidence," should not "call upon the jury to draw conclusions which are not fairly inferrable from the evidence," or make arguments that "have no bearing on any legitimate issue in the case" (*id.* at 109-110 [internal quotation marks omitted]).

Here, on two separate occasions during his summation, the prosecutor did exactly that.

At one point, he rolled up a piece of paper and placed it in front of a gun. He used this prop, over repeated objection, to demonstrate a police officer's testimony regarding muzzle flashes. The police witness, however, did not make such a demonstration during his testimony, and his references to a muzzle flash were limited.

Subsequently, the prosecutor used a laser pointer to demonstrate how the shots fired by defendant would have gone wide of their mark. He also used this demonstration to argue that defendant's bullets would have shattered and thus explain the

absence of ballistics evidence from defendant's gun. No expert ballistics testimony was presented during the trial.

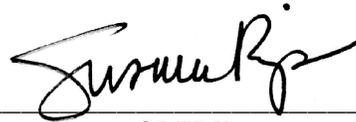
These comments were based upon facts not in evidence, something defense counsel specifically noted in at least two objections that were overruled. Moreover, they tended to lead the jury away from the issues before them in this case. As a result, they were improper (*People v Fisher*, 18 NY3d 964, 966 [2012]; *People v Collins*, 12 AD3d 33, 39-40 [1st Dept 2004]). Additionally, by discussing muzzle flashes and the potential trajectory of the defendant's bullets, the prosecutor improperly testified, not only as a witness, but as an expert witness (*People v Fisher*, 18 NY3d at 966).

The cumulative effect of these multiple improprieties during the People's direct case and summation caused defendant substantial prejudice and denied him a fair trial (*People v Calabria*, 94 NY2d 519, 523 [2000]).

Accordingly, we reverse and remand for a new trial (*People v Riback*, 13 NY3d 416, 423 [2009]).

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

ENTERED: JUNE 7, 2016



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did not render her testimony incredible. Moreover, her testimony was supported by evidence that she contracted the same sexually transmitted disease (STD) as defendant and his girlfriend.

The admission of the report on defendant's blood test stating that he tested positive for the STD, without giving defendant the opportunity to cross-examine the technician who operated the machine that conducted the testing and automatically generated the report, did not violate defendant's right of confrontation.

People v John (__ NY3d __, 2016 NY Slip Op 03208 [2016]) does not require a contrary result. The Court there, in reliance on *Bullcoming v New Mexico* (564 US 647 [2011]) and *Melendez-Diaz v Massachusetts* (557 US 305 [2009]), held that the defendant's Sixth Amendment right to confront witnesses against him was violated by the admission into evidence of a report regarding the results of DNA typing analysis conducted by New York City's Office of the Chief Medical Examiner, because the People failed to introduce it through the testimony of "an analyst who witnessed, performed or supervised the generation of defendant's DNA profile, or who used his or her independent analysis on the raw data" (2016 NY Slip Op 03208, *13). The use of "a testifying analyst functioning as a conduit for the conclusions of others"

(*id.*) was held to be insufficient to satisfy the Confrontation Clause. In its reasoning, the Court explicitly contrasted the DNA testing performed in that case, by OCME employees who conducted individual analyses of computer-generated information in the course of the testing process, with the kinds of lab reports that contain purely “machine-generated” data analysis (*id.* at 10). Indeed, the Court in *John* cited a footnote from *Melendez-Diaz* which makes clear that the prosecution is not required to produce the testimony of “anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device” (see 2016 NY Slip Op 03208 at 12, citing *Melendez-Diaz v Massachusetts*, 557 US 305, 311 n 1 [2009] [emphasis added]).

The lab report at issue here was of the purely “machine generated” category, and the witness whose testimony defendant claims was required was, at best, a technician who tested the accuracy of the machine before placing the sample in it for testing. Under *People v John* and the U.S. Supreme Court cases on which it relies, the report generated by the machine should not be treated as testimonial, and the absence of testimony by the technician who calibrated the machine did not violate defendant’s Sixth Amendment right of confrontation. “[T]he testing and

procedures employed . . . were neither discretionary nor based on opinion; nor did they concern the exercise of fallible human judgment over questions of cause and effect" (*People v Meekins*, 10 NY3d 136, 159 [2008], *cert denied* 557 US 934 [2009] [internal quotation marks and citation omitted]). In addition, contrary to defendant's argument, the report did not directly link him to the crimes, since the "test results, *standing alone*, shed no light on the guilt of the accused" (*id.* [emphasis added]), notwithstanding that they provided circumstantial evidence of guilt in light of other evidence.

The court properly declined to dismiss a panel of prospective jurors on the ground that they had been tainted by hearing the comments of one panelist, who was ultimately dismissed, to the effect that he would be predisposed to credit the child victim's testimony. The record "establishes that a fair and impartial jury was selected" despite any "prejudicial comments" (*People v Cruz*, 292 AD2d 175, 176 [1st Dept 2002], *lv denied* 98 NY2d 696 [2002]), in light of the court's curative instructions on the need to evaluate children in light of the same factors applicable to any other witness, and comments by several other prospective jurors affirming that principle.

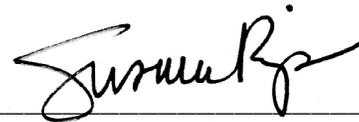
The court properly exercised its discretion in precluding

defense counsel from showing prospective jurors a photograph of the victim's genitals infected by the STD (see *People v Jean*, 75 NY2d 744 [1989]). The court placed no limitation on the scope of counsel's questioning regarding the prospective jurors' ability to remain fair and impartial when viewing such a photograph or considering the related allegations.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal, since they involve matters outside the record (see *People v Rivera*, 71 NY2d 705, 709 [1988]). We have considered and rejected defendant's remaining pro se claims.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2016

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Sweeny, J.P., Renwick, Andrias, Kapnick, Kahn, JJ.

1182 William McCrea, et al., Index 102667/11
Plaintiffs-Respondents, 590124/13

-against-

Arnlie Realty Company LLC,
Defendant-Appellant,

Arnar Purchasing Group Inc.,
Defendant.

- - - - -

Arnlie Realty Company, L.L.C.,
Third-Party Plaintiff-Appellant,

-against-

Brink Elevator Corp.,
Third-Party Defendant-Respondent,

Union Elevator Corp.,
Third-Party Defendant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Jonathan D'Agostino & Associates, P.C., Staten Island (Glen Devora of counsel), for McCrea respondents.

Chesney & Nicholas, LLP, Syosset (Marie I. Goutzounis of counsel), for Brink Elevator Corp., respondent.

Order, Supreme Court, New York County (Debra A. James, J.), entered August 11, 2015, which, insofar as appealed from as limited by the briefs, denied the motion of defendant Arnlie Realty Company LLC (Arnlie) for summary judgment dismissing the

Labor Law §§ 240(1) and 200 claims, granted plaintiffs' cross motion for partial summary judgment on their Labor Law § 240(1) claim, granted the motion of third-party defendant Brink Elevator Corp. (Brink) for summary judgment dismissing Arnlie's common-law indemnification claim, and, upon a search of the record, granted plaintiffs partial summary judgment on their Labor Law § 200 claim, unanimously modified, on the law, to deny Brink's motion, and to vacate that part of the order granting plaintiffs partial summary judgment on the Labor Law § 200 claim, and otherwise affirmed, without costs.

Plaintiff William McCrea, an elevator repairman employed by Brink, was injured when an elevator fell on top of him inside a building owned by Arnlie. Because "workers 'are scarcely in a position to protect themselves from accident[s]'" (*Cherry v Time Warner, Inc.*, 66 AD3d 233, 235 [1st Dept 2009], quoting *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985], and *Koenig v Patrick Constr. Corp.*, 298 NY 313, 318 [1948]), Labor Law § 240(1) is to be construed liberally in order to accomplish its intended purpose (*Zimmer v Chemung County Performing Arts*, 65 NY2d at 521; *Cherry v Time Warner, Inc.*, 66 AD3d at 235-236).

The evidence here establishes that at the time of the accident, McCrea was engaged in "repair" work because the

elevator's safety shoes were not operating properly, and the condition was an isolated event, unrelated to normal wear and tear (see *Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]; *Pieri v B&B Welch Assoc.*, 74 AD3d 1727, 1728-1729 [4th Dept 2010]). In addition, the elevator was a "falling object" within the meaning of the Labor Law, even though it was not actually being hoisted or secured at the time of the accident, because it required securing for the purpose of McCrea's repair work (see *Matthews v 400 Fifth Realty LLC*, 111 AD3d 405, 406 [1st Dept 2013]).

As plaintiff was engaged in activity protected by Labor Law § 240(1) at the time of the incident, Arnlie, as owner of the building, is subject to absolute liability for injuries which resulted from its failure to provide plaintiff with proper safety devices (*Cherry v Time Warner, Inc.*, 66 AD3d at 236), without regard to the comparative fault of plaintiff (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Where the worker is the sole proximate cause of the injury, however, the premises owner will not be liable (*Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554 [2006]). "[T]o raise a triable issue of fact as to whether a plaintiff was the sole proximate cause of an accident, the defendant must produce evidence that adequate

safety devices were available, that the plaintiff knew that they were available and was expected to use them, and that the plaintiff unreasonably chose not to do so, causing the injury sustained" (*Quinones v Olmstead Props., Inc.*, 133 AD3d 87, 89 [1st Dept 2015], quoting *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]).

Here, there is no indication that plaintiff refused or misused available safety equipment. The record is devoid of evidence that plaintiff was aware of the "kill switch" located in the building superintendent's office, and it is uncontroverted that the superintendent failed to alert him to the location of the switch or remain on the premises while the repair was ongoing, as required by the service contract (*cf. Quinones v Olmstead Props., Inc.*, 133 AD3d at 89 [triable issue of fact raised as to whether the plaintiff's conduct was sole proximate cause of accident where the "plaintiff was supplied with four safety devices and chose not to use any of them"])). The comparative fault of plaintiff, if any, in proceeding with the repair after triggering the dual relay switches, which were the only safety devices of which he was aware, does not relieve Arnlie of its absolute liability under the statute. Thus, the court properly granted summary judgment to plaintiffs on the

Labor Law § 240(1) claim.

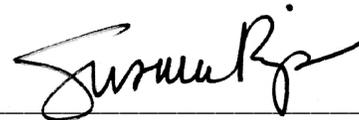
The court properly denied Arnlie's motion for summary judgment dismissing the Labor Law § 200 claim because there are issues of fact as to whether Arnlie had supervisory control over the means and methods of McCrea's work (*see Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). For the same reason, the record does not warrant the grant of partial summary judgment in favor of plaintiffs on the section 200 claim. Even though the service agreement between Arnlie and Brink provided that Arnlie would shut off the power to the elevator in the case of repair, there are triable issues as to whether the parties' course of conduct under this agreement waived or altered this provision (*see Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 501 [1st Dept 2014]). Plaintiffs also failed to conclusively establish that Arnlie or its "employees ever gave specific instructions to" McCrea (*Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014]; *compare Maza v University Ave. Dev. Corp.*, 13 AD3d 65 [1st Dept 2004]).

Furthermore, the court erred in dismissing Arnlie's common-law indemnification claim against Brink because there are issues of fact as to whether Brink purchased workers' compensation

insurance for McCrea (see Workers' Compensation Law § 11; *Boles v Dormer Giant, Inc.*, 4 NY3d 235, 240 [2005]), and as to whether Arnlie was negligent with respect to whether it actually exercised supervision or control over McCrea's work (see *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011]).

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

ENTERED: JUNE 7, 2016

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\$1,000,000 in improvements to the restaurant that it operates at the premises.

In February 2015, defendant purchased 218 Madison Avenue, which consists of 19-21 and the adjacent five-story building, which has residential space and two commercial tenants. Defendant states that it purchased 218 Madison intending to redevelop it, and that after the purchase it began to consider options which included: (i) demolishing 19-21 and erecting a new structure in its place which would connect to a new structure built on top of the adjacent building and (ii) demolishing both 19-21 and the adjacent building and erecting a new building.

On April 28, 2015, plaintiff was served with a Demolition Notice, which advised it of defendant's "election to demolish the area of the Building" where its restaurant was located, pursuant to Section 79 of the lease rider. Section 79(A) provides in relevant part that "[t]he parties understand and agree that if Landlord has a bona fide intention to demolish or alter the Building or the area of the Building in which the Demised Premises is located, then and in such event Landlord may cancel the unexpired portion of the term of this Lease . . . upon not less than six (6) months prior written notice to Tenant . . ."

Two days prior to the cancellation date of October 31, 2015,

plaintiff commenced this action seeking a declaratory judgment as to the legal validity of the Demolition Notice and the enforceability of Section 79(C) of the lease rider, under which defendant may assess a \$5,000 per diem penalty against plaintiff for each day it remains on the premises after the cancellation date. Plaintiff also sought preliminary and permanent injunctive relief.

The grant of the preliminary injunction tolling the cancellation date and the imposition of the \$5,000 per diem penalty was not an improvident exercise of discretion (see *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24-25 [1st Dept 2011]). Plaintiff met its burden of demonstrating “a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor” (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]; CPLR 6301).

To establish a likelihood of success on the merits, “[a] prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits” (*Weissman v Kubasek*, 112 AD2d 1086, 1086 [2d Dept 1985]; see also *Demartini v Chatham Green*, 169 AD2d 689 [1st Dept 1991]). A likelihood of success on

the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive (see *Four Times Sq. Assoc., L.L.C. v Cigna Invs.*, 306 AD2d 4, 5 [1st Dept 2003]).

Here, plaintiff established prima facie that, at the time the Demolition Notice was served, defendant lacked "a bona fide intention to demolish" the building or area of the building where its restaurant was located, as required by Section 79(A) of the lease rider (*Four Times Sq. Assoc.*, at 5-6). Up through the commencement of this action, defendant had not filed a demolition application with the Department of Buildings, and, although it had retained architectural and engineering firms to prepare architectural drawings, and had conducted geological and structural tests, its plans were still in the early stages and it was still evaluating different redevelopment options (see *Oriburger, Inc. v B.W.H.N.V. Assoc.*, 305 AD2d 275, 279 [1st Dept 2003]). Significantly, the drawings on which defendant relies are all dated September 11, 2015, 4½ months after the Demolition Notice was served.

Plaintiff also demonstrated that it will suffer irreparable harm absent an injunction and that the balance of equities tips in its favor. If a preliminary injunction is not granted,

plaintiff's restaurant, situated at a prime retail location, will be closed, its 19 employees will lose their jobs, and plaintiff will lose its substantial investment in improvements (see *Walbaum Inc. v Fifth Ave. of Long Is. Realty Assoc.*, 85 NY2d 600, 607 [1995] [forfeiture of "valuable improvements" and the good will built up by the plaintiff at the store location warranted a preliminary injunction]; *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 272-273 [1st Dept 2009] ["the loss of the goodwill of a viable ongoing business" constitutes "irreparable harm warranting the grant of preliminary injunctive relief"]; *FTI Consulting, Inc. v PricewaterhouseCoopers LLP*, 8 AD3d 145, 146 [1st Dept 2004] [loss of goodwill constitutes irreparable harm because it is not "readily quantifiable"]).

While plaintiff waited until the cancellation date was imminent before commencing this action, it explained in its application for injunctive relief that it had not moved earlier because it was waiting to see if defendant would file a demolition plan with the Department of Buildings or negotiate a buyout with the other two commercial tenants of the adjacent building, whose leases did not expire until 2025 and did not contain an early cancellation for demolition clause. It was not unreasonable for plaintiff to wait and see how defendant's

demolition plan manifested. Moreover, plaintiff still brought suit prior to the stated cancellation date and there is no evidence that defendant will be prejudiced, since it still appears to be weighing its options.

The balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief (*see Shau Thi Ma v Xuan T. Lien*, 198 AD2d 186 [1st Dept 1993], *lv dismissed* 83 NY2d 847 [1994]). The harm to plaintiff and its employees outweighs any potential harm to defendant resulting from delays to its redevelopment scheme, which it has not shown to be imminent. A preliminary injunction would "maintain the status quo [pending a hearing on the merits] and prevent the dissipation of property

that could render a judgment ineffectual" (*Ruiz v Meloney*, 26 AD3d 485, 486 [2d Dept 2006]).

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

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

ENTERED: JUNE 7, 2016

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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1368 & Roberto DeJesus,
M-1378 Plaintiff-Appellant,

Index 304767/13

-against-

Ana Tavares,
Defendant,

Yaqueline M. Morales,
Defendant-Respondent.

Greenstein & Milbauer, LLP, New York (Arnold E. DiJoseph, III of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondent.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 5, 2014, which granted defendant Morales's motion for summary judgment dismissing the complaint as to her, unanimously affirmed, without costs.

An out-of-possession landlord is generally not liable for negligence with respect to the condition of the demised premises unless it "(1) is contractually obligated to make repairs or maintain the premises or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (see *Vasquez v The Rector*,

40 AD3d 265, 266 [1st Dept 2007]).

Defendant sustained her initial burden of demonstrating that she was an out-of-possession landlord and that the alleged leak in the pipe in the kitchen sink was not a significant structural or design defect, and plaintiff failed to cite any specific statutory safety provision that was violated. In opposition, plaintiff failed to raise a triable issue of fact on these issues. His objection to defendant's affidavit, which was raised for the first time on appeal, was waived in that the issue is factual rather than legal and the defect, if any, could have been corrected by defendant before the motion court, if raised at an earlier time (*see Jordan v City of New York*, 126 AD3d 619, 620 [1st Dept 2015]).

Moreover, plaintiff failed to identify the facts essential to justify opposition to the motion which were within defendant's exclusive knowledge and control (*see Merisel, Inc. v Weinstock*, 117 AD3d 459, 460 [1st Dept 2014]). Plaintiff, defendant's brother, who was a resident of the premises, may have knowledge of the relevant issues and failed to submit his affidavit on the issue of whether defendant was an out-of-possession landlord. The affidavit of the witness to the accident did not address this factual issue.

M-1378 - Roberto DeJesus v Yaqueline Morales, et al.

Motion to dismiss appeal granted to the extent of supplementing the record on appeal to include the page of defendant's affidavit that is missing from the record but was before the motion court and striking the portions of plaintiff's briefs raising that issue, and otherwise denied.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2016

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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1369 In re Lisette R.,
Petitioner-Respondent,

-against-

Coral T.C.,
Respondent-Respondent,

Juan A.S.,
Respondent.

- - - - -

L.T., et al.,
Nonparty Appellants.

Karen Freedman, Lawyers for Children, Inc., New York (Shirim Nothenberg of counsel), for appellants.

Law Offices of Randall S. Carmel, Syossett (Randall S. Carmel of counsel), for Lisette R., respondent.

Andrew J. Baer, New York, for Coral T.C., respondent.

Order, Family Court, New York County (Douglas E. Hoffman, J.), entered on or about May 15, 2014, which, following a hearing, dismissed the petition for custody, and granted sole legal and residential custody to respondent mother, Coral T.C., unanimously affirmed, without costs.

The court's conclusion that there are no "extraordinary circumstances" warranting an award of custody to petitioner (see *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]) is based mainly on its credibility determinations, which are entitled to

deference and are amply supported in the record (see *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640 [1st Dept 2012]).

The children were in the care of petitioner, the grandmother of one of them, in New York, with the consent of respondent, for a period of 16 months. It is uncontested that respondent and petitioner had agreed that petitioner would care for the children while respondent was pursuing a year-long course of studies in Puerto Rico and would return the children to respondent at the end of that period. Instead of returning the children, however, petitioner filed her petition for custody.

Petitioner's allegations of abuse find no support in the record (see *Matter of Bennett v Jeffreys*, 40 NY2d at 548).

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ENTERED: JUNE 7, 2016

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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1370 Meriam Aflalo, Index 311467/11
Plaintiff-Appellant,

-against-

Leopeter Alvarez,
Defendant-Respondent,

Joanne Poccia,
Defendant.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for appellant.

Burke, Conway, Loccisano & Dillon, White Plains (Sean Levin of counsel), for respondent.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about April 7, 2015, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Leopeter Alvarez for summary judgment dismissing the claims of serious injury resulting in "significant" or "permanent consequential" limitation of use of plaintiff's knees within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff alleges that she suffered a left knee injury and exacerbation of a right knee condition as a result of a motor vehicle accident. Defendant established, prima facie, that

plaintiff did not sustain serious injury to either knee by submitting the affirmed report of an orthopedist, who found normal ranges of motion and negative test results, and diagnosed resolved sprains in both knees (see *Holmes v Brini Tr. Inc.*, 123 AD3d 628 [1st Dept 2014]; *Gibbs v Hee Hong*, 63 AD3d 559 [1st Dept 2009]). The orthopedist noted that plaintiff did not disclose any preexisting conditions and that he had reviewed post-accident medical records only. Defendant also submitted the transcript of plaintiff's deposition, where she testified that she had been diagnosed and treated for arthritis in her right knee months before the motor vehicle accident.

In opposition, plaintiff failed to raise an issue of fact as to either her left knee or her right knee. As to her alleged left knee injury, her medical expert found only slight limitations in range of motion, which are insufficient for purposes of Insurance Law § 5102(d) (see *Moore v Almanzar*, 103 AD3d 415 [1st Dept 2013]; *Hanif v Khan*, 101 AD3d 643 [1st Dept 2012]). It is noted that the MRI report of plaintiff's radiologist, which compared MRIs taken before and after the accident, did not provide evidence of any injuries that were distinct from her preexisting condition (see *Campbell v Fischetti*, 126 AD3d 472, 473 [1st Dept 2015]). Her medical

expert also failed to adequately explain or describe the tests he used to measure the range of motion limitations that he found during his examination of plaintiff (see *Gordon v Tibulcio*, 50 AD3d 460, 464 [1st Dept 2008]).

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

ENTERED: JUNE 7, 2016

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CLERK

deficiencies in his proof, the fact that he was the only witness to testify, in this "hit and run" accident, did not require a liability finding in his favor (see *Barreto v Motor Veh. Acc. Indem. Corp.*, 38 AD3d 359, 360 [1st Dept 2007]; *Sowell v Motor Veh. Acc. Indem. Corp.*, 16 AD3d 282 [1st Dept 2005]).

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extent the videotape was rendered incomplete by the manner in which the police downloaded it, the court provided a remedy by way of an adverse inference charge. Defendant did not preserve his claim that this instruction was insufficient, and we decline to review it in the interest of justice. As an alternative holding, we conclude that the charge was an adequate remedy that sufficed to prevent any prejudice (*see People v Handy*, 20 NY3d 663 [2013]; *People v Medina*, 9 AD3d 251 [1st Dept 2004], *lv denied* 3 NY3d 741 [2004]).

The court also properly exercised its discretion in admitting, as a model or demonstrative aid, a photograph of a revolver that was similar to the one that the victim testified was used in the robbery (*see e.g. People v Del Vermo*, 192 NY 470, 482-483 [1908]; *People v Brims*, 19 AD3d 433 [2d Dept 2005], *lv denied* 5 NY3d 804 [2005]; *People v Vasile*, 238 AD2d 221, 222 [1st Dept 1997]). While the victim at one point referred to the weapon depicted in the photo as the one used during the robbery, both the court and defense counsel corrected him, clarifying that this was not the actual revolver, and defense counsel requested no further relief. Defendant's claim of prejudice is speculative and meritless.

Defendant's challenge to the fact that the District

Attorney's signature on the indictment was printed rather than handwritten is nonjurisdictional (see *People v Striplin*, 48 AD3d 878 [3d Dept], *lv denied* 10 NY3d 871 [2008]), and we decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits (see General Construction Law § 46).

We perceive no basis for reducing the sentence.

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functional limitations or neurological symptoms, and opined that the knee condition would not have been caused by the accident and that any knee or spinal injuries were fully resolved (see *Adu v Kirby*, 132 AD3d 517, 517 [1st Dept 2015]; *Perdomo v City of New York*, 129 AD3d 585, 585 [1st Dept 2015]; *Malupa v Oppong*, 106 AD3d 538, 539 [1st Dept 2013]).

In opposition, plaintiff raised a triable issue of fact as to his right knee and lumbar spine injuries by submitting the affirmation of his treating physician, who found persisting limitations in range of motion, and affirmed MRI reports providing objective medical evidence of injury to the right knee and lumbar spine (see *Roldan v Conti*, 137 AD3d 507, 507-508 [1st Dept 2016]). Given that plaintiff was 20 years old and had no prior knee or back symptoms, his doctor's opinion that the injuries were directly caused by the accident was sufficient to raise an issue of fact as to causation (see *Jallow v Siri*, 133 AD3d 1391 [1st Dept 2015]; *Yuen v Arka Memory Cab Corp.*, 80 AD3d 481, 482 [1st Dept 2011]).

Plaintiff adequately addressed the gap in his treatment by submitting his deposition testimony and an affidavit in which he attested that he stopped treatment because he could not afford to pay for it after his no-fault benefits had expired, and later

resumed treatment when a payment arrangement was made with his doctor (see *Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905 [2013]; *Young Kyu Kim v Gomez*, 105 AD3d 415, 415 [1st Dept 2013]).

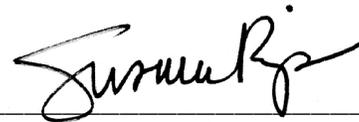
Plaintiff, however, did not submit objective medical evidence of injury to his cervical spine, or any evidence that any limitation in use of his cervical spine range of motion persisted (see *Lee v Lippman*, 136 AD3d 411, 412 [1st Dept 2016]; *Haniff v Khan*, 101 AD3d 643 [1st Dept 2012]). At trial, if plaintiff establishes a serious injury to his right knee and lumbar spine, he may recover for all injuries causally related to the accident, even those that do not meet the serious injury threshold (see *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Plaintiff's testimony that he missed only three or four days

of work after the accident defeats his 90/180-day claim (see *Streeter v Stanley*, 128 AD3d 477, 478 [1st Dept 2015]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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Tom, J.P., Sweeny, Moskowitz, Gesmer, JJ.

1374 Robert N. DeBenedictis,
Plaintiff-Respondent,

Index 602537/08

-against-

Robert Malta,
Defendant-Appellant,

Salvatore Gaudio,
Defendant.

- - - - -

[And a Third-Party Action]

Catafago Fini LLP, New York (Jacques Catafago and Adam Sherman of counsel), for appellant.

Zetlin & De Chiara LLP, New York (James H. Rowland of counsel), for respondent.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 9, 2015, which, inter alia, denied defendant Robert Malta's motion for summary judgment dismissing plaintiff's claims for breach of fiduciary duty and fraudulent concealment, unanimously affirmed, without costs.

Defendant could not raise the argument that he was not a fiduciary for the first time on appeal from the denial of summary judgment. This fact-based argument is not the type generally considered for the first time on appeal (*compare Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405,

408-409 [1st Dept 2009]). By raising it at this stage, defendant deprived plaintiff of the opportunity to annex relevant evidence to its affidavits (see *First Intl. Bank of Israel v Blankstein & Son*, 59 NY2d 436, 447 [1983]). In any event, the record shows that defendant, who was a co-managing member of various LLCs with plaintiff, and who had broad, long-standing business dealings with him, failed to establish a lack of fiduciary duty as a matter of law (see *Salm v Feldstein*, 20 AD3d 469 [2d Dept 2005]).

Defendant failed to establish any waiver, release, or limitation of his fiduciary obligations, simply by virtue of a standard integration clause in the parties' agreement. It is true that sophisticated parties can release fiduciaries from their obligations and from claims (see *Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 277 [2011]). However, such an agreement must contain a broad general release (see *id.*), or an express release of fiduciary claims (see *Pappas v Tzolis*, 20 NY3d 228, 232-233 [2012]). Moreover, these waivers must be made where there is no longer a relationship of trust (*id.* at 233). Here, the mere fact that plaintiff did not want to go through with developing certain of the properties was not dispositive of a lack of trust. For these same reasons, plaintiff was not under a duty of heightened diligence with

regard to the transaction.

Furthermore, since the only challenge to the fraudulent concealment claim was that defendant was not a fiduciary, summary judgment was properly denied as to that claim as well.

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ENTERED: JUNE 7, 2016

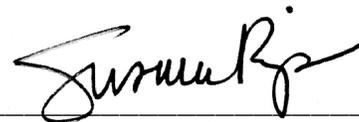
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intervention does not justify exempting him from the exhaustion requirement, since "[t]here is no legally cognizable injury to be suffered solely from being subjected to the disciplinary hearing[s] with the possibility of a subsequent finding of professional misconduct" (*Galín v Chassin*, 217 AD2d 446, 447 [1st Dept 1995]). Petitioner also failed to establish that his challenge to the agency action as "wholly beyond its grant of power" has any "substance" (*Matter of People Care Inc. v City of N.Y. Human Resources Admin.*, 89 AD3d 515, 516 [1st Dept 2011] [internal quotation marks omitted]).

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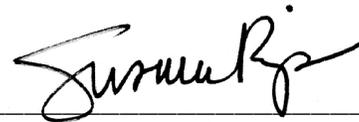
and is a material element of the other (Penal Law § 70.25[2]; *People v Laureano*, 87 NY2d 640, 643 [1996]).

This Court has upheld consecutive sentences for two or more offenses that include simple weapon possession without intent, but only where the “possession and use are separate or successive acts” (*People v Rosario*, 26 AD3d 271, 273 [1st Dept 2006], *lv denied* 6 NY3d 897 [2006]). Because there is nothing in defendant’s factual allocution or the allegations contained in the count in the indictment to which he pleaded guilty establishing possession at any point other than the shooting, the sentences must run concurrently (*see Laureano*, 87 NY2d at 644 [1996]; *compare People v Rodriguez*, 118 AD3d 451, 452 [1st Dept 2014], *lv denied* 24 NY3d 964 [2014] [consecutive sentences permitted because trial evidence established completed possession before shooting]). If, in fact, the possession and use were

separate acts, the plea allocution should have been structured accordingly in order to render the negotiated aggregate sentence a lawful one.

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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1377 In re Jasmine E. C.,
 Petitioner-Respondent,

 Gabriel J. C.,
 Respondent-Appellant.

Larry S. Bachner, Jamaica, for appellant.

Jo Ann Douglas, New York, for respondent.

Order of protection, Family Court, New York County (Gail A. Adams, Referee), entered on or about July 24, 2015, after a hearing, unanimously affirmed, without costs.

While the court credited petitioner's testimony as to the "frightening" history of violence and harassment to which respondent subjected her, it did not make an express finding that respondent committed any of the family offenses asserted in the petition. However, a fair preponderance of the evidence supports the conclusion that respondent committed harassment in the second degree and menacing in the second degree (Penal Law §§ 240.26[2], [3]; 120.14[2]; see *Matter of Kaur v Singh*, 73 AD3d 1178 [2d Dept 2010]). The court found credible petitioner's testimony that, in violation of prior orders of protection, respondent followed her wherever she went, including on the train and popping out of bushes; tracked her down through Facebook, causing her to

relocate to a shelter and to hide from him out of fear for her safety and that of her children; and harassed her by photographing her and her son during a court appearance. There is no basis for disturbing the court's determination crediting petitioner's version of events over that of respondent (*Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]; *Matter of Muldavin v Muldavin*, 248 AD2d 209 [1st Dept 1998]).

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

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

ENTERED: JUNE 7, 2016


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involving permanent consequential or significant limitations in use of the body parts they claim were injured through the affirmed report of their orthopedic expert, who found full range of motion in all allegedly injured body parts. However, defendants' reliance on certain numbers in the computerized range of motion studies contained in plaintiffs' medical records to show that plaintiffs had only "minor" limitations after the accident is unavailing. Defendants rely on percentages indicating "impairment" without explaining what those numbers mean. The range-of-motion measurements recorded in those same studies, when compared with the normal values provided, actually demonstrate limitations in range of motion in the body parts claimed to have been injured (see *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002]).

Plaintiff Anthony P. raised a triable issue of fact as to whether he sustained a serious injury to his right knee and cervical spine (see *Johnson v Salaj*, 130 AD3d 502 [1st Dept 2015]). He submitted MRI findings showing right knee ligament tears, which were confirmed by his surgeon, who viewed the tears during arthroscopic surgery, opined that the injury was causally related to the accident, and found persisting limitations in use. He also submitted a cervical spine MRI showing disc bulges, and

his physicians found limitations in range of motion and related these injuries to the subject accident (*see generally Toure*, 98 NY2d at 353). Since Anthony raised an issue of fact as to whether at least one of his serious injury claims meets the serious injury threshold, it is not necessary to consider the sufficiency of proof as to his other claims, particularly since defendants do not address each claim individually on appeal (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Fedorova v Kirkland*, 126 AD3d 624 [1st Dept 2015]).

Keyvanna H.'s claim of injury to her ankle should be dismissed, because she failed to raise an issue of fact in opposition to defendants' expert opinion that her ankle condition was a congenital condition that could not have been caused by the accident; the expert also noted that Hopkins's radiologist found that the foot and ankle MRIs taken after the accident were normal. Keyvanna's own medical records reflect that she had "congenital anomalies" in her foot and ankle, which diagnosis was not explained by the physician who saw her three years after the accident and opined that she had sustained an injury to her ankle that was causally related to the accident (*see Rivera v Fernandez & Ulloa Auto Group*, 123 AD3d 509, 510 [1st Dept 2014], *affd* 25 NY3d 1222 [2015]).

However, Keyvanna, who was 11 years old at the time of the accident, raised a triable issue of fact as to whether she sustained a serious injury to her lumbar spine. She submitted MRI reports providing objective medical evidence of injury to the lumbar spine, and her treating physician found limitations in range of motion that were causally related to the accident (see *Castillo v Abreu*, 132 AD3d 520 [1st Dept 2015]). Since this injury meets the serious injury threshold, we need not address whether Keyvanna's other claimed injuries meet the threshold (*Linton v Nawaz*, 14 NY3d 821).

At trial, if either plaintiff establishes a serious injury to any body part, he or she may recover for all injuries causally related to the accident, including those that do not meet the serious injury threshold (*Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Plaintiffs argue that the motion court erred in dismissing their claims of 90/180-day injuries. However, since plaintiffs did not appeal from the order, that issue is not before us.

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in connection with two incidents, one occurring between February and April 2009, and the other on November 20, 2009. Although the victim's trial testimony was less detailed than the statements made shortly after the incidents, which occurred three years before trial, when she was eight years old, her trial testimony supports a reasonable inference that defendant engaged in conduct satisfying the elements of first-degree sexual abuse. Moreover, the court properly admitted medical records and testimony, describing the two incidents in detail, that qualified for admission under the business records exception to the hearsay rule because the statements memorialized in the records were relevant to diagnosis and treatment (see *People v Ortega*, 15 NY3d 610 [2010]).

A detective's brief mention of the victim's disclosure of the February-April incident should not have been allowed because the disclosure was insufficiently prompt to qualify under the prompt outcry exception. However, the error was harmless, particularly because this evidence was cumulative to the properly admitted medical evidence. Defendant did not preserve his challenge to prompt outcry evidence regarding the November 20th incident, and we decline to review it in the interest of justice. As an alternative holding, we find that the testimony of the

mother and the detective contained detail that exceeded the limits of proper prompt outcry testimony, but that this evidence was likewise cumulative to the medical evidence and that its admission was likewise harmless.

Defendant's Confrontation Clause argument regarding the victim's testimony and out-of-court statements is also unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit because the victim testified appear at trial and defense counsel had a full opportunity to cross-examine her. The order of proof at trial had no impact on defendant's right of confrontation, because he could have requested to recall the victim for additional cross-examination about matters introduced at a later stage of the People's case.

We have considered and rejected defendant's ineffective assistance of counsel claims relating to the issues we have found to be unpreserved (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that he was prejudiced under the state and federal standards by his counsel's failure to object in any of those

instances. Accordingly, we do not find that any lack of preservation may be excused on the ground of ineffective assistance, or that his ineffective assistance claim warrants a new trial.

THIS CONSTITUTES THE DECISION AND ORDER
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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1381 Mutual Benefits Offshore Fund, Index 650438/09
Plaintiff,

-against-

Emanuel Zeltser, et al.,
Defendants.

- - - - -

Sternik & Zeltser, et al.,
Counterclaim Plaintiffs-Appellants,

-against-

Triangle International Management, Ltd.,
et al.,
Counterclaim Defendants-Respondents,

The Test Trust, et al.,
Additional Counterclaim-Defendants.

Sternik & Zeltser, New York (Emanuel Zeltser of counsel), for appellants.

Moss & Gilmore, LLP, Mineola (Michael P. Gilmore of counsel), for respondents.

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered September 24, 2014, which granted counterclaim defendants-respondents' motion to dismiss the amended verified counterclaims with prejudice and denied defendants/counterclaim plaintiffs' cross motion for, among other things, leave to use alternate forms of service, unanimously affirmed, with costs.

A counterclaim must assert a cause of action against the

plaintiff (*Ruzicka v Rager*, 305 NY 191, 196 [1953]; see also *New York Ind. Centre Corp. v National Biscuit Co.*, 14 AD2d 761, 761 [1st Dept 1961]). Although the original counterclaims in this action named plaintiff as a counterclaim defendant, the amended counterclaims, which are the operative pleadings (see e.g. *Plaza PH2001 LLC v Plaza Residential Owner LP*, 98 AD3d 89, 99 [1st Dept 2012]), do not. While a counterclaim may be made against “a person whom a plaintiff represents” (CPLR 3019[a]), plaintiff is not a representative, executor, or administrator of any of the counterclaim defendants (see *Weinstein-Korn-Miller*, NY Civ Prac ¶ 3019.09 [2d ed 2016]). Accordingly, the motion court correctly dismissed the counterclaims with prejudice.

Given the procedural requirements for a third-party action (see CPLR 1007), the motion court properly declined to convert the amended counterclaims into third-party claims. As the motion court noted, however, dismissal of the counterclaims does not preclude defendants/counterclaim plaintiffs from bringing a third-party action.

The motion court correctly denied defendants/counterclaim plaintiffs’ request, made in their reply brief on their cross motion, for leave to use alternative forms of service under CPLR 311(b). To the extent this Court held otherwise in *Sardanis v*

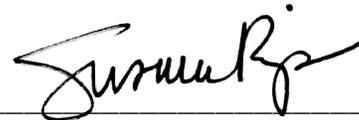
Sumitomo Corp. (279 AD2d 225 [1st Dept 2001]), we now join our sister Departments and hold that service of process by mail “directly to persons abroad” is authorized by article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 UST 361, TIAS No. 5568 [1969] [Hague Convention]), so long as the destination state does not object to such service (*New York State Thruway Auth. v Fenech*, 94 AD3d 17 [3d Dept 2012]; *Fernandez v Univan Leasing*, 15 AD3d 343 [2d Dept 2005]; *Rissew v Yamaha Motor Co.*, 129 AD2d 94 [4th Dept 1987]). Because the destination states of counterclaim defendants Triangle, Meridian, and Amicorp do not object to such service, there is no need for alternate service under CPLR 311(b). Switzerland, the destination state (or state of incorporation) for counterclaim defendants Investarit and Mutual Trust, has objected to article 10(a) of the Hague Convention. Therefore, the only way to serve those parties is through the “central authority” that Switzerland has established pursuant to the Convention (*New York State Thruway*, 94 AD3d at 19). It would not be proper to serve third-party claims on Mutual Trust and Investarit pursuant to Business Corporation Law § 307, because that would violate the Convention (see *Low v Bayerische Motoren Werke, AG.*, 88 AD2d 504, 505 [1st

Dept 1982])). Nor have defendants/counterclaim plaintiffs shown that service through Switzerland's central authority would be too costly or otherwise "impracticable" (CPLR 311[b]).

We have considered defendants/counterclaim plaintiff's remaining contentions and find them unavailing.

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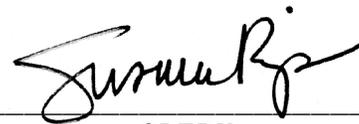
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supported the jury determination that the emergency doctrine did not apply.

The trial court erred in including the nonparty unidentified driver on the verdict sheet. Since article 16 did not apply to this motor vehicle accident (see CPLR 1602[6]), there was no reason for the jury to assess liability between the unknown nonparty driver and the bus driver (see *Duffy v County of Chautauqua*, 225 AD2d 261, 266-267 [4th Dept 1996], *lv dismissed in part and denied in part* 89 NY2d 980 [1997]). Nevertheless, the error was harmless, as there was no evidence of jury confusion or a compromise verdict (compare *Rivera v City of New York*, 253 AD2d 597, 600 [1st Dept 1998]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

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Tom, J.P., Sweeny, Moskowitz, Richter, Gesmer, JJ.

1384- Index 157621/12
1385 Uni-Rty Corporation, et al.,
Petitioners-Appellants,

-against-

New York Guangdong Finance, Inc.,
et al.,
Respondents,

Guangdong Building Inc., et al.,
Respondents-Respondents.

Byrd Campbell, P.A., Winter Park, Florida (Tucker H. Byrd of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellants.

Cooley LLP, New York (Laura Grossfield Birger of counsel), for Guangdong Building Inc., the Estate of Joseph Chu, Alexander Chu, Centre Plaza, LLC, and Eastbank, N.A., respondents.

White & Case LLP, New York (Paul B. Carberry of counsel), for China Construction Bank and Agricultural Bank of China, respondents.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered June 16, 2015, which denied petitioners' motions pursuant to CPLR 409(b) for summary judgment against respondents China Construction Bank and Agricultural Bank of China directing the turnover of monies received from respondent New York Guangdong Finance, Inc., and summary judgment against respondents Alexander Chu, the estate of Joseph Chu, Guangdong Building Inc., and

Centre Plaza LLC directing the turnover of property for public sale and an accounting if necessary to satisfy petitioners' outstanding judgment, unanimously affirmed, without costs.

Petitioners, holders of an approximately \$20 million judgment against respondent New York Guangdong Finance, Inc. (NYGFI), allege that while they were litigating claims against NYGFI in federal court, NYGFI fraudulently transferred cash and property interests to its shareholders (see Debtor and Creditor Law § 273-a). In particular, they allege that NYGFI entered into settlement agreements in unrelated actions that caused it to indirectly transfer approximately \$7.66 million to respondents China Construction Bank and Agricultural Bank of China for no consideration. They further allege that, through the settlements, respondents Alexander Chu and the estate of Joseph Chu received stock and LLC membership interests from NYGFI for no consideration.

We find, contrary to the motion court, that the record demonstrates conclusively that NYGFI was the indirect transferor of the \$7.66 million to the banks (see *Isaac v Marcus*, 258 NY 257, 264 [1932]; *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 53 [1st Dept 2008]).

However, with respect to the motion against the Chu

respondents, petitioners submitted no evidentiary proof of NYGFI's ownership of the stock and LLC membership interests, and the Chu respondents submitted evidence that presented an issue of fact as to ownership.

Petitioners also failed to provide evidence of a lack of fair consideration for either transfer or evidence that NYGFI was left insolvent by the transfers made pursuant to the settlement agreements. Specifically, they failed to show that the reassignment of NYGFI's outstanding loans did not constitute fair consideration for the transfers (see Debtor and Creditor Law § 272; *Matter of CIT Group/Commercial Servs., Inc. v 160-09 Jamaica Ave. Ltd. Partnership*, 25 AD3d 301, 302 [1st Dept 2006] [satisfaction of an antecedent debt can constitute fair consideration]).

In support of their argument that the transfers were not made "in good faith" (Debtor and Creditor Law § 272), petitioners submitted no evidence, relying instead on the presumption that "preferential transfers to directors, officers and shareholders of insolvent corporations in derogation of the rights of general creditors do not fulfill the requirement of good faith" (*Matter of Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 428-29 [1st Dept 2014]; see also *Matter of CIT Group/Commercial*

Servs., Inc., 25 AD3d at 303; *Matter of P.A. Bldg Co. v Silverman*, 298 AD2d 327 [1st Dept 2002]). Their reliance is misplaced, since there is no dispositive evidence that NYGFI was insolvent.

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

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

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Johnson's assault on plaintiff's decedent. Triable issues of fact exist concerning whether defendants, Johnson's putative employers, could be held either vicariously liable for her actions (see *Riviello v Waldron*, 47 NY2d 297, 303-304 [1979]; *Ramos v Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005]), or liable for negligently hiring and retaining Johnson (see *Haddock v City of New York*, 140 AD2d 91, 94 [1st Dept 1988], *affd* 75 NY2d 478 [1990]). Specifically, the submitted evidence presents questions as to whether Johnson was defendants' building superintendent or otherwise an employee, and whether defendants knew or should of known of her violent propensities, at least shortly after she was purportedly hired (see *T.W. v City of New York*, 286 AD2d 243 [1st Dept 2001]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 7, 2016

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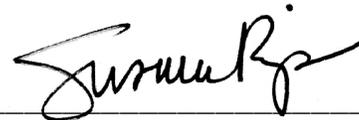
actual knowledge of the facts upon which their liability is predicated within 90 days after the claim arose (see *Rao v Triborough Bridge & Tunnel Auth.*, 223 AD2d 374 [1st Dept 1996]). The accident/crime investigation report created on the date of the accident sets forth the location and time of the accident, the identity of the bus operator who set up the ramp from which petitioner's wheelchair fell, a witness's identifying information, and the investigating supervisor's conclusion that the ramp was situated on the street and not on the curb when the accident happened.

Respondents' conclusory assertion of prejudice resulting from the delay in serving the notice of claim is insufficient (see *Thomas v New York City Hous. Auth.*, 132 AD3d 432, 434 [1st Dept 2015]). They do not claim that the bus operator, the

supervisor or the witness is unavailable (see *Perez v New York City Health & Hosps. Corp.*, 81 AD3d 448, 449 [1st Dept 2011]; see also *Matter of Ansong v City of New York*, 308 AD2d 333 [1st Dept 2003]; *Miranda v New York City Tr. Auth.*, 262 AD2d 199 [1st Dept 1999])).

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

ENTERED: JUNE 7, 2016

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CLERK

they are held liable in underlying personal injury and wrongful death actions arising out of the collapse of their building in Pennsylvania during the course of demolition. Plaintiffs allege that defendant negligently failed to obtain umbrella insurance on the demolished building, and failed to advise plaintiffs that no such insurance was in place. Defendant seeks to compel plaintiffs to produce certain requested documents.

The motion court correctly found that plaintiffs' communications with third-party insurance brokers (about topics other than demolition insurance) are not "material and necessary" in the defense of this action, including the allegation that the parties had a "special relationship" justifying insurance broker liability (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734-735 [2014]; CPLR 3101[a]). Contrary to defendant's suggestion, plaintiffs do not base their claim of a special relationship on a "course of dealing over an extended period of time" (see *id.* at 735 [internal quotation marks omitted]; they base it on a particular "interaction regarding a question of coverage" - namely, insurance for the demolition project (see *id.*). Accordingly, communications with other insurance brokers are not relevant unless they concern the demolition project. Because all documents "concerning insurance coverage for the Demolition

Project" have been produced, there is nothing further to compel.

The motion court also correctly found that documents concerning the underlying actions are not material and necessary - at least not at this time. In the event plaintiffs are awarded damages in the underlying actions, no further information will be necessary to calculate defendant's damages - the amount awarded, up to the alleged \$35 million policy limit. In the event the underlying actions settle, defendant may be entitled to "a trial as to the reasonableness of the amounts paid in settlement" (*Atlantic Cement Co. v Fidelity & Cas. Co. of N.Y.*, 63 NY2d 798, 801-802 [1984]). Some subset of documents related to the underlying actions may be relevant to this reasonableness determination, but certainly not the broad category of documents defendant now seeks. Moreover, once damages are awarded or a settlement entered, defendant may also be entitled to discovery regarding whether the awards are punitive in nature, and thus not indemnifiable (see *Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196, 200-201 [1990]). However, since no damages have yet been awarded or settlement reached, discovery on this issue is premature.

Although the motion court correctly found that most documents concerning the demolition (excluding documents related

to the demolition insurance) are not material and necessary, defendant is entitled to limited discovery on the issue of proximate causation, i.e., whether and at what rate or under what conditions plaintiffs would have obtained insurance, but for defendant's alleged negligence (see *American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 346 [1st Dept 1984]). However, defendant's request for all documents concerning the demolition project is overbroad. Accordingly, we give defendant leave to serve a more narrowly tailored demand.

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

ENTERED: JUNE 7, 2016

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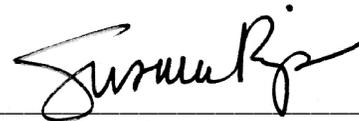
stairway was safe and in accordance with accepted customs and standards (see *Salman v L-Ray LLC*, 93 AD3d 568 [1st Dept 2012]). The record also shows that plaintiff was able to successfully ascend the stairs moments before the accident happened and she never testified that she was unable to see the steps as she was walking back down the stairs to return to her vehicle (see *Zhao v Brookfield Off. Props., Inc.*, 128 AD3d 623 [1st Dept 2015]).

Plaintiff's opposition failed to raise a triable issue of fact. The two expert affidavits submitted by plaintiff were insufficient because the experts' opinions that good and commonly accepted safe industry practice required handrails and uniform riser heights on the stairway are not supported by reference to specific, applicable safety standards or practices (see *Hernandez v Callen*, 134 AD3d 654 [1st Dept 2015]). Furthermore, since no showing was made that the applicable building code required that handrails be installed, and in the absence of any evidence that the stairway was otherwise defective or inherently dangerous,

plaintiff's testimony that she reached for the handrail and was obstructed from being able to properly grab onto it does not require a different result (see *Fishelson v Kramer Props., LLC*, 133 AD3d 706, 708 [2d Dept 2015]).

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1392 In re Amarnee T. T.,
and Others,

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

Tanya T.,
Respondent-Appellant,

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

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

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

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

Order of disposition, Family Court, Bronx County (Joan L.
Piccirillo, J.), entered on or about February 20, 2015, which,
upon a determination that the respondent mother permanently
neglected the subject children, terminated her parental rights
and transferred custody and guardianship of the subject children
to the Commissioner of Social Services and Graham-Windham
Services to Families and Children for the purpose of adoption,
unanimously affirmed, without costs.

Clear and convincing evidence shows that the agency made

diligent efforts to strengthen the mother's relationship with the subject children by, among other things, scheduling regular visitation and referring her to therapy to address the conditions that led to the children's removal (see Social Services Law § 384-b [7][f]; *Matter of Sheila G.*, 61 NY2d 368, 373 [1984]). After a failed trial discharge, the mother failed to attend a family team conference, failed to regularly attend her ongoing counseling sessions, failed to attend the beginning of a special needs parenting course, and refused to attend another parenting program. In the year preceding the petition to terminate the mother's parental rights, she missed several visits with the children and often failed to engage with them during the visits she did attend (see e.g. *Matter of Marissa Tiffany C-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]; *Matter of Tiara J. [Anthony Lamont A.]*, 118 AD3d 545 [1st Dept 2014]; *Matter of Alani G. [Angelica G.]*, 116 AD3d 629 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]). Despite the agency's diligent efforts, the mother failed to plan for the future of the subject children.

A suspended judgment was not appropriate here, where "there was no evidence that [the mother] had a realistic and feasible plan to provide an adequate and stable home for the subject children," especially where two of them had special needs (*Matter*

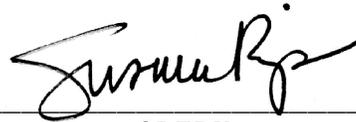
of Charles Jahmel M. [Charles E.M.], 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]; *see also Matter of Jaelyn Hennesy F. [Jose F.]*, 113 AD3d 411 [1st Dept 2014]; *Matter of Jamal N. [Shanikqua N.]*, 89 AD3d 537 [1st Dept 2011]). Here, the mother's home was not in a suitable condition, she did not have space for the subject children, she had not contacted the children's service providers, had missed therapy sessions, and failed to engage with the children during visits.

A preponderance of the evidence shows that termination of the mother's parental rights was in the best interests of the children, given that the children have thrived in their foster care home, have been appropriately provided for by the foster parents for more than four years, and have developed strong bonds with the foster parents (*see Matter of Clarence Davion M.*

[Clarence M.], 124 AD3d 469 [1st Dept 2015]; *Matter of Isis M. [Deeanna C.]*, 114 AD3d 480 [1st Dept 2014]).

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1393 Jeffrey Tavarez, Index 305639/13
Plaintiff-Respondent,

-against-

Felix Manuel Castillo Herrasme,
et al.,
Defendants-Appellants.

Burns, Russo, Tamigi & Reardon, LLP, Garden City (Jeffrey M. Burkhoff of counsel), for appellants.

William Schwitzer & Associates, P.C., New York (Daniel A. Berger of counsel), for respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered January 13, 2015, which granted plaintiff's motion for partial summary judgment on liability, unanimously affirmed, without costs.

The evidence plaintiff submitted in support of his motion for summary judgment established his prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Plaintiff's affidavit stating that the rear door of defendants' vehicle "opened without warning" and struck the left side of his vehicle established that defendant driver violated Vehicle and Traffic Law (VTL) § 1214, and that plaintiff was unable to avoid the accident (*see Montesinos v*

Cote, 46 AD3d 774 [2d Dept 2007]; *Williams v Persaud*, 19 AD3d 686, 686-687 [2d Dept 2005]). Plaintiff also submitted an affidavit of the police officer who prepared the accident report, which contained defendant driver's admissions that the rear door swung open wider than normal, causing plaintiff to strike it, and his statement that the door was blown open by the wind.

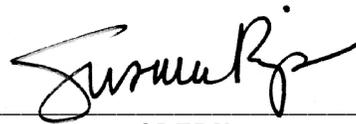
In opposition, defendants failed to submit evidence sufficient to raise an issue of fact as to whether defendant driver violated VTL § 1214, or whether plaintiff could have avoided the accident.

Summary judgment was not granted prematurely, since defendants did not show that discovery was necessary to avoid summary judgment (see CPLR 3212[f]). The "mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient" to

deny such a motion (*Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]; *Neryaev v Solon*, 6 AD3d 510, 510 [2d Dept 2004]).

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

ENTERED: JUNE 7, 2016

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date the property was sold after termination of the lease, unanimously affirmed, with costs.

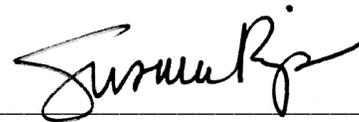
The motion court correctly held Reckson, the tenant under the ground lease with plaintiff, liable for its payment obligations under the lease. Those obligations were expressly preserved in Reckson's assignment of the lease to REP, and were unaffected by the oral joint venture alleged by REP in a pending action in Nassau County, which, at oral argument, the parties advised us had been tried, thereby mooting the application for stay.

The inquest court properly fixed the end date of the lease for the purpose of calculating rent arrears as the date of the sale of the property, rather than the date of surrender in the stipulation settling a holdover proceeding against REP. The stipulation merely resolved the issue of possession, and

expressly preserved the landlord's right to seek damages against Reckson, as provided in the lease and in the letter accompanying the assignment and assumption agreement.

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1396- The People of the State of New York, Ind. 6208/06
1397 Respondent,

-against-

Jerome Arps,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York
(Abigail Everett of counsel) and DLA Piper LLP, New York
(Constance Che Hang Tse of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Renee A. White,
J.), rendered August 21, 2007, convicting defendant, upon his
plea of guilty, of attempted rape in the first degree, and
sentencing him, as a second violent felony offender, to a term of
eight years, unanimously affirmed. Order, same court (Abraham L.
Clott, J.), entered on or about October 30, 2014, which
adjudicated defendant a level three sexually violent predicate
sex offender pursuant to the Sex Offender Registration Act
(Correction Law art 6-C), unanimously affirmed, without costs.

As to the appeal from the judgment of conviction, defendant
was not entitled to have the victim testify at the *Wade* hearing.
The record does not support his contention that the victim was

briefly left alone with a nontestifying officer before a second lineup was arranged with the participants standing, after the victim was unable to conclusively identify defendant during an initial lineup procedure with the participants seated. While the detective who did testify did not recall the victim asking whether she "got it right" after the initial lineup, the defense attorney who represented defendant at the lineup testified regarding that conversation, and related the detective's reply that there was no right or wrong answer, which the attorney described as an "appropriate[]" response. Defendant merely speculates about what prompted the victim's request to view the men standing. Thus, the hearing evidence did not raise a substantial issue about the constitutionality of the lineup that could only be resolved by the testimony of the identifying witness (*see People v Chipp*, 75 NY2d 327, 338 [1990], *cert denied* 498 US 833 [1990]; *People v Perez*, 85 AD3d 630 [1st Dept 2011], *lv denied* 17 NY3d 955 [2011]).

As to defendant's civil appeal from his sex offender adjudication, the record supports the court's determination that defendant is subject to the presumptive override for a prior felony sex crime conviction, which results in a level three adjudication independent of any point assessments. Accordingly,

it is unnecessary to address defendant's challenges to particular assessments; in any event, we find those challenges to be unavailing. The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were outweighed by the seriousness of the underlying crime as well as the similarity and violence of the prior felony sex crime, for which he was previously adjudicated a level three offender. To the extent defendant argues that the court need not have adjudicated him a predicate sex offender, that claim is without merit (*see People v Bullock*, 125 AD3d 1, 8 [1st Dept 2014], *lv denied* 24 NY3d 915 [2015]; *People v Rodriguez*, 122 AD3d 538 [1st Dept 2014], *lv denied* 24 NY3d 1221 [2015];).

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bladder. She continued the packing, which lessened, but did not stop, the bleeding.

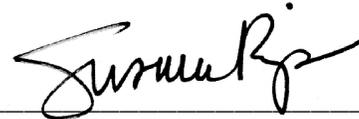
The jury's findings that defendant departed from accepted medical practice by failing to call for a urological consultation and exploratory laparotomy after she lacerated the vaginal wall and bladder during the packing process and that this departure did not cause plaintiff's injuries are not "irreconcilably inconsistent" (see *McCollin v New York City Hous. Auth.*, 307 AD2d 875, 876 [1st Dept 2003]). The jury could reasonably have found that it would have been dangerous to cease packing plaintiff's uterus in an attempt to stop an emergent, possibly life-threatening bleed. It could reasonably have found that, as defendant's expert testified, the performance of an exploratory laparotomy would have been harmful to plaintiff in her already unstable condition. The jury was free to credit defendants' expert's testimony over that of plaintiff's experts (see *Torricelli v Pisacano*, 9 AD3d 291 [1st Dept 2004], *lv denied* 3 NY3d 612 [2004]).

The jury's findings that Kaufman did not deviate from accepted medical practices in using an Allis clamp during the performance of both the D&C and the packing procedure and that

she did not depart from the standard of care in the performance of the packing procedure itself were not against the weight of the evidence (see *McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]).

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440, 448 [2015]; *Matter of Bennett v Jeffreys*, 40 NY2d 543, 544 [1976]; Domestic Relations Law (DRL) § 72[2][a]). Contrary to the father's argument, the evidence supports the determination that petitioner, not the parents, cared for the child on a daily basis for a prolonged period of time of over 24 months, and that the child resided in her home during that period, and for almost all of his life. When the mother became unable by reason of mental illness to care for the child, the grandmother sought legal custody. By contrast, the father has not cared for the child, on a daily basis, for any length of time, has had sporadic contact, and has not provided financial support for the child's care (see *Matter of Jerrina P. [June H.-Shondell N.P.]*, 126 AD3d 980 [2d Dept 2015]; *Matter of Carton v Grimm*, 51 AD3d 1111, 1113 [3d Dept 2008]).

The father did not challenge petitioner's standing to seek custody as a grandmother under DRL § 72, or raise any constitutional arguments at trial, and those arguments are unpreserved for appellate review (see *Matter of Gracie C. v Nelson C.*, 118 AD3d 417 [1st Dept 2014]; *Matter of Rayshawn F.*, 36 AD3d 429, 430 [1st Dept 2007]). With respect to petitioner's standing to seek custody, since she adopted the mother, she is the child's grandmother for purposes of DRL § 72 (see DRL § 117

[1][c]; *Matter of Emanuel S. v Joseph E.*, 78 NY2d 178, 180 [1991]; *cf. Matter of Chifrine v Bekker*, 97 AD3d 574, 575 [2d Dept 2012], *lv denied* 19 NY3d 814 [2012]).

The father's due process arguments are unavailing, as the court made clear that the grant of temporary custody to petitioner was merely to preserve the status quo, confirming that petitioner, and not the father, was, at the time of the petition, raising the child. The court properly exercised its discretion in adjourning the proceeding to allow for the forensic evaluation to take place (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 727 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]), and the father did not object (*see Matter of Skylar Lanie B. [Jonathan Miranda B.]*, 116 AD3d 589, 590 [1st Dept 2014]).

There is no basis to disturb Family Court's determination that it is in the child's best interests to remain with petitioner (*see Melissa C.D. v Rene I.D.*, 117 AD3d 407, 407-408 [1st Dept 2014]). Family Court properly considered all relevant factors in making that determination, and the evidence that petitioner had provided the child with a loving and stable home, as well as that the child wished to remain with her, supported the determination. On the other hand, the father had never provided for the child's care on a daily basis, and intended to

uproot the child from his home, to move across the country, to be cared for by the father's fiancé, whom the child never met, without regard to the child's well-being or emotional needs (see *Matter of Michaellica Lee W.*, 106 AD3d 639, 640 [1st Dept 2013]).

Finally, the father's arguments regarding the court's visitation provision are unfounded. Since no home study was provided to the court concerning the father's new home in California, visitation was rationally restricted to New York City. To the extent the father refers to new information regarding his current marital status, living arrangements and employment, which was not before the trial court, such information is not part of the record on this appeal (see *Mendoza v Plaza Homes, LLC*, 55 AD3d 692 [2d Dept 2008]), but may be raised in a modification petition.

We have considered the father's remaining arguments and find them unreserved and unavailing.

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

ENTERED: JUNE 7, 2016



CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1402 Timothy Nerney, et al., Index 159067/12
Plaintiffs-Appellants,

-against-

1 World Trade Center LLC, et al.,
Defendants-Respondents.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for appellants.

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

Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 8, 2015, which denied plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff made a prima facie showing that his accident was proximately caused by the absence of safety devices affording adequate protection from the elevation-related risks he faced while hoisting a guiderail in an elevator shaft using a rope and pulley system. Plaintiff testified that he followed the normal procedure of adding slack to the rope in an attempt to free the rail from an obstruction, when he lost control of the rope, and his leg became entangled in coiled rope on the platform where he

was working. The rope then lifted and dropped his leg, causing injuries.

Plaintiff established that a receptacle in which to place the coiled rope could have prevented the accident by allowing him to keep the rope separate from himself. Defendants unavailingly argue that such a device was available and plaintiff chose not to use it, instead coiling the rope on the platform where he was working. Defendants acknowledge that either method was permitted, and "[t]here is no evidence that plaintiff received any ... directions to use" a receptacle to store the coiled rope (*Toukara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011]; see *Gallagher v New York Post*, 14 NY3d 83, 88 [2010]).

Plaintiff's testimony also showed that a device with a locking or braking mechanism should have been installed to prevent the rope from losing control, and defendants' contention that failure to provide an appropriate safety device was not practicable under the circumstances presented is not convincing (see *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523-524 [1985]; *Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472 [1st Dept 2008]).

Defendants did not raise triable issues of fact by submitting affidavits of two experts who found it improbable or

impossible for the accident to have occurred as plaintiff testified and speculating about how the accident might have happened. In light of the lack of safety devices provided, plaintiff is entitled to recovery under any version of the accident (*see Lipari v AT Spring, LLC*, 92 AD3d 502, 504 [1st Dept 2012]; *Wise v 141 McDonald Ave.*, 297 AD2d 515, 516-517 [1st Dept 2002]). Finally, that plaintiff was the only direct witness to the accident does not preclude an award of partial summary judgment (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 410 [1st Dept 2013]).

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

ENTERED: JUNE 7, 2016

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Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1403 Integrated Urban Holdings, LLC, Index 652138/13
 et al.,
 Plaintiffs-Appellants,

-against-

Vornado Harlem Park LLC, et al.,
Defendants-Respondents.

Berry Law PLLC, New York (Eric W. Berry of counsel), for appellants.

Sullivan & Cromwell, LLP, New York (Marc De Leeuw Of counsel), for respondents.

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered January 30, 2015, which granted defendants' motion to dismiss the amended complaint, unanimously affirmed, without costs.

The court properly dismissed plaintiffs' breach of contract claim under Delaware law (see *GMG Capital Invs., LLC v Athenian Venture Partners I, L.P.*, 36 A3d 776, 780 [Del 2012]).

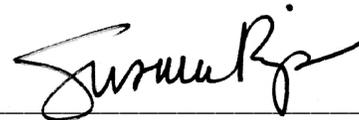
Plaintiffs were not entitled to a profit distribution under the parties' unambiguous agreement after the property, that was the subject of the agreement, was sold for a loss, taking into account the developer defendants' capital contributions to the company formed to acquire and sell the property. Contrary to

plaintiffs' argument, the amounts paid by the developer defendants to acquire the property were properly considered capital contributions under the plain meaning of the agreement.

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

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

ENTERED: JUNE 7, 2016

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alcohol and appeared to be intoxicated, was admissible, as it was not based on hearsay (*cf. Rivera v City of New York*, 253 AD2d 597, 600-601 [1st Dept 1998] ["A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation"]; *Allan v Keystone Nineties*, 74 AD2d 992 [4th Dept 1980], *appeal dismissed* 52 NY2d 899 [1981] [same]). This, coupled with plaintiff's own deposition testimony, submitted in support of his motion for summary judgment, that he was one car length away from defendant's vehicle when the driver's-side door opened, and that he was riding his bicycle at only 4 miles per hour, raises issues of fact as to whether his purported intoxication contributed to his inability to stop in time to avoid the collision. While other testimony by plaintiff indicates that he was next to defendant's car when the door opened, this merely raises issues of fact.

The court also properly denied that aspect of defendant's motion which sought summary judgment on the issue of serious injury within the meaning of Insurance Law § 5104(a). It is uncontested that the medical records submitted by plaintiff were not in admissible form, and therefore lacked probative value (see *Rampersaud v Eljamali*, 100 AD3d 508, 509 [1st Dept 2012];

Quinones v Ksieniewicz, 80 AD3d 506 [1st Dept 2011]).

Plaintiff's sworn affidavit that he suffered a fractured clavicle is insufficient to establish a serious injury, as "objective proof" of plaintiff's injury is required (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]), and plaintiff's basic knowledge relating to the specific diagnosis of his injury is clearly based on what the medical records show and what his doctors have told him, and so his affidavit is mere hearsay. At the very least, plaintiff has not established that his diagnosis is based on his own personal knowledge and not hearsay.

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1406 Kyle Hampton, Index 805088/12
Plaintiff-Respondent, 590378/13

-against-

Universal Dental, et al.,
Defendants,

Sol Stolzenberg, D.M.D., P.C.
doing business as Toothsavers,
Defendant-Appellant.

- - - - -

Laurence R. Danziger, D.M.D., P.C.,
doing business as Universal Dental,
Third-Party Plaintiff,

Sol S. Stolzenberg, D.M.D., P.C.,
doing business as Toothsavers sued herein
as Sol Stolzenberg, D.M.D., doing business
as Toothsavers,
Third-Party Plaintiff-Appellant,

-against-

David Cohen, etc., et al.,
Third Party-Defendants.

Gordon & Silber, P.C., New York (Steven H. Mutz of counsel), for
appellant.

Joel M. Kotick, New York, for respondent.

Order, Supreme Court, New York County (Alice Schlesinger,
J.), entered June 10, 2015, which, to the extent appealed from as
limited by the briefs and appealable, denied the motion of
defendant/third-party plaintiff Sol S. Stolzenberg, D.M.D., P.C.,

d/b/a Toothsavers (Toothsavers NY) motion for summary judgment dismissing the complaint as against it, unanimously reversed, on the law, the motion is granted, with leave for plaintiff to amend the pleadings to name the proper entity, without costs.

The motion court correctly found that questions of fact existed regarding the relationship between Toothsavers NY and defendants David Cohen, as executor of the estate of Morton Cohen, D.D.S., and Morton Cohen, PA (Toothsavers NJ) (see *Fields v Seavey Org.*, 258 AD2d 414, 415 [1st Dept 1999]). Further, questions of fact exist as to whether Toothsavers NY is vicariously liable for the malpractice of Toothsavers NJ, if any, based upon a theory of agency by estoppel, also known as ostensible agency. Evidence exists indicating that plaintiff reasonably believed that the orthodontic treatment provided to him was by Toothsavers NY, albeit in a satellite New Jersey office, rather than on referral to a different practice altogether (see *Welch v Scheinfeld*, 21 AD3d 802, 808 [1st Dept 2005], citing *Hannon v Siegel-Cooper Co.*, 167 NY 244 [1901]; see also *Sarivola v Brookdale Hosp. & Med. Ctr.*, 204 AD2d 245, 245-246 [1st Dept 1994], *lv denied* 85 NY2d 805 [1995]). Notably, only one dental chart was kept for plaintiff, with notations made on it without respect to whether treatment was being rendered by

Toothsavers NY or Toothsavers NJ. Plaintiff testified that he was angry at having to travel to New Jersey, but felt he had no choice since he had paid in advance for his orthodontic treatment at Toothsavers NY. Plaintiff was given a business card by Toothsavers NY listing both addresses under the name "Toothsavers," without any indication that the two were separate practices.

Similarly, Toothsavers NY is not entitled to summary judgment under the independent contractor defense as to those individual dentists who performed orthodontic work upon plaintiff. Plaintiff did not seek out any of the orthodontists Toothsavers NY claims were independent contractors. Rather, he went to the practice based upon a newspaper advertisement for "Toothsavers," and could not even recall the full names of most of the individuals who treated him. And Toothsavers NY's position that plaintiff's claim that Dr. Stolzenberg, D.M.D., P.C.'s purchase of Toothsavers NY from its prior owner, a dentist who had lost his license, was somehow fraudulent or a sham does not warrant dismissal on the doctrine of estoppel. To hold otherwise would permit Dr. Stolzenberg to benefit from his alleged fraudulent acts.

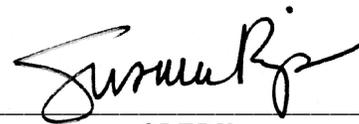
Toothsavers NY's arguments regarding punitive damages are

academic, as they prevailed on that point below and thus are not an aggrieved party (CPLR 5511; *T.D. v New York State Off. of Mental Health*, 91 NY2d 860, 862 [1997]). Plaintiff did not file a cross appeal and we decline plaintiffs' suggestion to review this issue sua sponte.

In light of the confusing record, while Toothsavers NY's argument that dismissal is warranted because plaintiff named and served an incorrect entity, Sol S. Stolzenberg, D.M.D., d/b/a Toothsavers, rather than his eponymous professional corporation d/b/a Toothsavers, may have some merit, we grant leave to plaintiff to serve and amend the pleadings to reflect the proper entity; we note the lack of any showing of prejudice.

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1408-

Ind. 672/07

1409 The People of the State of New York,
Respondent,

-against-

Ralph Labarbera,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Beth Fisch
Cohen of counsel), for respondent.

Order, Supreme Court, New York County (Jill Konviser, J.),
entered on or about July 24, 2013, which adjudicated defendant a
level three sex offender pursuant to the Sex Offender
Registration Act Correction Law art 6-C), unanimously affirmed,
without costs. Appeal from order, Supreme Court, New York County
(Lewis Bart Stone, J.), entered on or about October 4, 2011,
which adjudicated defendant a level two sex offender, unanimously
dismissed, without costs, as academic.

The record supports the court's determination (41 Misc 3d
321 [Sup Ct NY County 2013]), made after the 2013 de novo
proceeding requested by defendant in his renewal motion based on
the 2012 position statement of the Board of Examiners of Sex

Offenders relating to child pornography offenders (see *People v Ascher*, 106 AD3d 448 [1st Dept 2013]). Initially, we note that points may be assigned under risk factors 3 (number of victims) and 7 (relationship with victim) to a child pornography offender despite the fact that the offender had no contact with the victims, and despite anything to the contrary in the Board's position statement (see *People v Gillotti*, 23 NY3d 841, 854-855 [2014]).

At the 2013 proceeding, the court properly exercised its discretion in denying defendant's request for a downward departure from level two, which was his presumptive risk level. The mitigating factors cited by defendant were either adequately taken into account by the risk assessment instrument or inadequately substantiated, and are in any event outweighed by aggravating factors, including the seriousness of the underlying offense (see e.g. *People v Johnson*, 136 AD3d 570 [1st Dept 2016]).

Moreover, rather than departing downwardly, the court providently granted the People's renewed request for an upward departure and correctly adjudicated defendant a level three offender. Clear and convincing evidence established the presence of egregious aggravating factors, demonstrating a risk of harm to

children, that were not otherwise adequately taken into account by the risk assessment instrument, including newly identified factors specified in the position statement.

The record establishes that the 2013 hearing was an unlimited de novo proceeding, that it was treated by the court and parties as such, and that it resulted in a new order. Accordingly, we reject defendant's argument that the law of the case doctrine required the court to adhere to certain conclusions reached by the prior Justice at the 2011 proceeding.

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

ENTERED: JUNE 7, 2016

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CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1410 Daniel Perez Juarez, Index 303069/09
Plaintiff,

-against-

Rye Depot Plaza, LLC, et al.,
Defendants.

- - - -

Rye Depot Plaza, LLC, et al.,
Third-Party Plaintiffs-Appellants,

-against-

GFX Site Development, Inc., doing business as
Groundseffects Landscaping, Inc.,
Third-Party Defendant-Respondent.

Baxter Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of
counsel), for appellants.

Gorton & Gorton, LLP, Mineola (John T. Gorton of counsel), for
respondent.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.),
entered April 1, 2015, which denied defendants/third-party
plaintiffs' (Rye and Imajan) motion for summary judgment on their
contractual indemnification claim against third-party defendant
(GFX), unanimously affirmed, with costs.

Rye and Imajan failed to establish prima facie either that
GFX executed the indemnification agreement before plaintiff's
accident or that the agreement was intended to be retroactive

(see *Mikulski v Adam R. West, Inc.*, 78 AD3d 910 [2d Dept 2010]). Neither Rye's principal nor GFX's principal recalled when the undated agreement was signed. Nor does the conclusory affidavit by the controller of Imajan's manager establish the date on which the agreement was signed. As to retroactivity, the agreement contains no "express words or necessary implication [by which] it clearly appears to be the parties' intention to include past obligations" (see *Mikulski*, 78 AD3d at 911 [internal quotation marks omitted]).

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

ENTERED: JUNE 7, 2016

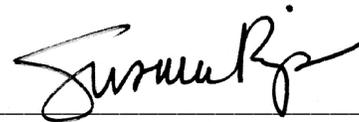


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Court's determination that respondent's accident was a hit-and-run covered by petitioner's policy is against the weight of the evidence.

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

ENTERED: JUNE 7, 2016

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CLERK

affirmed, without costs.

The two actions sought to be consolidated, i.e., a personal injury action and an insurance coverage action, do not involve common questions of law or fact (CPLR 602[a]); they involve different contracts, different parties, and different factual issues (see *H.H. Robertson Co. v New York Convention Ctr. Dev. Corp.*, 160 AD2d 524 [1st Dept 1990]).

Moreover, litigating an insurance coverage claim together with the underlying liability issues is inherently prejudicial to the insurer (see *Kelly v Yannotti*, 4 NY2d 603, 607 [1958]; *McDavid v Gunnigle*, 50 AD2d 737 [1st Dept 1975]; *D'Apice v Tishman 919 Corp.*, 43 AD2d 925 [1st Dept 1974]). In contrast to *Bridger v Donaldson* (36 AD2d 915 [1st Dept 1971], *affd* 29 NY2d 769 [1971]) and other cases cited by plaintiff, consolidation in this case would result in a single action involving the insured, the insurance policy, and the construction of that policy.

In addition, Eurotech did not bring its coverage action against QBE until more than six years after it was named as a third-party defendant in the liability action and almost four years after plaintiff McGinty filed the note of issue and certificate of readiness in the liability action. Litigating the actions separately will allow QBE to take any necessary discovery

to which it is entitled, while avoiding prejudice caused by delay to McGinty (see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 94 AD3d 455 [1st Dept 2012]; *Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001]).

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

ENTERED: JUNE 7, 2016

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

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
John W. Sweeny, Jr.
Sallie Manzanet-Daniels
Judith J. Gische
Ellen Gesmer, JJ.

685
SCID 99022/14

x

The People of the State of New York,
Respondent,

-against-

George Reid,
Defendant-Appellant.

x

Defendant appeals from the order of the Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about October 1, 2014, which adjudicated him a level two sex offender pursuant to the Sex Offender Registration Act.

Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Kaye Scholer LLP, New York (Diana Sterk of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James Wen and Peter D. Coddington of counsel), for respondent.

GISCHE, J.

In August 2006, defendant was convicted in Michigan of accosting a child for immoral purposes and three counts of criminal sexual conduct. It is undisputed that in April 2012, after completing his prison term for the underlying sex offenses, defendant was released from custody without supervision. Defendant relocated to New York, and six months later, in October 2012, he was arrested for failing to register as a sex offender, in violation of federal law (18 USC § 2250). He pleaded guilty in June 2013 and was sentenced to 18 months incarceration, followed by five years of supervised release. The conditions of his federal supervised release include participation in sex offender treatment, refraining from contact with children without permission, warrantless searches of his home and person, and having his personal computer monitored.

The sole issue raised by this appeal is whether defendant is entitled to have his sex offender status under the Sexual Offender Registration Act (SORA) (Correction Law art 6-C) reduced from a level two to a level one, based on his argument that he was improperly assessed 15 points under guideline factor 14 because, notwithstanding that he was released without supervision from prison in Michigan, he is presently subject to supervision following his release on the federal conviction. We hold that

because the Michigan conviction is the qualifying offense triggering the SORA assessment under New York Law, defendant was properly scored 15 points for factor 14 on the Risk Assessment Instrument (RAI). The federal offense is not a qualifying offense under SORA and, consequently, cannot serve as the basis for the guideline scoring required under the RAI. While supervision following a nonqualifying offense might bear upon the possibility of a downward departure, defendant does not raise this issue on appeal. In any event, on this record it is not clear that the circumstances of the federal conviction and the consequent federal supervision would support a downward departure.

A SORA proceeding, which is civil in nature, determines the risk of reoffense by a person convicted of a qualifying sex offense and then requires the person to register with law enforcement officials according to that adjudicated risk level (*People v Pettigrew*, 14 NY3d 406, 408 [2010]). The Board of Examiners of Sex Offenders is required to make a recommendation to the court hearing the SORA application by considering 15 statutory factors and applying them according to guidelines developed to assess an individual applicant's risk of a repeat offense (*People v Watson*, 112 AD3d 501, 502 [1st Dept 2013], *lv denied* 22 NY3d 863[2014]; SORA: Risk Assessment Guidelines and

Commentary). The evaluation is made using the RAI to identify each factor, which if established, is assigned a numerical value. The values are then tallied and a risk assessment is recommended according to a corresponding schedule. The assessment is considered presumptively correct at the SORA hearing (*id.*). The SORA court reviews whether the RAI has correctly assigned points for certain risk factors.¹ In addition, the court may also consider whether there are mitigating or aggravating circumstances that would warrant a departure from the presumptive risk assessment made in accordance with the RAI guidelines. Departures can account for circumstances when the guidelines are not a perfect fit for a required risk assessment (*People v Johnson*, 11 NY3d 416, 421 [2008]). It is well recognized, however, that the circumstances warranting departures should be of a kind or to a degree that is otherwise not adequately taken into account by the guidelines (*People v Rodriguez*, 128 AD3d 603 [1st Dept 2015] *lv denied* 26 NY3d 907 [2015]; Commentary at 4).

Factor 14 expressly provides that when an offender “will be released with no official supervision,” 15 points should be assessed on the RAI. In the event, however, that an offender “will be released under the supervision of a probation, parole or

¹There are certain overrides that are not relevant here (see Corrections Law 168-I{5}; Guidelines at V).

mental health professional who specializes in the management of sexual offenders or oversees a sex offender caseload" then no points are assessed. Defendant argues that he should not be assessed any points under factor 14 because he is currently under federal supervision which satisfies the requirement that he be managed and treated as a sex offender. SORA, however, applies only when a defendant is convicted of a "sex offense" as that term is defined under Correction Law 168-a. Qualifying sex offenses include expressly enumerated sections of New York Penal Law (Corrections Law 160-a[2]). They also include offenses in other jurisdictions that contain all the essential elements of the New York offenses, or for which registration as a sex offender in that foreign jurisdiction is required (Corrections Law 168-a[2][d][i] and [ii]). However, neither 18 USC § 2250, the statute under which defendant was federally convicted, nor the New York offense criminalizing a sex offender's failure to register after establishing residence in the state is listed among the offenses mandating registration under SORA (see Corrections Law §§ 168-a, 168-k and 168-t).

Under SORA, in the case at bar, only the Michigan conviction qualifies as a sex offense requiring registration. The federal offense to which defendant later pleaded guilty does not. The Board Guidelines make it clear the RAI scoring is predicated upon

consideration of an offender's "current offense," which clearly relates to the SORA qualifying offense and not necessarily other offenses that a defendant may have committed (see Guidelines at II). Thus, when considering factor 14, the SORA court properly looked to Michigan as the qualifying conviction. Because there is no dispute that defendant was not subject to any supervision at any time following his release from Michigan's custody, he was properly assessed 15 points under the RAI (see generally Sex Offender Registration Act: (Risk Assessment Guidelines and Commentary at 17); *People v Pinickney*, 129 AD3d 1048 [2nd Dept 2015]; *People v McNeil*, 116 AD3d 1018 [2d Dept 2014], *lv denied* 23 NY3d 908 [2014]).

This interpretation does not foreclose consideration of what impact, if any, the federal supervision may have on defendant's risk of future reoffense. Because that information is not captured by consideration of the guideline factors, it could have been separately considered by the SORA court as a mitigating factor in the context of a request for a departure (Commentary at 4; *People v Gordon*, 133 AD3d 835 [2d Dept 2015] *lv denied* __ NY3d __ 2016 NY Slip Op 72251 [2016]; *People v Gillotti* 23 NY3d 841, 861 [2014]). Were supervision pursuant to the nonqualifying federal offense interchangeable with supervision pursuant to the qualifying offense for guideline purposes, there would be no

accounting for the fact that following defendant's release on the Michigan conviction there was no supervision. On the other hand if the supervision on the nonqualifying federal offense may be considered on the issue of a possible departure, all of the relevant information could be accounted for at the SORA hearing, which is in keeping with the statute (see *Johnson*, 11 NY3d at 420-421). In this case, although a request for a downward departure was made and summarily denied at the SORA hearing, defendant does not argue the propriety of a downward departure on appeal. Nor are we willing to say on this record that the federal supervision would have necessarily warranted a downward departure, given that it was the consequence of defendant's failure to register as a sex offender in the first place, a fact which may be an aggravating factor in terms of a risk of reoffense.

Defendant's argument that factor 14 requires us to consider defendant's release conditions only at the time of SORA evaluation begs the question of whether the federal offense is a qualifying offense. There was no supervision following the Michigan conviction either at the time of his release or at the time of the SORA evaluation (see: *People v English*, 60 AD3d 923 [2nd Dept 2009] *lv denied* 12 NY3d 712 [2009]; *People v Leeks*, 43 AD3d 1251 [3rd Dept 2007]). Because the Michigan offense is the

qualifying offense, the SORA court evaluation did not run afoul of the rule that the risk be assessed at the time of evaluation. Our interpretation of the guidelines is not, as argued by defendant, punitive. It serves the salutary objective of having a complete record of information required to make a proper risk assessment before the SORA court, including information related to the qualifying sex offense, as well as any mitigating or aggravating factors not otherwise captured by the guidelines (see *People v Johnson*, at 420-421; *People v Watson*, 112 AD3d at 502-503]).

Accordingly, the order of the Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about October 1, 2014, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act, should be affirmed, without costs.

All concur.

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

ENTERED: JUNE 7, 2016


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