SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 3, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Friedman, J.P., Andrias, Saxe, Gische, Kapnick, JJ.

15701 Lynette Blumenthal, et al., Index 308815/08
Plaintiffs-Respondents,

-against-

The Bronx Equestrian Center, Inc.,
doing business as Pelham Bit Stables,
et al.,
Defendants-Appellants.

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Perry, Van Etten, Rozanski & Primavera, LLP, Melville (Henry M. Primavera of counsel), for appellants.

Calman Greenberg, Bronx, for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 14, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint.

Defendants' motion for summary judgment should have been granted in this action where plaintiff Lynette Blumenthal was injured when she was thrown from a horse during a recreational

ride at the stable operated by defendant the Bronx Equestrian Center (*see Morgan v State of New York*, 90 NY2d 471, 484 [1997]; *Turcotte v Fell*, 68 NY2d 432 [1986]). The risk of a horse acting in an unintended manner resulting in the rider being thrown is a risk inherent in the sport of horseback riding (*see Quintanilla v Thomas Sch. of Horsemanship, Inc.*, 129 AD3d 815, 816 [2d Dept 2015]; *Dalton v Adirondack Saddle Tours, Inc.*, 40 AD3d 1169, 1171 [3d Dept 2007]; *Eslin v County of Suffolk*, 18 AD3d 698, 699 [2d Dept 2005]). There is no evidence that defendant stable was reckless, nor were there any concealed or unreasonably increased risks (*see e.g. Deak v Bach Farms, LLC*, 34 AD3d 1212, 1214 [4th Dept 2006]). To the extent plaintiffs' expert opined otherwise, such opinion was conclusory, since it did not rely on any rules, regulations, laws or industry standards, and therefore, it fails to raise a triable issue of fact (*see Bean v Ruppert Towers Hous. Co.*, 274 AD2d 305, 307-308 [1st Dept 2000]).

Defendant City of New York, which owned and operated the park in which plaintiff rode, is also entitled to dismissal, as there were no defects in the bridle path contributing to the accident. Plaintiff's theory that the City owed her a duty based upon the licensing agreement it issued to the stable is unavailing since the City had no involvement with the operation

of the stable, and the agreement contained no provision that would make plaintiff a third-party beneficiary of it (*see Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). We have considered plaintiffs' remaining arguments and find them unavailing.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15856 Dormitory Authority of the State of New York, et al., Plaintiffs-Appellants-Respondents, -against- Samson Construction Co., etc., et al., Defendants, Perkins Eastman Architects, P.C., Defendant-Respondent-Appellant. [And Other Actions]

Index 403436/06, 590732/09, 591020/09, 591133/10, 590318/12

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

Wasserman Grubin & Rogers, LLP, New York (Michael T. Rogers of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 1, 2013, which, to the extent appealed from as limited by the briefs, granted the part of defendant Perkins Eastman Architects, P.C.'s (Perkins) motion for summary judgment seeking dismissal of the fifth cause of action, for breach of contract, and denied the part of the motion seeking dismissal of the sixth cause of action, for negligence, modified, on the law, to deny the motion as to the fifth cause of action, and otherwise affirmed, without costs.

In or about 2000, plaintiff City decided to build a state-

of-the-art forensic biology laboratory for the Office of the Chief Medical Examiner. The project was designed to be a 15-story structure with a two-level basement, and was to be located on a parcel of City-owned land at the intersection of First Avenue and East 26th Street in Manhattan. The project site was part of the Bellevue Hospital Campus.

The City turned over the project to plaintiff Dormitory Authority of the State of New York (DASNY), a public authority that provides professional services and expertise for the financing and construction of public projects. The City and DASNY then entered into an agreement pursuant to which DASNY was to manage and finance the planning, design, and construction of the project. DASNY was authorized to contract with consultants, contractors, and a construction manager. It retained Perkins as the architect. Defendant Samson Construction Co. (not a party to this appeal) was hired as the foundation contractor. Samson was responsible for site excavation and the foundation's construction.

In or about May 2002, when Samson began driving piles as part of the foundation work, the adjacent Bellevue building, known as the C&D building, began to settle. The settling of the building continued while the foundation work continued. By March

2004, the C&D Building had settled eight inches in some areas, leading to a delay of the project by more than 18 months. Other structures adjacent to the project site, including sidewalks, roadbeds, sewers, and water systems, also sustained damage due to the settlement during the foundation work. The cost of fixing the damage to the project site and the adjacent properties was approximately $37 million. Perkins ultimately completed its work on the project in February 2007.

The motion court erred in dismissing the breach of contract claim against Perkins. Although Perkins made a prima facie showing that the City is not a third-party beneficiary of the contract because it is not named in the contract, the City raised an issue of fact whether it is an intended third-party beneficiary of the contract (*see MK W. St. Co. v Meridien Hotels*, 184 AD2d 312 [1st Dept 1992]). The contract expressly states that a City agency will operate the DNA laboratory, and the City retained control over various aspects of the project, including participation in and approval of the design of the building, the budget for the project, the selection of contractors, including Perkins, and the construction of the building.

The motion court, however, correctly determined that DASNY may proceed with its negligence claim. Perkins, as architect,

may be subject to tort liability based on a failure to exercise due care in the performance of its duties. In making this determination, the court is to look at the nature of the injury and whether the plaintiff is merely seeking the benefit of its agreement. Where the plaintiff is merely seeking the benefit of its agreement, it is limited to a contract claim (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 551-552 [1992]).

Where, however, "the particular project . . . is so affected with the public interest that the failure to perform competently can have catastrophic consequences," a professional may be subject to tort liability as well (*Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151, 154 [1st Dept 1993]). Indeed, "[t]his is one of the most significant elements in determining whether the nature of the type of services rendered gives rise to a duty of reasonable care independent of the contract itself" (*id.*, citing *Sommer v Federal Signal Corp.*, 79 NY2d 540, 553 [1992]). As the Court explained in *Sommer*, "[I]t is policy, not the parties' contract, that gives rise to a duty of care" (79 NY2d at 552). The "nature of the injury, the manner in which the injury occurred and the resulting harm" are also considered (*id.*, *citing Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 293–295 [1991] [Court rejected

plaintiff's attempt to ground in tort a claim that defendants supplied defective floor tiles, noting that the injury (delamination of tiles) was not personal injury or property damage, there was no abrupt, cataclysmic occurrence, and the injury was simply replacement cost of the product]).

Here, there is a factual question whether Perkins assumed an independent legal duty as an architect to perform its work in a manner consistent with the generally accepted standard of professional care in its industry. DASNY alleges that Perkins's failure to adhere to professional standards of care by not conducting an adequate site investigation and/or providing an adequate foundation design appropriate to the existing site conditions violated the relevant standard of professional care, resulting in increased costs for the project and additional costs of $37 million to remediate the damage caused by the failure to comply with those professional standards. The damage included damage to the sidewalks, roadbeds, sewers, and water systems located near a major medical center in Manhattan. There are issues of fact whether the project was so affected with the public interest that Perkins's failure to comply with the relevant professional standards could result in catastrophic consequences (*Trustees of Columbia Univ.*, 192 AD2d at 154).

The dissent opposes this position on the basis that the damages were not "catastrophic" since the "settling of the building took place gradually over a couple of years and never posed a serious threat to the public's safety." However, the suddenness of the injury is only one factor for the court to consider, and, in any event, a catastrophe does not necessarily have to be a sudden event (*see* Oxford Dictionaries ["[A]n event causing great *and often* sudden damage or suffering; a disaster"] [emphasis added]).[1] The destruction of road beds, sidewalks, sewers and water pipes in a crowded city is a catastrophe and has the potential to lead to catastrophic consequences (*see Sommer*, 79 NY2d at 552; *see also Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 189-190 [1st Dept 2006] [tort claim properly made out where it was alleged that "defendant reduced the heat in the building and . . . freezing temperatures caused a sprinkler pipe to burst, resulting in $500,000 in damages to plaintiff's property"]).

Perkins's reliance on the "economic loss" rule is also unavailing. The "economic loss" doctrine does not apply to negligence claims arising out of a violation of a professional

[1]http://www.oxforddictionaries.com/us/definition/american_english/catastrophe

duty (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept 2010], *affd* 18 NY3d 341 [2011]).

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

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

TOM, J.P. (dissenting in part)

While I agree with the majority that the motion court erred in dismissing the breach of contract claim against defendant Perkins Eastman Architects, P.C. (Perkins), I would find that, because plaintiffs are "essentially seeking enforcement of the bargain," the action should proceed under a contract theory (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 552 [1992]), and the cause of action for negligence should be dismissed as duplicative of the cause of action for breach of contract.

This action arises from the construction of a new DNA testing laboratory adjacent to the City's Bellevue Hospital complex in Manhattan. Plaintiff City contracted with plaintiff Dormitory Authority of the State of New York (DASNY) to serve as the project manager. DASNY, in turn, contracted with defendant Perkins to serve as the project's architect.

The contract between DASNY and Perkins required Perkins's designs to be "sufficiently detailed to ensure . . . installation compatibility" and to conform to applicable laws, codes and industry standards. Perkins was also obligated to investigate the site conditions and to supervise and monitor the work of the subcontractors and subconsultants.

Notably, the contract between DASNY and Perkins provides in

pertinent part that "[e]xtra costs to [DASNY] resultant from design errors or omissions shall be recoverable from [Perkins] and/or its Professional Liability Insurance carrier."

During the foundation work on the project, and as a result of that work, one of the adjacent Bellevue buildings began to settle into the ground. The adjacent sidewalks, roadbeds, sewers, and water systems sustained damage. Plaintiffs assert claims against Perkins for breach of contract and negligence.

Both causes of action allege identical wrongdoing and additional expenses to the project based on the alleged failures. The only distinction between the two causes of action is that the cause of action for negligence alleges that Perkins "failed to comply with professional standards of care."

Of course, DASNY's allegations of a mere breach of duty of care do not transform its breach of contract claim into a tort claim (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 390 [1987]). Moreover, in disentangling tort and contract claims, courts consider "the nature of the injury, the manner in which the injury occurred and the resulting harm" (*Sommer*, 79 NY2d at 552). This Court has described the nature of the harm, particularly whether it is "catastrophic," as "one of the most significant elements in determining whether the nature of the

type of services rendered gives rise to a duty of reasonable care independent of the contract itself" (*Trustees of Columbia Univ. in City of N.Y. v Gwathmey Siegel & Assoc. Architects*, 192 AD2d 151, 154 [1st Dept 1993]).

In *Trustees of Columbia*, we found that the professional defendants could be subject to tort liability because the project was "so affected with the public interest" (*id.*). We noted that due to failures of the architect, a large chunk of the facade of a building fell into the complex's courtyard presenting a great danger to an area regularly used by students and pedestrians and requiring emergency safety measures and emergency repairs. We also stated that "[t]he sudden precipitous manner in which the harm in this case occurred adds further support to a finding that a claim lies in tort" (*id.* at 155).

In contrast to the nature of the harm presented in *Trustees of Columbia*, no "catastrophic" harm is or could be alleged in this case. The settling of the building took place gradually over a couple of years and never posed a serious threat to the public's safety. Nor were emergency safety measures or repairs required. Contrary to the majority's assertion, there is no factual issue whether "Perkins's failure to comply with the relevant professional standards could result in catastrophic

consequences." The alleged breach of contract by Perkins resulted only in the delay of the project and additional costs expended for repairs to the sidewalks, roadbeds, sewers and water systems as a result of the settling of the foundation of the adjoining building. This damage can hardly be described as "catastrophic." That the project took place near a hospital does not change these crucial facts. Thus, there are no issues of fact presented whether the project was so affected with the public interest that any alleged failure by Perkins resulted in catastrophic consequences (*see e.g. Verizon N.Y., Inc. v Optical Communications Group, Inc.*, 91 AD3d 176 [1st Dept 2011]).

The majority's position is not aided by reference to the dictionary definition of "catastrophe." While the Oxford Dictionaries' definition does not preclude non-sudden events within the meaning of "catastrophe," the majority can point to no cases sustaining a tort claim where the damage did not occur suddenly. Further, while the suddenness of the injury is only one factor in the analysis, the cases sustaining tort claims involve actual, not hypothetical, threats to the public safety, such as the fire in *Sommer* or the falling chunks of facade in *Trustees of Columbia*. In this regard, it is notable that *Duane Reade v SL Green Operating Partnership, LP* (30 AD3d 189 [1st Dept

2006]), upon which the majority relies, sustained the tort claim because of the "abrupt nature of the injury" (*id.* at 191) and because the landlord's failure to protect the water supply pipes from freezing temperatures as part of a comprehensive scheme of regulations designed to promote fire safety presented a risk to public safety akin to the failure to maintain fire alarms in *Sommer*. We do not have such circumstances in this case.

Accordingly, DASNY cannot claim a legal duty on the part of Perkins independent of Perkins's contractual obligations, and the cause of action for negligence is duplicative and should be dismissed (*see Dormitory Auth. of State of N.Y. v Caudill Rowlett Scott*, 160 AD2d 179 [1st Dept 1990], *lv denied* 76 NY2d 706 [1990]).

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Renwick, Saxe, Kapnick, JJ.

16463 The People of the State of New York, Ind. 3891/11
Respondent,

-against-

Calvin Reed,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Calvin Reed, appellant pro se.

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered October 22, 2012, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 8½ years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning identification and credibility. Defendant, who was arrested in very close temporal and spatial proximity to the crime, matched, in critical respects, the detailed description provided by the victims.

The court properly denied defendant's suppression motion. The police conducted a prompt showup in the vicinity of the robbery in a manner that was not unduly suggestive, given the fast-paced chain of events (*see People v Duuvon*, 77 NY2d 541, 544-545 [1991]). Although defendant was guarded by three police officers, this was an appropriate security measure, and "the overall effect of the allegedly suggestive circumstances was not significantly greater than what is inherent in any showup" (*People v Brujan*, 104 AD3d 481, 482 [1st Dept 2013], *lv denied* 21 NY3d 1014 [2013]).

We perceive no basis for reducing the sentence.

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

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, JJ.

214 In re Duneen Belgrave, Index 400499/14
Petitioner-Appellant,

-against-

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

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MFY Legal Services, Inc., New York (Bernadette Jentsch of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jeremy W. Shweder of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered October 23, 2014, dismissing the petition to annul respondent New York City Police Department's (NYPD) determination, dated December 14, 2013, not to hire petitioner as a Police Communications Technician (PCT)[1] and to exclude her from any further consideration as a PCT, unanimously affirmed, without costs.

Disposition of this appeal requires that we interpret Correction Law article 23-A and decide an issue of first impression, which is whether a law enforcement agency (here the NYPD), may refuse to hire an applicant seeking employment with

[1]More familiarly known as a 911 operator or dispatcher.

that agency as a civilian, without regard to the criteria set forth in Correction Law article 23-A, solely on the basis of the applicant's prior criminal conviction. We find that the protections of article 23-A do not apply to a civilian seeking to be hired by NYPD because "membership in any law enforcement agency" is expressly exempted from the statutory definition of "employment" pursuant to section 750(5) of the Correction Law.

Petitioner applied for a position as a PCT with the NYPD and her application was denied. A fair reading of the petition is that by failing to consider enumerated statutory factors, respondents' determination violated her rights under Correction Law article 23-A and the New York State and City Human Rights Laws. Although respondents thinly argue that the application was denied for other reasons, we accept, for the purpose of this appeal, petitioner's allegation that the sole basis for the denial was that she has a prior criminal conviction[2].

Article 23-A is a remedial statute, enacted to eliminate the effect of bias against ex-offenders that prevented them from

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[2]Petitioner contends she was a victim of domestic violence and that she inflicted certain injuries on her abuser, the father of her daughter, in self-defense. She pleaded guilty to second-degree assault, a Class D felony and was sentenced to five years probation which she completed.

obtaining employment, while also protecting society's interest in assuring performance by reliable and trustworthy persons (*Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 611 [1988]). Article 23-A broadly provides that employers, whether public or private, are prohibited from unfairly discriminating against persons previously convicted of one or more criminal offenses, unless after consideration of certain enumerated statutory factors, the employer determines that there is direct relationship between the offense(s) and the duties or responsibilities inherent in the license or employment sought or held by the individual, or such employment or license poses an unreasonable risk to the public, etc. (Correction Law §§ 752, 753). The statute defines the term "employment" as follows: "(5) 'Employment' means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include *membership* in any law enforcement agency" (Correction Law § 750[5] emphasis added). The term "membership," as used in the exemption or exception part of the definition is not further defined, nor does it appear anywhere else in the body of the statute.

The issue we address is whether petitioner, by seeking civilian employment as a PCT with the NYPD, indisputably a law

enforcement agency, seeks something different from "membership" in a law enforcement agency, and therefore subject to consideration of whether there is a direct relationship between her prior criminal conviction and the employment she seeks, or whether there is an unreasonable risk to the safety or welfare of the public (Correction Law § 752). Petitioner's contention is that "membership" is a narrower, more specific classification than employment that applies only to persons with the authority to enforce the law (i.e. police officers and peace officers), and not to those seeking civilian employment. Petitioner argues that any other interpretation renders the policy of rehabilitation through employment meaningless because good jobs with the NYPD are foreclosed to her, despite having received a certificate from disabilities.

In situations where, as here, a term does not have a controlling statutory definition, "courts should construe the term using its 'usual and commonly understood meaning'" (*Matter of Orens v Novello*, 99 NY2d 180, 185-186 [2002], quoting *Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479 [2001]). The Merriam-Webster dictionary defines membership as "the state of belonging to or being a part of a group or an organization – the state of being a member – all the people or things that

belong to or are part of an organization or a group" (http://www.merriam-webster.com/dictionary/membership [accessed Feb. 18, 2016]). Guided by this broad definition, the exemption does not apply to a narrower group of people than those seeking employment with the NYPD. To the contrary, it applies to anyone, like petitioner, who seeks to be hired by a law enforcement agency. Had the legislature intended that the exemption from article 23-a only apply to persons seeking to enforce laws (i.e. uniformed police officers or peace officers), but not the civilians employed by the same agencies or departments, it could have specifically so provided.

The New York State Attorney General has similarly interpreted the exemption in article 23-A. In a matter involving the transfer of an employee assigned to work as a police dispatcher, the Attorney General determined that the criteria set forth in Correction Law § 751 did not apply and the law enforcement agency could transfer him out of that position, solely on the basis that the police dispatcher had been convicted of a felony, even though he had obtained a certificate of relief from disabilities (1981 Ops Atty Gen No. 81-7). While not binding authority, the interpretation "is an element to be considered" (*Matter of American Tel. & Tel. Co v State Tax*

Commn., 61 NY2d 393, 404 [1984]). At least one Court has used the terms "employment" and "membership" interchangeably in deciding whether article 23-A's exemption applied in the case before it (*Matter of Little v County of Westchester*, 36 AD3d 616 [2d Dept 2007]).

Our interpretation is not inconsistent with the broad purpose of article 23-A, that applicants with prior criminal convictions be treated fairly. Although petitioner seeks to downplay the nature of the job that she applied for, PCTs (911 Operators/Radio Dispatchers) take calls, obtain critical information and are the first point of contact between the public and law enforcement. By dispatching police resources and performing other clerical and administrative duties related to the provision of emergency service, a PCT also has access to confidential information, including non-public activities. The civilian nature of the job does not determine its importance in NYPD operations.

Nor do the provisions of the State and City Human Rights Laws upon which petitioner relies avail her. They prohibit denials of employment only to the extent the denials violate Correction Law article 23-A (*see* Executive Law § 296[15]; Administrative Code of the City of NY § 8-107[10][a]). Since we

find that the exemption within article 23-A applied to petitioner's application for employment/membership with the NYPD, NYPD was not required to consider the statutory factors set forth in Correction Law §§ 752, 753.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

370 The People of the State of New York, Ind. 3614N/11
Respondent,

-against-

Rashawn Smith,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at suppression hearing; Laura A. Ward, J. at plea and sentencing), rendered August 27, 2012, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of six months, concurrent with five years' probation, unanimously affirmed.

Initially, we find that the record does not establish a valid waiver of defendant's right to appeal. However, we find that the court properly denied defendant's suppression motion.

Defendant asserts that the officers' initial contact with defendant constituted at least a common-law inquiry, and that it was not supported by the requisite founded suspicion of

criminality. Defendant's general arguments on probable cause failed to preserve this issue (*see People v Tutt*, 38 NY2d 1011 [1976]), and the court did not "expressly decide[ ]" (CPL 470.05[2]) it (*see People v Turriago*, 90 NY2d 77, 83-84 [1997]). We decline to review this claim in the interest of justice.

As an alternative holding, we reject it on the merits. Defendant was smoking what appeared to an officer, based on his experience and training, to be a cigar that had been modified for the purpose of smoking marijuana. This provided, at a minimum, a founded suspicion of criminality justifying a common-law inquiry (*see People v Brown*, 308 AD2d 398 [1st Dept 2003], *lv denied* 1 NY3d 595 [2004]), even though, from his vantage point, the officer could not determine with certainty whether defendant was smoking marijuana or an ordinary cigar. After defendant dropped the "blunt," which the officer confirmed to be marijuana by its odor, the police had probable cause for defendant's arrest.

Regardless of whether defendant's behavior at the precinct satisfied the required predicate for a strip search (*see People v Hall*, 10 NY3d 303, 310-311 [2008], *cert denied* 553 US 938 [2008]), the cocaine recovered from defendant was not the product of such a search. When the police found drugs in defendant's

shoe, this was still within the scope of an ordinary search incident to arrest (*see People v Vega*, 56 AD3d 578, 580 [2d Dept2008], *lv denied* 12 NY3d 763 [2009]), which had not yet progressed to a strip search.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

372-
373 In re Tione M.,

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

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

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

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about December 16, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of menacing in the third degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348, 349 [2007]). There is no basis for disturbing the court's credibility determinations. The victim's testimony established that appellant, while acting in concert with others, chased the victim and demanded money from

him, causing him to reasonably fear an attack (*see Matter of Orenzo H.*, 33 AD3d 492 [1st Dept 2006]). This evidence supported the elements of third-degree menacing. Appellant's alternative interpretations of these events are unavailing.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

374 Janessa Jordan, Index 400186/13
Plaintiff-Appellant,

-against-

Dr. Maria Raccuglia,
Defendant-Respondent,

Rosh Maternity,
Defendant.

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Janessa Jordan, appellant pro se.

James W. Tuffin, Islandia, for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger J.), entered on or about March 12, 2015, which granted defendant Dr. Maria Raccuglia's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established entitlement to judgment as a matter of law by submitting evidence, including an expert's affirmation, showing that her treatment of plaintiff was within good and accepted medical practice and was not the proximate cause of plaintiff's alleged injuries (*see Foster-Sturrup v Long*, 95 AD3d 726, 728 [1st Dept 2012]). The record shows that blood tests revealed that plaintiff tested positive for a virus and defendant prescribed an appropriate medication.

In opposition, plaintiff failed to raise a triable issue of fact. Although subsequent blood tests showed that she did not suffer from the subject virus, plaintiff failed to demonstrate that any of her alleged injuries were caused by the medication that defendant prescribed. Rather, the evidence showed that plaintiff did not take the dosage of medication that was prescribed, that she suffered from her headaches prior to being prescribed the medication and that her other alleged injuries were unrelated to the medication (*see e.g. Pullman v Silverman*, 125 AD3d 562, 563 [1st Dept 2015]).

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

376-
377 The People of the State of New York, Ind. 4485/12
Respondent, 2027/12

-against-

Jamie Frierson,
Defendant-Appellant.

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

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

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Judgments, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Charles H. Solomon, J. at dismissal motion and suppression ruling; Ruth Pickholz, J. at jury trial and sentencing), rendered March 7, 2013, as amended June 10, 2013, convicting defendant of criminal possession of a forged instrument in the first degree (four counts) and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment, made on the ground that he was deprived of his right to testify before the grand jury when, against defendant's wishes, his counsel withdrew defendant's notice of intent to

testify. We decline to revisit our prior holdings (*see People v Brown*, 116 AD3d 568 [1st Dept 2014], *lv denied* 24 NY3d 1001 [2014]; *People v Santiago*, 72 AD3d 492 [1st Dept 2010], *lv denied* 15 NY2d 757 [2010]) that the right to testify before the grand jury is not among the rights reserved to a defendant personally, but is among the rights of a defendant whose exercise is a strategic decision requiring "the expert judgment of counsel" (*People v Colville*, 20 NY3d 20, 32 [2012]).

Defendant's argument that the warrantless searches of his backpack and wallet were not justified by exigent circumstances is unpreserved, and we decline to review it in the interest of justice. While defendant's cross-examination may have touched on this subject, he limited his suppression argument to the distinct issue of probable cause to arrest, and the court did not "expressly decide[ ]" the issue "in response to a protest by a party" (CPL 470.05[2]; *see People v [Emilio] Jimenez*, 109 AD3d 764 [1st Dept 2013]). As an alternative holding, we find that although the hearing evidence did not demonstrate exigent circumstances (*see People v [Josefina] Jimenez*, 22 NY3d 717 [2014]), any error in receiving the evidence at issue was

harmless because the remaining evidence of defendant's guilt was overwhelming (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Andrias, Richter, Kapnick, JJ.

378 ADB Net Corp., doing business as Preferred Funeral Funding Corp., etc., Plaintiff-Respondent-Appellant, Index 156700/14

-against-

Columbian Mutual Life Insurance Company, Defendant-Appellant-Respondent.

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Phillips Nizer LLP, New York (Jeffrey L. Shore of counsel), for appellant-respondent.

Joshua E. Abraham, New York, for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 30, 2015, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) to the extent plaintiff sued as attorney-in-fact for the seven beneficiaries of Columbian's life insurance policies, and denied the motion to the extent plaintiff sued as assignee, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, with costs.

Life insurance proceeds are freely assignable in New York (*see Kramer v Phoenix Life Ins. Co.*, 15 NY3d 539, 551-553 [2010]), where, as here, it is undisputed that the assignment provision contains no restriction on the beneficiary's right to

assign. Columbian, which was put on notice of the assignments, chose to disburse the assigned funds to the original beneficiaries, rather than to the beneficiaries' assignee, Preferred. Columbian thus might be obligated to remit the assigned life insurance proceeds to Preferred (*see General Motors Acceptance Corp. v Albany Water Bd.*, 187 AD2d 894, 895-896 [3d Dept 1992]), although summary judgment pursuant to CPLR 3211(c) was properly denied to Preferred, as the case cannot be decided as a matter of law on the present record.

Preferred's claims as attorney-in-fact were properly dismissed. "An attorney in fact is essentially an alter ego of the principal and is authorized to act with respect to any and all matters on behalf of the principal with the exception of those acts which, by their nature, by public policy, or by contract require personal performance" (*Matter of Perosi v LiGreci*, 98 AD3d 230, 237 [2d Dept 2012]). Since the

beneficiaries have already been paid, Preferred is not entitled to receive payment as attorney-in-fact.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

379 The People of the State of New York, Ind. 121/12
Respondent,

-against-

Cynthia Ramos,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Thomas Farber, J.), rendered October 22, 2013,

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

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

ENTERED: MARCH 3, 2016

CLERK

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

Tom, J.P., Saxe, Richter, Kapnick, JJ.

380 Jorge Lois,
Plaintiff-Respondent,

Index 304208/09
83755/10
84082/13

-against-

Flintlock Construction Services, LLC, et al.,
Defendants-Appellants.

- - - - -

Flintlock Construction Services, LLC, et al.,
Third-Party Plaintiffs-Respondents,

-against-

J&R Glassworks, Inc.,
Third-Party Defendant-Appellant.

[And a Second Third-Party Action]

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Burke, Gordon & Conway, White Plains (Robert J. Spence of counsel), for J&R Glassworks, Inc., appellant.

Carol R. Finocchio, New York (Marie R. Hodukavich of counsel), for Flintlock Construction Services, LLC and Bass Associates, appellants/respondents.

Law Office of Ephrem Wertenteil, New York (Ephrem J. Wertenteil of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered December 16, 2014, which, insofar as appealed from as limited by the briefs, denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim, and denied the motion of third-party defendant J&R Glassworks, Inc. (J&R) for

summary judgment dismissing defendants/third-party plaintiffs' contractual indemnification claim against it, unanimously affirmed, without costs.

The court properly denied defendants' motion for summary judgment dismissing the Labor Law § 241(6) claim, rejecting their arguments that defendants, Bass Associates, LLC (Bass) and Flintlock Construction Services, LLC (Flintlock), were not the owner and general contractor, respectively, for purposes of the statute. Plaintiff allegedly slipped and/or tripped on a plastic tarp and broken concrete on the floor, causing him to fall, in the course of attempting to comply with an instruction from his superior to transport a window to a different part of the eighth or ninth floor of a new building. Plaintiff's employer, third-party defendant J&R, had assigned the two to complete this task to address a complaint that the window was leaking water. J&R was required to perform this work pursuant to the warranty in its subcontract with Flintlock that J&R would correct any defects within 12 months after "substantial completion" of its work (part of which was installing exterior windows), which undisputedly occurred much less than 12 months before the accident. Thus, there is at least an issue of fact whether Bass served the role of an owner by contracting to have the work performed for its

benefit, notwithstanding that Bass had previously transferred title to the eighth and ninth floors to new unit owners (*see Scaparo v Village of Ilion*, 13 NY3d 864, 866 [2009]).

Defendants' argument that no one within the chain of authority of their construction project created or had notice of the hazardous condition that caused plaintiff to fall is unavailing (*cf. DeStefano v Amtad N.Y.*, 269 AD2d 229 [1st Dept 2000]). Defendants' argument that the debris covered by a plastic tarp, upon which plaintiff slipped and fell, must have been created by a contractor hired by the owner which had recently purchased the floor from Bass, since unit owners were responsible for building out the interior of their units, is speculative. Assuming for the sake of argument that defendants were not in contractual privity with whoever created the debris, they were still in contractual privity with J&R. Since plaintiff's J&R superior was present on the undivided floor for about five hours before the accident occurred, a jury could "rationally conclude[] that someone within the chain of the construction project was negligent in not exercising reasonable care, or acting within a reasonable time, to prevent or remediate the hazard, and that plaintiff's slipping, falling and subsequent injury proximately resulted from such negligence" (*Rizzuto v L.A.*

Wenger Contr. Co., 91 NY2d 343, 351 [1998]).

The court also properly found that defendants failed to meet their initial burden of establishing the inapplicability of Industrial Code (12 NYCRR) §§ 23-1.7(e)(1) and (2). Viewed in the light most favorable to plaintiff, his testimony that he fell while walking on a two- or three-foot space between two large piles of debris, and that he was required to pass through that area in order to access the window being repaired, established that the accident occurred in a "passageway" within the meaning of Industrial Code § 23-1.7(e)(1). Whether the accident is characterized as a slip and fall or trip and fall is not dispositive as to the applicability of that regulation (*see DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]).

Contrary to defendants' argument that Industrial Code § Section 23-1.7(e)(2) is inapplicable, the plastic tarp on which plaintiff slipped "was not an integral part of the work being performed by the plaintiff at the time of the accident" (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]). Plaintiff's testimony raised an inference that the tarp had been placed over the debris by other companies, which had apparently departed the area by the day of the accident since plaintiff and his coworker were the only workers on their floor from about 7:00

a.m. until the accident occurred about five hours later (*see Kutza v Bovis Lend Lease LMB, Inc.*, 95 AD3d 590, 591-592 [1st Dept 2012]).

The court properly denied J&R's motion for summary judgment dismissing defendants' contractual indemnification claim against it. J&R's obligation to indemnify defendants pursuant to its subcontract with Flintlock is limited to injuries or claims arising from its negligent acts or omissions in performing the work. However, J&R failed to meet its initial burden of demonstrating an absence of issues of fact as to whether it had notice of the hazardous condition that caused plaintiff's injuries.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

382-
383 In re Donovan Jermaine R., etc.,

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

Leatrice B.,
Respondent-Appellant,

SCO Family of Services,
Petitioner-Respondent.

_____

John R. Eyerman, New York, 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 child.

_____

Order, Family Court, New York County (Susan Knipps, J.), entered on or about October 23, 2013, which, to the extent appealed from as limited by the briefs, upon a fact-finding determination that respondent mother suffers from a mental illness within the meaning of Social Services Law § 384-b, terminated her parental rights to the subject child, and transferred guardianship and custody of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the determination

that the mother, by reason of mental illness, is presently and for the foreseeable future unable to provide proper and adequate care for her child (Social Services Law § 384-b[4][c], [6][a]). The mother admitted that in February 2008, less than two years before the subject child was born, she killed her three older children by slitting the oldest child's throat and drowning all three of them in the bathtub. In response to criminal charges, she pleaded not responsible by reason of mental disease or defect, and has since been residing in a forensic psychiatric center. An expert psychologist diagnosed her with schizoaffective and antisocial personality disorders, which were persistent and severe, and which rendered her unable to adequately care for the subject child. The expert's review of the mother's extensive medical records, and his clinical interview of her, provided a sufficient basis for his conclusions, and the mother failed to submit any evidence to refute those conclusions (*see Matter of Thaddeus Jacob C.* [*Tanya K.M.*], 104 AD3d 558, 558-559 [1st Dept 2013]).

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

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

384 The People of the State of New York, Respondent, Ind. 3344/12 4705/12

-against-

Patrick Archer, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered June 25, 2103, as amended July 12 and August 1, 2013, convicting defendant, upon his pleas of guilty, of two counts of driving while intoxicated as a felony, and sentencing him to concurrent terms of 2⅓ to 7 years and 1 to 3 years, respectively, unanimously affirmed.

The court properly denied defendant's motion to suppress statements he made to the police. The first statement did not require *Miranda* warnings, because defendant, who was detained during a traffic stop, was not in custody for *Miranda* purposes (*see Berkemer v McCarty*, 468 US 420, 436-437 [1984]; *People v Bennett*, 70 NY2d 891 [1987]), and because the questioning was merely investigatory in any event (*see People v Huffman*, 41 NY2d

29, 33-34 [1976]). The subsequent challenged statement, although made while defendant was in custody, was spontaneous and not the result of interrogation (*see Rhode Island v Innis*, 446 US 291, 301 [1980]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence or directing that it run concurrently with defendant's Queens County sentence.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

385 Sylvestre Jean-Francois, Index 305053/09
Plaintiff-Appellant,

-against-

The Port Authority of New York
and New Jersey,
Defendant,

British Airways, PLC, et al.,
Defendants-Respondents.

[And Other Third-Party Actions]

_____

The Flomenhaft Law Firm, PLLC, New York (Benedene Cannata of counsel), for appellant.

Condon & Forsyth LLP, New York (Marshall S. Turner of counsel), for British Airways, PLC, respondent.

Morris Duffy Alonso & Faley, New York (Arjay G. Yao of counsel), for Mic General Contracting Inc., respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered June 4, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiff's cross motion for partial summary judgment on the issue of liability as against defendants British Airways, PLC and MIC General Contracting Inc. (MIC), unanimously reversed, on the law, without costs, and the cross motion granted.

Plaintiff established entitlement to judgment as a matter of

law in this action where he was injured when a television monitor and its bracket fell from the wall to which they had been mounted and onto him. Plaintiff submitted evidence, including the deposition testimony of MIC's employees, the affidavit of a construction expert, and the instruction manual for installation of the monitor bracket, showing that MIC negligently installed the subject bracket. In opposition, MIC failed to raise a triable issue of fact. It did not proffer an expert that contradicted plaintiff's expert, and instead offered only unsupported speculation that was insufficient to rebut plaintiff's showing. Although MIC was a third-party contractor, that status does not protect it where, as here, it "launched a force or instrument of harm" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002] [internal quotation marks omitted]).

Partial summary judgment should have also been granted in favor of plaintiff as against British Airways, which contracted for MIC to perform monitor installations at its terminal (*see Dabbagh v Newmark Knight Frank Glob. Mgt. Servs., LLC*, 99 AD3d 448, 450 [1st Dept 2012]). As an invitee, MIC's negligence is imputed to British Airways (*see Correa v City of New York*, 66

AD3d 573, 574-575 [1st Dept 2009]; *Logiudice v Silverstein Props., Inc.*, 48 AD3d 286 [1st Dept 2008]).

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

387 The People of the State of New York, Ind. 1283/12
Respondent,

-against-

Bryan Davis,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Denis Boyle, J.), rendered November 28, 2012,

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

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

ENTERED: MARCH 3, 2016

CLERK

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

Tom, J.P., Saxe, Richter, Kapnick, JJ.

389-
389A Lin Shi, Index 160529/13
Plaintiff-Appellant,

-against-

Panagis Alexandratos, et al.,
Defendants-Respondents.

Law Office of Frank Xu, PLLC, New York (Frank Xu of counsel), for appellant.

Rosenberg Calica & Birney LLP, Garden City (Robert J. Howard of counsel), for respondents.

Appeal from order, Supreme Court, New York County (Lawrence K. Marks, J.), entered May 13, 2014, which granted defendants' motion for summary judgment dismissing the complaint, declaring that the Alexandratos defendants are entitled to retain the contact down payment and, on the first counterclaim, in favor of defendant Terry S. Triades, for attorney's fees and costs pursuant to section 6(b) of the contract, and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs, as to the grant of summary judgment dismissing the complaint and the declaration. That portion of the order which granted summary judgment on the first counterclaim deemed appeal from judgment, same court and Justice, entered October 17, 2014,

in favor of defendant Terry S. Triades and against plaintiff, and, so considered, said judgment unanimously affirmed, without costs.

The residential contract of sale entered into between plaintiff and defendants Panagis Alexandratos and Carol Alexandratos provided that, if plaintiff did not receive a commitment for a first mortgage loan from an institutional lender on or before the "Commitment Date," he "may cancel this contract by giving Notice to Seller within 5 business days after the Commitment Date." It is undisputed that plaintiff failed to give the Alexandratoses notice of cancellation within five business days after the date on which the extension period he had requested and been granted expired. Plaintiff's argument that the mortgage contingency clauses of the contract constituted a condition precedent to his purchase of the Alexandratoses' house is belied by the contract language and by plaintiff's own conduct in requesting an extension of the mortgage contingency date before the initial 60-day "Commitment Date" term expired (*see Regal Realty Servs., LLC v 2590 Frisby, LLC*, 62 AD3d 498 [1st Dept 2009]).

Plaintiff's equitable restitution cause of action is barred by the existence of the contract of sale (*see IIG Capital LLC v*

Archipelago, L.L.C., 36 AD3d 401, 404-405 [1st Dept 2007]).

Plaintiff's causes of action against defendant Triades for breach of fiduciary duty and violation of Judiciary Law § 487 were correctly dismissed since documentary evidence established that Triades, as escrow agent, handled the down payment in accordance with the contract's escrow terms (*see Carter Fin. Corp. v Atlantic Med. Mgt.*, 268 AD2d 233 [1st Dept 2000], *lv denied* 94 NY2d 764 [2000]). We have considered plaintiff's remaining arguments and find them unavailing.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

390 James L. Register, Index 302904/12
Plaintiff-Appellant,

-against-

KNW Apartments, LLC, et al.,
Defendants-Respondents.

_____

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

Smith Mazure Director Wilkins, Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Faviola Soto, J.), entered May 19, 2015, sua sponte dismissing plaintiff's complaint against defendants KNW Apartments, LLC and Urban American Management, LLC, unanimously reversed, on the law, without costs, the complaint reinstated, and the matter remitted to Supreme Court, Bronx County, for further proceedings.

During a conference between counsel and the trial court, the trial court improvidently exercised its discretion in dismissing plaintiff's case, given that plaintiff's counsel had not violated any court order and had not received any warning that his conduct might lead to dismissal. Sua sponte dismissal of a proceeding is warranted only where the record presents "extraordinary circumstances" (*Thornton v New York City Bd./Dept. of Educ.*, 125

AD3d 444, 445 [1st Dept 2015]). Such circumstances were not present here, where plaintiff's counsel was merely attempting, during jury selection, to preserve his objections for appeal.

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

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

391 The People of the State of New York, Ind. 4087/13
Respondent,

-against-

Anthony Thomas,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered February 25, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 3, 2016

CLERK

Tom, J.P., Saxe, Richter, Kapnick, JJ.

392N Viola Carol, Index 156730/13
Plaintiff-Appellant,

-against-

Madison Plaza Apartments Corp.,
Defendant-Respondent.

_____

Viola Carol, appellant pro se.

White Fleischner & Fino, LLP, New York (Evan A. Richman of counsel), respondent.

_____

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about November 18, 2014, which, insofar appealed from as limited by the briefs, granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint was properly dismissed as barred by the doctrine of res judicata. Plaintiff's action arose out of the same set of circumstances as her prior 2010 action, which was dismissed (*see* 95 AD3d 735 [1st Dept 2012], *lv denied in part and dismissed in part* 20 NY3d 1021 [2013]), and "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse,* 54 NY2d 353, 357 [1981]).

Plaintiff's contentions that she did not have an opportunity to be heard and that there was no final judgment in the prior action are unavailing. To the extent she is arguing that a prior dismissal (as opposed to a full trial on the merits) cannot form the basis for res judicata, she is mistaken (*see e.g. Smith v Russell Sage Coll.*, 54 NY2d 185, 194 [1981]; *Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 4-5 [1st Dept 2000]).

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

ENTERED: MARCH 3, 2016

CLERK

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

393-
393A-
393B The People of the State of New York, Ind. 3107/13
Respondent, 263/14
60/14

-against-

Richard Haney,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Michael Obus, J.), rendered July 17, 2014,

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

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

ENTERED: MARCH 3, 2016

CLERK

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

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

394 Nereida Guzman Villa, Index 307729/12
Plaintiff-Respondent,

-against-

Property Resources Corp., et al.,
Defendants-Appellants.

_____

Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for appellants.

Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered October 21, 2014, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff alleges that she slipped on a floor that was negligently waxed or polished, and fell down a flight of steps. It is well established that "the fact that a floor is slippery by reason of its smoothness or polish, in the absence of proof of a negligent application of wax or polish, does not give rise to a cause of action or an inference of negligence" (*Katz v New York Hosp.*, 170 AD2d 345, 345 [1st Dept 1991]). Here, defendants met their initial burden of demonstrating that no waxy residue was on

the floor through their superintendent's testimony that the floor was never waxed, but was mopped daily by a porter, and polished periodically with a buffing machine and a liquid that dries instantly (*see Kudrov v Laro Servs. Sys., Inc.*, 41 AD3d 315 [1st Dept 2007]; *Katz* at 346). Plaintiff's testimony that she saw the porter using the buffing machine the day before she fell, and her conclusory claim that the wetness she felt on her pants and hands after she fell smelled like "wax or ammonia," was insufficient to raise an issue of fact as to whether the wetness on the floor was a waxy residue left by the porter's cleaning the previous day (*see Aguilar v Transworld Maintenance Servs.*, 267 AD2d 85 [1st Dept 1999], *lv denied* 94 NY2d 762 [2000]; *compare Santos v Temco Serv. Indus.*, 295 AD2d 218 [1st Dept 2002]).

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

ENTERED: MARCH 3, 2016

CLERK

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

395 In re Julio O., and Others,

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

Moises O.,
Respondent,

Latishya H.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Michelle R. Duprey of counsel), attorney for the children.

_____

Order, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about December 1, 2014, which, to the extent appealed from, after a fact-finding hearing, determined that respondent mother had neglected the subject child Roberto O., and had derivatively neglected the other subject children, unanimously affirmed, without costs.

A preponderance of the evidence shows that the mother neglected Roberto by failing to address his numerous long-standing special needs and by failing to comply with the

dispositional order in an earlier neglect proceeding against her (*see Matter of Kiera R.* [*Kinyetta R.*], 99 AD3d 565, 565 [1st Dept 2012]). Family Court properly drew a negative inference from the mother's failure to testify (*see Matter of Jazmyn R.* [*Luceita F.*], 67 AD3d 495, 495 [1st Dept 2009]).

The derivative neglect finding as to the other children is also supported by a preponderance of the evidence (Family Ct Act § 1046[a][i], [b][i]). The mother's failure to address Roberto's problems demonstrated an impaired level of parental judgment that created a substantial risk of harm for all of the children in her care (*Matter of Perry S.*, 22 AD3d 234, 235 [1st Dept 2005]). In addition, the evidence shows that two of the other subject children were having difficulty in school and had hygiene problems, and there was a prior derivative neglect finding with respect to three of the other subject children.

The mother never filed a notice of appeal with respect to the order of disposition entered on or about December 1, 2014, or with respect to the subsequent order extending placement, entered on or about February 23, 2015. Accordingly, we decline to reach the mother's arguments regarding those orders (*see Matter of M.-*

H. Children, 284 AD2d 188 [1st Dept 2001]). In any event, the mother's arguments are unavailing.

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

ENTERED: MARCH 3, 2016

CLERK

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

396-
396A Carlos Santiago, Index 305735/09
Plaintiff-Respondent,

-against-

The City of New York,
Defendant-Appellant,

New York City Transit Authority,
Defendant.

_____

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for appellant.

Alexander J. Wulwick, New York, for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 23, 2015, which denied defendant City's motion to renew, unanimously reversed, on the law, without costs, the motion granted, and, upon renewal, the City's motion for summary judgment dismissing the complaint granted. The Clerk is directed to enter judgment accordingly. Appeal from order, same court and Justice, entered on or about December 15, 2014, unanimously dismissed, without costs, as academic.

Assuming without deciding that the court properly denied the City's initial motion for summary judgment on the ground that the City failed to demonstrate that the lease was in effect at the

time of plaintiff's accident, we find that the court improvidently denied the City's motion for renewal. The affidavit of the MTA's Senior Real Estate Manager, coupled with the MTA's website, sufficiently established the authenticity of the 1953 lease, and that it was in effect at the time of plaintiff's accident. This, in turn, established that the City was an out-of-possession landlord that did not have responsibility for the allegedly hazardous condition of the subway steps (*see Alladice v The City of New York*, 111 AD3d 477 [1st Dept 2013]; *Arteaga v The City of New York*, 101 AD3d 454 [1st Dept 2012]; *McGuire v City of New York*, 211 AD2d 428 [1st Dept 1995]; *Mattera v City of New York*, 169 AD2d 759 [2d Dept 1991]). Plaintiff has failed to raise any triable issue of fact that the allegedly hazardous condition was a significant structural or design defect for which the City may be held liable.

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

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

ENTERED: MARCH 3, 2016

CLERK

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

397 The People of the State of New York, Ind. 1642/78
Respondent,

-against-

Robert Bonds,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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Order, Supreme Court, New York County (Richard D. Carruthers, J.), entered on or about July 25, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Regardless of whether defendant's correct point score is 140 or, as he claims, 115 points, we find no basis for a discretionary downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors raised by defendant were adequately accounted for in the risk assessment instrument, or

were outweighed by the seriousness of defendant's underlying offenses.

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

ENTERED: MARCH 3, 2016

CLERK

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

398 Preferred Mutual Insurance Company, Index 652598/13
Plaintiff-Respondent,

-against-

John Zani, doing business as
Classic Home Improvement, et al.,
Defendants-Appellants,

_____

Rizzo & Kelly, Poughkeepsie (James P. Kelley of counsel), for John Zani, appellant.

Rosner Nocera & Ragone, LLP, New York (Eliot L. Greenberg), for Aspen American Insurance Company, appellant.

Methfessel & Werbel, New York (Fredric P. Gallin of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 25, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment declaring that it had no obligation to defend or indemnify defendant John C. Zani d/b/a Classic Home Improvement Company in the subrogation action brought by defendant Aspen American Insurance Company with respect to certain property damage, and so declared, unanimously affirmed, without costs.

Aspen's allegations in its subrogation action that as a result of Zani's negligent work on Aspen's insured's building, the building was "severe[ly] damage[d]" by "a partial collapse"

of a wall "on or about November 22, 2012" do not give rise to a duty on plaintiff's part to defend Zani in that action. First, the policy excludes from coverage damage attributable to Zani's own defective work product (*see generally George A. Fuller Co. v United States Fid. & Guar. Co.*, 200 AD2d 255 [1st Dept 1994], *lv denied* 84 NY2d 806 [1994]; *Erie Ins. Co. v Nick Radtke, Inc.*, 126 AD3d 757 [2d Dept 2015]). Second, the partial collapse of the wall constitutes an occurrence under the occurrence-based policy, and the occurrence took place outside the policy coverage period; the policy had been cancelled in October 2010. Aspen and Zani's contention that the occurrence was not the collapse of the wall but the continuous movement of the outer layer of brick for

several years, which had impaired the structural integrity of the wall, is belied by the policy definition of occurrence as an "accident."

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

ENTERED: MARCH 3, 2016

CLERK

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

399 260-261 Madison Avenue, LLC, Index 650187/12
Plaintiff-Appellant, 590190/12

-against-

Bower Monte & Greene, P.C., et al.,
Defendants,

Peter R. Bower,
Defendant,

Guy A. Lawrence,
Defendant-Respondent.

[And a Third-Party Action]

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Pryor Cashman LLP, New York (Michael H. Levison and Joshua D. Bernstein of counsel), for appellant.

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ellen M. Coin, J.), entered October 22, 2014, which, to the extent appealed from as limited by the briefs, dismissed the complaint against defendant Guy A. Lawrence, and brings up for review an order, same court and Justice, entered October 24, 2013, and an amended order, same court and Justice, entered September 12, 2014, which determined that Lawrence was released from his obligations under a guaranty, unanimously affirmed, without costs.

The term "withdraws," as employed in the parties'

unambiguous guaranty and interpreted according to its plain meaning, refers to a voluntary act. Because defendants, who are seasoned attorneys, chose not to employ terms such as "involuntarily withdraws," "withdraws for cause," "is terminated" or other similar language, it is reasonable to conclude that they did not intend for an attorney departing the firm under such involuntary circumstances to be considered the first guarantor who "retires or withdraws" under the guaranty (*Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] ["if parties to a contract omit terms ... the inescapable conclusion is that the parties intended the omission"]). Moreover, the guaranty specifically identifies those limited involuntary circumstances that would apply (i.e., death or disability). The fact that the parties did not expand this category to expressly include termination further underscores that they did not intend it to trigger a release from the guaranty (*id.*).

The court's reading of the lease modification is appropriate, since, by its terms, it does not modify the foregoing terms of the guaranty.

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

ENTERED: MARCH 3, 2016

CLERK

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

400 The People of the State of New York, SCI 30255/13
Respondent,

-against-

Tyrone Smith,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about May 20, 2014, which adjudicated defendant a level one sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly determined that defendant was required to register as a sex offender in New York based on his New Jersey conviction of criminal sexual contact, for which he is undisputedly required to register in New Jersey. Pursuant to Correction Law 168-a(2)(d)(ii), defendant was required to register in New York if his New Jersey conviction was for "a felony in [that] other jurisdiction for which the offender is

required to register as a sex offender in [that] jurisdiction." We reject defendant's argument that the New Jersey crime was not a felony for this purpose.

The plain meaning of the word felony in the provision at issue is felony under the other jurisdiction's law; unlike § 168-a(2)(d)(I) there is no requirement of equivalency, or comparison of elements. Although New Jersey's statutory system of classifying offenses does not use the terms felonies or misdemeanors, defendant's conviction carried a possible sentence in excess of one year, and New Jersey, choosing to follow the common-law definition of felony, deems defendant's conviction a felony for that reason (*see State v Doyle*, 42 NJ 334, 346-349 [1964).

Defendant correctly observes that a potential sentence in excess of one year does not qualify a foreign-jurisdiction conviction as a felony for purposes of sex offender registration in New York. However, what makes defendant's New Jersey crime a felony for these purposes is not its potential sentence, but the fact that *New Jersey* chooses to deem it a felony, albeit *because* of its potential sentence, in accordance with the common-law rule.

We have considered and rejected defendant's remaining arguments.

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

ENTERED: MARCH 3, 2016

CLERK

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

401 In re Yamilly M.S.,
Petitioner-Appellant,

-against-

Ricardo A.S.,
Respondent-Respondent.

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Andrew J. Baer, New York, appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for respondent.

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

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Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about February 27, 2015, which denied petitioner mother's application to relocate with the subject children to Florida, unanimously affirmed, without costs.

The determination that relocation to Florida would not be in the children's best interests has a sound and substantial basis in the record (*see Matter of Tropea v Tropea*, 87 NY2d 727, 736 [1996]; *Matter of David J.B. v Monique H.*, 52 AD3d 414 [1st Dept 2008]). The parties stipulated to joint custody, with petitioner having primary physical custody. Respondent father has fully exercised his visitation rights and has frequently picked the children up from their school near his home. Petitioner has good

reasons for seeking to move to Florida; her husband lives there, and his home is larger than her apartment. However, respondent has sound reasons for opposing the relocation; it would limit the amount and quality of his contact with the children and disrupt their relationship, even with liberal vacation visitation. Any quality-of-life advantage realized would not necessarily outweigh the disruption in the children's relationship with their father (*see Matter of Angel D. v Nieza S.*, 131 AD3d 874 [1st Dept 2015]). The older child's expressed preference for relocation is but one factor to be considered; it is not determinative (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]).

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

ENTERED: MARCH 3, 2016

CLERK

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

402 In re Selwyn Walker, Index 400829/14
Petitioner-Appellant,

-against-

Jonathan David,
Respondent-Respondent.

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Selwyn Walker, appellant pro se.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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Judgment, Supreme Court, New York County (Shlomo Hagler, J.), entered November 28, 2014, denying the petition seeking to compel respondent to disclose documents pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

This proceeding is time-barred (*see* CPLR 217[1]). On December 6, 2013, the New York City Police Department's Records Access Appeals Officer denied petitioner's FOIL request. Petitioner attempted to commence an article 78 proceeding challenging that determination in Supreme Court, Genesee County, but that court rejected petitioner's filings, informing him that he must file his proceeding in New York or Queens County, pursuant to CPLR 506(b), 7804(b). Thereafter, petitioner

commenced the instant proceeding on June 6, 2014, more than four months after the denial of his administrative appeal (*see Matter of Swinton v Record Access Officers for City of N.Y. Police Dept.*, 198 AD2d 165 [1st Dept 1993]). The filing of petitioner's papers was effective upon their physical receipt by Supreme Court, New York County (*see Matter of Grant v Senkowski*, 95 NY2d 605, 609 [2001]), and this Court has no discretion to extend the statute of limitations (*see Matter of Clemons v New York City Hous. Auth.*, 110 AD3d 500 [1st Dept 2013]; *see also* CPLR 201). Petitioner's contention that Genesee County Supreme Court's ruling on venue was improper is not relevant to the untimeliness of this proceeding.

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

ENTERED: MARCH 3, 2016

CLERK

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

403 D. Penguin Brothers Ltd., et al., Index 154182/13
Plaintiffs-Appellants,

-against-

National Black United Fund, Inc.,
Defendant-Respondent.

_____

Gordon & Haffner, LLP, Harrison (David Gordon of counsel), for appellants.

Dentons US LLP, New York (Charles E. Dorkey III of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 22, 2014, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211 and CPLR 3016(b), unanimously affirmed, with costs.

Plaintiffs allege that defendant engaged in a conspiracy to defraud them via a real estate scheme involving nonparties David Spiegelman and James Robert Williams and several affiliated entities. They claim that Spiegelman and Williams, in conjunction with defendant and the affiliated entities, induced them to deposit millions of dollars in escrow for the purported purchase of properties so that the conspirators could access and misappropriate the funds. Spiegelman was plaintiffs' attorney, and Williams allegedly held high-ranking positions with

defendant.

The fraud claims, to the extent they accrued in 2005, when plaintiffs transferred funds into an escrow account (*see Vigilant Ins. Co. of Am. v Housing Auth. of City of El Paso, Tex.*, 87 NY2d 36, 43 [1995]; *Ingrami v Rovner*, 45 AD3d 806, 808 [2d Dept 2007]), are barred by the applicable statute of limitations (CPLR 213[8]). Those claims accrued more than six years before the complaint was filed, on May 6, 2013, and, in light of plaintiffs' admission that they discovered the thefts on or after February 3, 2011, are not saved by the statute's two-year discovery rule. We perceive no basis for applying the doctrine of equitable estoppel; plaintiffs were afforded the benefit of the two-year discovery rule, and they failed to demonstrate that further acts of concealment prevented them from commencing the action within the two-year period. In any event, the fraud claims fail to allege facts sufficient to permit a reasonable inference that defendant was involved in the scheme (*see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]).

The six-year limitations period applies to the aiding and abetting breach of fiduciary duty claims, since those claims are based on allegations of actual fraud (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). However, the claims are

untimely, since they accrued in May 2005, when plaintiffs first suffered losses by transferring funds into an escrow account (*see IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 140 [2009]). We perceive no basis for applying the doctrine of equitable estoppel. In any event, the conclusory allegations concerning defendant's involvement in the fraud scheme are insufficient to give rise to an inference that defendant substantially assisted Spiegelman in breaching his fiduciary duty to plaintiffs (*see Roni LLC v Arfa*, 15 NY3d 826 [2010]).

We also see no basis for applying the doctrine of equitable estoppel to bar defendant from asserting a statute of limitations defense to the unjust enrichment claim. In any event, plaintiffs do not allege facts demonstrating a relationship sufficient to hold defendant liable, and their allegations that defendant participated in and benefited from the fraud scheme are conclusory (*see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 518 [2012]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

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: MARCH 3, 2016

CLERK

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

404 Zylon Corp., et al., Index 650523/08
Plaintiffs-Respondents,

-against-

Medtronic, Inc., et al.,
Defendants-Appellants.

_____

Greenberg Traurig LLP, New York (Richard A. Edlin of counsel), for appellants.

Williams Kherkher Hart Boundas, LLP, Houston, TX (Edwin Armistead "Armi" Easterby of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 20, 2014, which, insofar as appealed from, denied defendants' motion for summary judgment dismissing the misappropriation of trade secrets and unfair competition claims, unanimously affirmed, without costs.

In 2005, the parties entered into an Evaluation Agreement, pursuant to which defendant Medtronic Vascular, Inc. (together with the other defendants, Medtronic) agreed to fund plaintiff Zylon Corp. to render services in attempting to create a "zero-fold" balloon, a component of a balloon angioplasty catheter, meeting Medtronic's specifications. "Information generated pursuant to the Project" was to be deemed "Confidential

Information" owned by Medtronic.

Zylon and its president, Alan Zamore, allege that Medtronic, inter alia, misappropriated trade secrets and confidential information relating to a process for producing zero-fold balloons and improperly used these trade secrets to create the balloon component of a product known as the Sprinter® Legend Semicompliant Rapid Exchange Balloon Catheter (*see Integrated Cash Mgt. Servs., Inc. v Digital Transactions, Inc.*, 920 F2d 171, 173 [2d Cir 1990] [elements of misappropriation claim] [internal quotation marks omitted]).

Medtronic failed to establish, as a matter of law, that the alleged trade secret process was "generated pursuant to the Project," foreclosing the misappropriation claim. Plaintiffs raised a triable issue of fact as to the existence of a protectable trade secret via, inter alia, their pre-agreement provision of machine settings for making zero-fold balloons and defendants' internal references to "Zylon technology" and the "Zylon process," which defendants attempted to replicate. The fact that plaintiffs were required to issue a final report summarizing the accumulated data does not, in and of itself, mean that the machine settings used to create the zero-fold balloons were also to be provided and considered part of Medtronic's

Confidential Information.

Plaintiffs also raised a triable issue of fact as to whether the alleged trade secret process was provided to Medtronic under a duty of confidence with evidence of, inter alia, Zamore's expressed concern over the confidentiality of the alleged trade secret process and defendants' assurances that it was protected and would not be stolen (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]; *see also* Restatement [First] of Torts § 757, Comment b).

The unfair competition claim is not duplicative of the misappropriation of trade secrets claim (*see e.g. Front, Inc. v Khalil*, 103 AD3d 481, 483 [1st Dept 2013], *affd* 24 NY3d 713 [2015]; *CBS Corp. v Dumsday*, 268 AD2d 350, 353 [1st Dept 2000]).

We have considered and rejected defendants' remaining arguments.

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

ENTERED: MARCH 3, 2016

CLERK

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

405 The People of the State of New York, Ind. 827/13
Respondent,

-against-

Leon Ray,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered February 20, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree, criminal mischief in the third degree and possession of burglar's tools (two counts), and sentencing him to an aggregate term of 2½ to 5 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the burglary conviction to a term of 2 to 4 years, resulting in a new aggregate term of 2 to 4 years, and otherwise affirmed.

We find the sentence excessive to the extent indicated. We

do not find that defendant made a valid waiver of the right to appeal.

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

ENTERED: MARCH 3, 2016

CLERK

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

406 The People of the State of New York, Ind. 152/13
Respondent,

-against-

Titan Turner,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Lawrence K. Marks, J. at suppression hearing; Charles Solomon, J. at jury trial and sentencing), rendered December 18, 2013, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of seven years, unanimously affirmed.

Defendant's statement to the undercover buyer, "I can't go back to jail," injected an uncharged crime that was not necessary to complete the narrative or explain defendant's precautions to avoid arrest, and the remark should have been redacted. However, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]), given the overwhelming evidence of defendant's guilt,

which included the recovery of buy money from defendant. Accordingly, this evidence was not unduly prejudicial.

Defendant's other evidentiary claim is unpreserved and we decline to review it in the interest of justice. "The word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law (*People v Tevaha*, 84 NY2d 879, 881 [1994]). As an alternative holding, we find that defendant opened the door to the evidence that he characterizes as "bolstering," and that any error was likewise harmless in any event.

The hearing court properly denied defendant's motion to suppress the undercover officer's identification of defendant. Although defendant asserts that the identification was made under particularly suggestive circumstances, we conclude that, given that this was not a civilian-witness showup, but a confirmatory identification made by a trained undercover officer as part of a planned procedure promptly after a drug transaction (*see People v Wharton*, 74 NY2d 921, 922-923 [1989]), the identification could not have been the product of undue suggestiveness. We have considered and rejected defendant's remaining arguments on this issue.

The evidence at the *Hinton* hearing established an overriding

interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Echevarria*, 21 NY3d 1, 12-14 [2013]). The record sufficiently demonstrates that the court fulfilled its obligation under *Waller* to consider alternatives to closing the courtroom, and it can be implied that the court determined that no lesser alternative would suffice (*see Echevarria*, 21 NY3d at 14-19 [2013]).

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

ENTERED: MARCH 3, 2016

CLERK

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

409 People ex rel. Haywood Hinton, Index 400254/14
Petitioner-Appellant, 30047/14

-against-

Warden, Manhattan Detention Complex,
Respondent-Respondent.

_____

Haywood Hinton, appellant pro se.

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

_____

Appeal from judgment (denominated an order), Supreme Court, New York County (Larry R.C. Stephen, J.), entered on or about March 26, 2014, denying the petition for a writ of habeas corpus and dismissing the proceeding brought pursuant to CPLR article 70, unanimously dismissed, without costs, as moot.

This appeal from the denial of the petition challenging the legality of petitioner's pretrial detention is moot, since he is currently incarcerated as the result of his conviction and sentencing (see *People ex rel. Macgiollabhui v Schriro*, 123 AD3d

633 [1st Dept 2014]), and no exception to the mootness doctrine applies.

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

ENTERED: MARCH 3, 2016

CLERK

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

410 Nenad Zecevic, et al., Index 152477/13
Plaintiffs-Appellants,

-against-

LAN Cargo S.A., et al.,
Defendants-Respondents,

TGT Transport, Inc.,
Defendant.

_____

Jaroslawicz & Jaros, LLC, New York (Norman E. Frowley of counsel), for appellants.

Brown Gavalas & Fromm LLP, New York (David H.Fromm of counsel), for respondents.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered February 5, 2015, which, insofar as appealed from as limited by the briefs, denied plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff Nenad Zecevic was allegedly injured after a crate weighing approximately 400 pounds fell on him as he was working at John F. Kennedy International Airport. Defendants contend that an unusually strong wind caused the crate to fall.

Supreme Court properly denied plaintiffs' motion for partial summary judgment on the issue of liability. Although plaintiffs

may be entitled to invoke the doctrine of res ipsa loquitur at trial, they are not entitled to partial summary judgment because the circumstantial proof is insufficient to create an inescapable inference of defendants' negligence (*see Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006]; *Stubbs v 350 E. Fordham Rd., LLC*, 117 AD3d 642, 644 [1st Dept 2014]; *Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 581 [1st Dept 2012]; *Tora v GVP AG*, 31 AD3d 341 [1st Dept 2006]).

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

ENTERED: MARCH 3, 2016

CLERK

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

411 Wanda Via, Index 153730/13
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant,

City of New York,
Defendant.

_____

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for appellant.

Law Offices of Andrew J. Spinnell, LLC, New York (Andrew J. Spinnell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 23, 2015, which denied defendant New York City Housing Authority's (NYCHA) motion to dismiss plaintiff's bedbug claims, unanimously affirmed, without costs.

Plaintiff alleges that she suffered hundreds of bedbug bites over a period of months as the result of an infestation in an apartment owned by NYCHA. On or about November 16, 2012, she served a notice of claim on NYCHA, and thereafter NYCHA moved to dismiss her claims for failure to serve a timely notice of claim.

Plaintiff's bedbug claims are not governed by CPLR 214-c(3), because her injuries were not caused by a "substance" (*see Casson*

v City of New York, 269 AD2d 285, 286 [1st Dept 2000], *lv denied* 95 NY2d 756 [2000]; *compare DiMarco v Hudson Val. Blood Servs.*, 147 AD2d 156, 159 [1st Dept 1989] [contaminated blood is a substance for the purposes of the statute]).

Nor does the evidence conclusively establish that plaintiff knew on or before August 5, 2012 that bedbugs were the cause of her injuries. Although plaintiff's testimony is often vague and inconsistent, she explicitly testified that she immediately called NYCHA when she discovered the bedbugs, and NYCHA's records indicate that plaintiff reported her bedbug complaint on August 19, 2012. While she had been bitten before that date, she attributed the bites to mosquitos. Her doctor's letter does not conclusively establish that she knew on August 5, 2012 that bedbugs were the cause of her injuries. At the very least, a factual issue exists as to whether plaintiff's claims arose more than 90 days before she served the notice of claim (*see* General Municipal Law § 50-e[1][a]), and therefore NYCHA is not entitled

to dismissal of her claims (*see e.g. Sarjoo v New York City Health & Hosps. Corp.*, 252 AD2d 449, 450 [1st Dept 1998]).

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

ENTERED: MARCH 3, 2016

CLERK

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

412-
412A The People of the State of New York, Ind. 389N/11
Respondent, 5389N/13

-against-

Shakim Thorpe,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Ellen Coin, J. at plea under Ind. 389N/11; Richard Weinberg, J., at plea under Ind. 5389N/13 and sentencing), rendered March 4, 2014, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on

reasonable notice to the respondent within thirty (30) days after service of a copy of this order. Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 3, 2016

CLERK

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

413N Benjamin Cortes, Index 158942/12
Plaintiff-Appellant,

-against-

ALN Restaurant, Inc., et al.,
Defendants-Appellants.
- - - - - -
180 Hester Street Investors LLC,
Nonparty Respondent.

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Wingate, Russotti, Shapiro & Halperin, LLP, New York (Michael J. Fitzpatrick of counsel), for Benjamin Cortes, appellant.

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for ALN Restaurant Inc., ALN Restaurant Inc, doing business as Goivanna's Restaurant, and PB 180 Hester Street, LLC, appellants.

Richard J. Migliaccio, New York (Joel Scott Ray of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 22, 2014, which, to the extent appealed from as limited by the briefs, denied defendants' motion, and plaintiff's cross motion, to compel nonparty 180 Hester Street Investors LLC (180 Hester) to permit access to the premises located at 128 Mulberry Street to inspect a stairwell, unanimously reversed, on the law, the facts, and in the exercise of discretion, without costs, and the motion and cross motion granted.

Plaintiff alleges that on March 22, 2010 he tripped and fell on "the interior steps/staircase" in the premises at issue, which is currently owned by 180 Hester. Plaintiff commenced this action on or about December 6, 2012, and served defendants in January 2013. Defendants answered the complaint in March 2013. On April 18, 2014, defendants' counsel e-mailed 180 Hester's counsel, "in furtherance of . . . recent correspondence," and requested permission to inspect the premises' staircase and surrounding area. On or about May 30, 2014, defendants moved to compel 180 Hester to permit access to the premises to conduct an inspection of the stairwell. In July 2014, plaintiff cross-moved for the same relief.

The motion court improvidently exercised its discretion in denying the motions (*see Hirschfeld v Hirschfeld*, 69 NY2d 842, 844 [1987]). Although the delay in seeking access to the premises may weaken the probative value of any evidence collected, the inspection will assist in the parties' preparation for trial, and thus access should be permitted (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). The lapse of time does not warrant denial of the motions, where 180 Hester failed to show any prejudice (*see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003]). The record

indicates that the parties have agreed to provide a waiver of liability prior to inspecting the premises' staircase, and to conduct the inspection in a manner that causes the least amount of disruption to the premises' current tenant. No bond need be posted for the inspection.

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

ENTERED: MARCH 3, 2016

CLERK

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

414 In re Anthony Jones Index 47/16
[M-45] Petitioner,

-against-

Bronx County Supreme Court, etc.,
Respondent.

_____

Anthony Jones, petitioner pro se.

John W. McConnell, Office of Court Administration, New York (Sean Kerby of counsel), for respondent.

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

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

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

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

ENTERED: MARCH 3, 2016

CLERK