SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 21, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

2395N Denise James, Index 17396/06
Plaintiff-Respondent,

-against-

1620 Westchester Avenue LLC,
et al.,
Defendants-Appellants.

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Ford Marrin Esposito Witmeyer & Gleser, L.L.P., New York (Andrew I. Mandelbaum of counsel), for appellants.

Spiegel & Barbato, LLP, Bronx (Stephen A. Iannacone of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered on or about November 7, 2014,[1] which after an in camera review, inter alia, denied defendants' motion to compel plaintiff to authorize the release of medical records pertaining to alcohol and drug treatment, mental health information, and HIV-related information, if any, and granted plaintiff's cross motion for a protective order precluding disclosure of such records, modified,

[1]By order of this Court entered December 22, 2015 (M-4297), the notice of appeal dated December 22, 2014, was deemed a valid notice of appeal from the November 7, 2014 order.

on the law, the facts and in the exercise of discretion, to direct disclosure as indicated, and otherwise affirmed, without costs.

Defendants did not meet their burden of showing a "compelling need" for medical records concerning HIV; they failed to submit evidence that would establish a connection between plaintiff's claimed HIV status and her future enjoyment of life (Public Health Law § 2785[2][a]; *Budano v Gurdon*, 97 AD3d 497 [1st Dept 2012]; *see also Abdur-Rahman v Pollari*, 107 AD3d 452 [1st Dept 2013]). Similarly, defendants failed to meet their burden of showing that "the interests of justice significantly outweigh the need for confidentiality" such to permit discovery of mental health, alcohol abuse, or substance abuse records (Mental Hygiene Law § 33.13[c][1]; Mental Hygiene Law § 22.05 [b]; *see also Keith v Forest Labs., Inc.*, 72 AD3d 519 [1st Dept 2010] *Catherine D. v Judy*, 38 AD3d 258 [1st Dept 2007]).

As the dissent notes, as a rule, "all matter material and necessary in the prosecution or defense of an action" should be fully disclosed (CPLR 3101[a]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403 [1968]). However, plaintiff's alleged general anxiety and mental anguish from back and leg injuries do not place her entire mental and physical health into contention (*see*

Serra v Goldman Sachs Group, Inc., 116 AD3d 639 [1st Dept 2014]; *Gumbs v Flushing Town Ctr. III, L.P.*, 114 AD3d 573 [1st Dept 2014]). She has not, as argued by the dissent, waived any protection applicable to such records.

The records reviewed by the court in camera, however, contain a report of a CT-scan taken April 9, 2012 of plaintiff's cervical spine, one of the areas of the body plaintiff claims was injured in the subject accident. Thus, that report should be exchanged, with any information concerning mental health, HIV status, or substance and/or alcohol abuse redacted.

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

SAXE, J. (dissenting in part)

Although I agree that defendants failed to show the "compelling need" for medical records concerning HIV required by Public Health Law § 2785(2)(a), I would direct disclosure of, and deny a protective order relating to, records concerning any recent treatment plaintiff received for mental health problems, alcohol abuse or substance abuse, as well as standard medical records.

As a rule, "all matter material and necessary in the prosecution or defense of an action" should be fully disclosed (CPLR 3101[a]; *see Allen v Crowell-Collier Pub. Co.*, 21 NY2d 403 [1968]). Plaintiff's injuries were allegedly caused by a trip and fall on a hazardous condition on defendants' property, but more than just plaintiff's physical condition is in issue; she also alleges anxiety and mental anguish, and seeks an award of future pain and suffering, which may incorporate a calculation of life expectancy or an assessment of loss of enjoyment of life (*see* NY PJI 2:280, 2:281). In my view, records regarding any treatment plaintiff recently received for her mental health or for alcohol or substance abuse are sufficiently relevant to satisfy the material and necessary standard of CPLR 3101, and by putting her emotional or psychological condition in controversy

plaintiff has waived any protection applicable to such records (*see Velez v Daar*, 41 AD3d 164 [1st Dept 2007]). To the extent that this Court has held that a plaintiff's allegations of anxiety and mental anguish resulting from the alleged physical injuries do not place that plaintiff's mental health history into contention (*see Serra v Goldman Sachs Group, Inc.*, 116 AD3d 639 [1st Dept 2014]), I disagree. It may bear repeating that the discoverability of such records does not mean they are necessarily admissible at trial.

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

ENTERED: FEBRUARY 21, 2017

CLERK

Sweeny, J.P., Renwick, Mazzarelli, Manzanet-Daniels, Feinman, JJ.

2730 The People of the State of New York, Ind. 3534/08
Respondent,

-against-

Mark Richardson,
Defendant-Appellant.

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Seymour W. James, The Legal Aid Society, New York (Denise Fabiano of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Bruce Allen, J. at trial), rendered October 27, 2011, convicting defendant, after a jury trial, of murder in the second degree and robbery in the first and second degrees, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

On the afternoon of Friday, January 11, 2008, defendant and one or more accomplices robbed and killed the 69-year-old victim inside her apartment in the Wagner Houses, in Harlem. The body was discovered by the victim's daughter approximately two days later. The victim's cell phone was not found in the apartment, but cell phone records indicated that several calls had been

placed from the phone to friends and relatives of defendant. Surveillance video revealed that defendant had entered and exited the victim's building several times during the morning and afternoon of January 11th.

On February 5, 2008, defendant agreed to accompany the police to the station for an interview. Defendant was not handcuffed and was told that he was free to leave. The police showed defendant a photo of the victim's body and said they wanted to ask him about her death, since they knew defendant often visited the building. The detectives advised defendant of his *Miranda* rights, which he waived in writing.

Defendant initially denied knowing the victim, but eventually gave an oral statement, which the detective wrote down and defendant signed. Defendant claimed to be at work during the day of January 11, but admitted that he and an acquaintance, Anthony Hall, went to the victim's apartment in the evening to collect a debt owed him. Once inside the victim's apartment, the acquaintance began to argue with the victim, then slammed her into the refrigerator. When defendant tried to intervene, the victim's wallet fell. Defendant retrieved the wallet, put it on a table, and said, "[I]t's not worth this for my money." Defendant maintained that he left the apartment while the

acquaintance and the victim were still arguing.

Defendant refused to provide a DNA sample. An "I-Card" was issued to instruct any police officers who arrested defendant to obtain his DNA sample. On May 31, defendant was arrested on an unrelated charge. One of the detectives recovered defendant's cigarette butts and water cup for DNA testing.

On July 3, the medical examiner informed the detective on the case that defendant's DNA matched the DNA recovered from the victim's breast.

On the morning of July 10, defendant was arrested. At about 8:40 a.m., defendant was brought to an interview room, uncuffed, and given cigarettes. The police told him he was under arrest based on DNA evidence and other evidence obtained after he had given his first written statement on February 5th.

The police left the room for about an hour. Then, around 9:45 a.m., the detectives returned. The lead detective read defendant's February 5th statement in order to "solidify what he said the first time"; as the detective read, defendant nodded. The detective discussed the surveillance video footage and cell phone records.

Defendant said he stood by his written statement, whereupon the detective confronted him with the fact that the amylase from

the victim's breast matched defendant's DNA. Defendant became "upset" and remarked: "[T]heoretically she could have been sitting on my lap and I could have been sucking on her titties." Defendant said: "[W]hat you got in the first statement is my statement and you are not getting anything else."

At that point, the lead detective read defendant his *Miranda* rights. At 10:25 a.m., defendant signed a *Miranda* waiver and said that he did not want to speak or to answer questions.

The lead detective left the room. At about 10:45 or 10:50 a.m., defendant was taken to a cell. One of the other detectives observed defendant with his head in his hands, saying: "I can't believe this is happening to me."

At about 11:20 a.m., detectives escorted defendant to the restroom. As they were walking back to the cell, defendant stopped and asked one of the detectives: "[H]ow serious is this? Am I going to do a lot of time for this?" The detective told him he was facing "a murder charge," adding that he was on "the video" and that the victim's phone showed calls to defendant's "family members." Defendant looked up and started to cry. The detective said he would listen to defendant if he wanted to "say something." Defendant replied: "[Y]eah, I want to talk."

At about 11:15 a.m., defendant was brought back to the

interview room. The lead detective reissued the *Miranda* warnings, and defendant agreed to speak. Defendant made an oral statement, which the lead detective wrote down and defendant signed at 11:55 a.m. Defendant largely reiterated his February 5th written statement, but added that Hall was a "drunk," and defendant had lent him the $28 with the expectation of being paid back $30. Hall brought defendant to the victim's apartment for the "express purpose of getting the money." Defendant stated that while the acquaintance was arguing with the victim he noticed money in the victim's bra – the $30 he was owed. He told the victim that he wanted his money, and reached into her bra and grabbed it. The victim slapped defendant in the face, and defendant pushed her and left the apartment.

Defendant also added that someone named "John" or "Johnny" was present during the incident. Before defendant left, he saw Johnny grab the victim around the neck, after which the other acquaintance grabbed a silver object from the kitchen and started punching the victim. Defendant saw that the victim was bleeding, and realized the acquaintance had stabbed her.

Around 12:55 p.m., the detectives left while defendant stayed in the interrogation room. They occasionally returned to check on defendant and ask if he wanted to eat or use the

restroom.

About five hours later, around 6:00 p.m., an assistant district attorney took a videotaped statement from defendant in the same interrogation room, in the presence of two of the detectives who had interrogated him earlier in the day. The ADA repeated the *Miranda* warnings to defendant, and defendant again waived his *Miranda* rights.

In the videotaped interrogation, defendant reiterated that he had lent $28 to his acquaintance with the understanding that the acquaintance would pay him back $30. Hall told defendant the victim had his money and the two went to the victim's apartment to retrieve it. Defendant stated that while Hall was arguing with the victim, he saw the money in the victim's blouse and took it. The victim "grabbed" defendant. He tried to push her away, at which point Johnny grabbed the victim by the neck, and Hall appeared to "punch[] her in the stomach." After, defendant observed a silver object in Hall's hand and realized that he had stabbed the victim. Defendant said "I'm out of her [sic]" and left.

Defendant acknowledged that he had been allowed to use the restroom and been given food, drink, and cigarettes following his

arrest.[1]

The hearing court granted in part and denied in part defendant's suppression motion. The court declined to suppress defendant's February 5th statement, finding that he "freely accompanied" the detectives to the precinct and was not in custody.

The court suppressed defendant's initial oral and written statements after his arrest on July 10. The court credited the detective's testimony that he considered the pre-*Miranda* questioning a "review" and did not anticipate that defendant would be making a statement; still, the court reasoned that the detective should have read defendant his *Miranda* rights before reviewing defendant's February 5th statement and confronting him with the DNA, cell phone records, and other evidence.

The court suppressed defendant's post-*Miranda* statement to the lead detective, as well as the conversation between defendant and another detective as he was being escorted to the bathroom. The court reasoned that there had been an insufficient break

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[1] Defendant made another statement about 20 minutes after his videotaped statement, which the court admitted; however, any challenge to this ruling is moot, since this statement was not introduced at trial (*see People v Falcon*, 281 AD2d 368, 368 [1st Dept 2001], *lv denied* 96 NY2d 901 [2001]).

between the earlier, unwarned statement to the lead detective and the subsequent statements to establish attenuation. Insofar as relevant to the appeal, the court ruled that the initial, 13-minute portion of defendant's videotaped statement to the ADA, made approximately five hours later, was attenuated from any illegal police conduct and thus admissible. That portion of the videotape included defendant's account of his actions on the date of the victim's death and references to the contents of his February 5th statement to the police. The court reasoned, inter alia, that defendant had been lawfully arrested; there was "no evidence of flagrant police misconduct"; the two initial interview sessions were "relatively brief; there was an interval of almost five hours between the conclusion of those interviews and the videotaped interview; and the ADA, rather than the detectives, conducted "the greater part of the questioning" on the video.

The court suppressed the remainder of the video because it contained references to defendant's suppressed statements to the detectives. We agree that the hearing court properly admitted the first 13 minutes of the videotaped statement, and now affirm.

"[W]here an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a single continuous

chain of events, there is inadequate assurance that the *Miranda* warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed" (*People v Paulman*, 5 NY3d 122, 130 [2005] [internal quotation marks omitted]). The following factors should be considered in determining whether there was a "definite, pronounced break in the interrogation to dissipate the taint from the *Miranda* violation":

> the time differential between the *Miranda* violation and the subsequent admission; whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police (*id*. at 130-131 [internal quotation marks omitted]).

Defendant's videotaped statement was made approximately five hours after the initial *Miranda* violation. Much shorter breaks have been found sufficient to dissipate the taint of a *Miranda* violation (*see e.g. People v White*, 10 NY3d 286 [2008], *cert denied* 555 US 897 [2008]). In addition, "defendant had demonstrated an unqualified desire to speak" (*People v Rodriguez*, 55 AD3d 351, 352 [1st Dept 2008], *lv denied* 12 NY3d 762 [2009]), seemed alert and relaxed in the video, and did not appear nervous or intimidated. Indeed, he was even "laughing on occasion."

Defendant had been Mirandized after his first encounter with the police concerning the case, on February 5. Further, the ADA – who had not participated in the earlier interrogation – was the sole questioner in the admitted portion of the video. Although two of the detectives who had conducted the earlier interrogation were present, they did not participate in the questioning in the admitted segment. Notably, the court suppressed any references to the suppressed statements made earlier on July 11th, as well as the later portion of the video in which the detectives participated in questioning (*see People v Thompson*, 136 AD3d 429, 430 [1st Dept 2016], *lv denied* 27 NY3d 1075 [2016] [taint of *Miranda* violation was dissipated where Mirandized interrogation was conducted by "new interrogators" after "pronounced break of at least four hours," and "the original interrogator [was] merely present without participating"]; *People v Davis*, 106 AD3d 144, 154-155 [1st Dept 2013], *lv denied* 21 NY3d 1073 [2013] [while the interviews took place in the same location with the lead investigators present, the prolonged break and the administration of *Miranda* warnings by the ADA, who had not previously been involved in the interrogation of defendant, "signaled a change in the nature of the interrogation," as reflected in defendant's calm demeanor and willingness to provide information]). The

prosecutor did not refer to defendant's suppressed statements in the initial 13 minutes of the videotaped interview – the only segment admitted into evidence.

Defendant made no pre-*Miranda* inculpatory statements. He placed himself on the scene – but he had already done so in his initial, February 5th statement, which was admitted. Defendant maintained throughout that Hall and/or Johnny committed the assault upon the victim, and he was merely present in the apartment to collect a debt owed. We therefore conclude that the first 13-minutes of the videotaped interrogation were sufficiently attenuated from the *Miranda* violation and properly admitted.

Neither defendant's invocation of his right of silence after his oral statement (*see People v Curry*, 287 AD2d 252, 253 [2001], *lv denied* 97 NY2d 680 [2001]), nor the other alleged improprieties regarding the suppressed statements require suppression of the videotaped statement. In any event, regardless of whether the court should have suppressed defendant's entire videotaped statement as unlawfully obtained, any error was harmless in light of the overwhelming evidence of guilt, including defendant's undisputedly admissible prearrest statement made on an earlier day, video surveillance footage, and

compelling forensic evidence (*see People v Crimmins*, 36 NY2d 230, 237 [1975]).

The court properly rejected defendant's claim under *Brady* v *Maryland* (373 US 83 [1963]) regarding the People's delay in disclosing allegedly exculpatory material, which was disclosed before trial, but at a time when, according to defendant, it was too "stale" to use. Even under the standard applicable where a defendant makes a specific request for the evidence at issue, there is no "reasonable possibility" that earlier disclosure of statements indicating that the offense happened on January 12 rather than January 11, 2008, or that persons other than the two alleged perpetrators participated in the murder, "would have changed the result of the proceedings" (*People v Fuentes*, 12 NY3d 259, 263 [2009]). As noted, there was overwhelming evidence, including the presence of defendant's DNA on the victim's body and other proof having no reasonable explanation other than defendant's guilt. The statement by defendant's accomplice that the incident occurred on January 12 was not material in light of the accomplice's later statements that the incident occurred on January 11, defendant's undisputedly admissible statement where he admitted taking money from the victim in her apartment on January 11, surveillance video showing defendant repeatedly

taking the elevator up to the victim's floor of her apartment building over the course of many hours on that date, and the records of defendant's employer showing that defendant lied when he told the police he worked as scheduled on that date. In this case where the number of perpetrators was uncertain, the statements by others suggesting that various persons aside from defendant and his known accomplice might have also participated in the offense "were reconcilable with the trial testimony" (*see People v Buie*, 289 AD2d 140, 141 [1st Dept 2001], *lv denied* 98 NY2d 695 [2002]). The court also providently exercised its discretion in declining to permit defendant to elicit hearsay as a remedy for the delay in disclosure (*see id.*).

"Defendant's right of confrontation was not violated when an autopsy report prepared by a former medical examiner, who did not testify, was introduced through the testimony of another medical examiner" (*People v Acevedo*, 112 AD3d 454, 455 [1st Dept 2013], *lv denied* 23 NY3d 1017 [2014]). The report was not testimonial, since it "d[id] not link the commission of the crime to a

particular person" (*People v John*, 27 NY3d 294, 315 [2016]; *see People v Freycinet*, 11 NY3d 38, 42 [2008]).

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

ENTERED: FEBRUARY 21, 2017

CLERK

Friedman, J.P., Richter, Saxe, Moskowitz, Kapnick, JJ.

2899 Pastabar Café Corporation, Index 652078/13
Plaintiff,

-against-

343 East 8th Street Associates, LLC,
Defendant-Respondent,

343 East 8th Street, LLC,
Defendant,

National Specialty Insurance Co., Inc.,
Defendant-Appellant.

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Gennet, Kallmann, Antin & Robinson, New York (Stanley W. Kallmann of counsel), for appellant.

Law Offices of Roger D. Olson, New York (Roger D. Olson of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 20, 2016, which denied defendant National Specialty Insurance Co., Inc.'s (National Speciality) motion for summary judgment dismissing the contract cause of action against it, unanimously affirmed, without costs.

Plaintiff Pastabar Café Corporation was damaged when Hurricane Sandy hit New York City in October 2012. In compliance with its obligations under its lease, Pastabar had bought a commercial package policy containing commercial general liability and property damage coverage from defendant National Specialty.

The policy, which was in force on October 29, 2012, provides that the insurer "will not pay for loss or damage caused directly or indirectly by," among other things, water. The policy also contained a "Water Exclusion Endorsement" that defined "water" as "[f]lood, surface water, waves (including tidal wave and tsunami), tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind (including storm surge)." The policy also provided that if any of the above "result[ed] in fire, explosion or sprinkler leakage, [National Specialty] will pay for the loss or damage caused by that fire, explosion or sprinkler leakage (if sprinkler leakage is a Covered Cause of Loss)."

After Hurricane Sandy struck, Pastabar claimed the premises lost electricity for an extended period of time, and as a result, the business was damaged by the spoilage of perishable food. Power finally returned, but according to the complaint, the landlord's failure to repair the electrical system at the premises caused Pastabar's refrigeration system to short out, requiring a complete replacement.

National Specialty's third-party claims agent investigated the conditions at the premises and, on National Specialty's behalf, disclaimed coverage under the policy on the ground that

the water exclusion barred Pastabar's claims. Pastabar commenced this action, seeking a declaration that the damage sustained as a result of Hurricane Sandy was caused by a covered loss under the National Specialty policy, and also seeking specific performance under the policy.

At his deposition, Pastabar's manager testified that three refrigerators and an ice machine were damaged by either water damage or electric damage that occurred when Con Ed turned the electricity back on about a month after the hurricane "without checking the clocks or the watches downstairs," thus "caus[ing] the melting of wires and burning of . . . most of the equipment." Specifically, the manager testified, "[w]hen the electric turned on, it must have caused some type of spark and it caused the damage" to the equipment.

National Specialty's moved for summary judgment dismissing the complaint. On its motion, National Specialty's submitted a sworn expert affidavit attesting that the water level at the exterior of the premises was between 2.9 and 3.9 feet above the roadway surface, and that the street flooding was due to the overflow of the East River and was a direct cause of the water entry into the building. The engineering report attached to the affidavit included findings and photographs showing flood

inundation at the location. The report, however, was unsigned, and there were no findings that attributed Pastabar's damages to flood inundation or any other cause of loss.

To begin, the motion court properly considered the report from National Specialty's expert. Although the report was unsigned, it was incorporated into the expert's sworn affidavit, thus rendering it appropriate for consideration on National Specialty's motion (*see Townes v Harlem Group, Inc.*, 82 AD3d 583 [1st Dept 2011]).

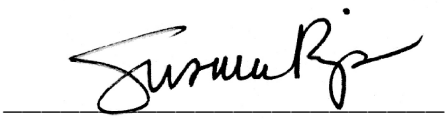
Nonetheless, National Specialty failed to establish prima facie that all of Pastabar's claimed losses were caused by flood waters resulting from Hurricane Sandy on October 29, 2012, and were thus within the insurance policy exclusion for water and floods. Based on photographs that Pastabar received from an unidentified neighbor, National Specialty's expert made a finding concerning the exterior water level at the premises on October 29, 2012. However, the expert never inspected the site or the electrical wiring. Therefore, the expert could not refute testimony by Pastabar's manager that Pastabar suffered additional damage a month after the storm, when electricity was restored and caused "the melting of wires and burning of . . . most of the equipment." Thus, the expert's report never rose above the level

of speculation (*see Oboler v City of New York*, 31 AD3d 308, 308-309 [1st Det 2006], *affd* 8 NY3d 888 [2007]).

In view of our decision, we need not evaluate the sufficiency of Pastabar's showing in opposition (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

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

ENTERED: FEBRUARY 21, 2017



CLERK

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

2944 Juan R. Matos, Index 24956/14E
Plaintiff-Respondent,

-against-

Angel R. Sanchez, et al.,
Defendants-Appellants.

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White Fleischner & Fino, LLP, New York (Nathan Losman of counsel), for appellants.

Bernstein & Bernstein, White Plains (Walter L. Rich of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered October 2, 2015, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, with costs.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident (*Williams v Kadri*, 112 AD3d 442, 442 [1st Dept 2013]). Plaintiff made a prima facie showing of his entitlement to partial summary judgment on the issue of liability by establishing that defendant Angel Sanchez, the driver of defendant Basics Development Group's vehicle, was

negligent.

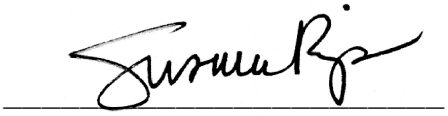
Although plaintiff came to a sudden stop and defendants contend that icy road conditions that day provide a valid, non-negligent explanation for why the accident occurred (i.e., that Sanchez's car skidded), a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions (*Williams*, 112 AD3d at 443; *Renteria v Simakov*, 109 AD3d 749, 750 [1st Dept 2013]; *Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]). Furthermore, defendants' reliance on the emergency doctrine is misplaced, since that defense is unavailable where, as here, defendant driver was aware of inclement weather conditions and should have properly accounted for them (*see Williams* at 443).

Defendants' alternative argument, that plaintiff stopped

suddenly, is insufficient to rebut the presumption of Sanchez's negligence (*see Corrigan*, 101 AD3d at 472; *compare Berger v New York City Hous. Auth.*, 82 AD3d 531 [1st Dept 2011]).

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

ENTERED: FEBRUARY 21, 2017



CLERK

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

2955 Lion Copolymer, LLC, Index 651993/12
Plaintiff-Respondent-Appellant,

-against-

Kolmar Americas, Inc.,
Defendant-Appellant-Respondent,

SGS Nederland, B.V., et al.,
Defendants.

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Crowell & Moring LLP, New York (Jack Thomas of counsel), for appellant-respondent.

Duane Morris LLP, New York (James W. Carbin of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 21, 2016, which, to the extent appealed from, found that the Transaction Confirmation and terms and conditions provided by defendant Kolmar Americas, Inc. (Kolmar) formed the parties' contract, and denied Kolmar's motion for summary judgment dismissing plaintiff's breach of contract claim, unanimously modified, on the law, to grant Kolmar's motion for summary judgment, and otherwise affirmed, without costs.

In July 2011, representatives from plaintiff Lion Copolymer, LLC (Lion) and Kolmar agreed, during a telephone call, that Kolmar would provide Lion with a certain amount of the industrial

chemical butadiene that met certain specifications. Kolmar subsequently sent an email confirming the major details of the agreed-upon deal, and several days later, Kolmar sent a formal Transaction Confirmation and its terms and conditions, which included a provision that if Lion did not object within 48 hours, these documents would make up the parties' agreement. These documents also contained a forum selection/choice of law provision, a waiver of warranty provision, and a notice of claim provision.

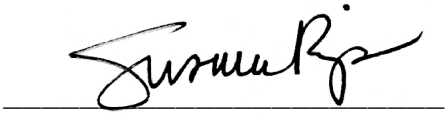
We agree with the motion court that the Transaction Confirmation and Kolmar's terms and conditions, to which Lion did not object, constituted the parties' agreement. The forum selection, waiver of warranty and notice of claim provisions did not constitute a material alteration such as would require Lion's consent for enforcement.

Kolmar established Lion's failure to comply with the notice of claim provision. Lion's assertion that it complied with the two year requirement does not negate its obligation to provide an initial notice of claim within 90 days of discharge. In the absence of a timely notice of claim, Lion is barred from bringing

its breach of contract claim, regardless of the questions raised regarding whether the butadiene was nonconforming when it was loaded onto a ship in the Netherlands and whether the butadiene testing in the Netherlands contained manifest errors.

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

ENTERED: FEBRUARY 21, 2017



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Tom, J.P., Renwick, Saxe, Feinman, Gesmer, JJ.

3010 The People of the State of New York, Ind. 3861/13
Respondent,

-against-

Mark Winston,
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 (Sabrina Margret Bierer of counsel), for respondent.

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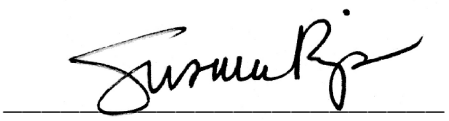
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward McLaughlin, J.), rendered June 3, 2014,

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

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

ENTERED: FEBRUARY 21, 2017



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

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3150 The People of the State of New York, Ind. 447N/14
Respondent,

-against-

Timothy Martin,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at *Darden* hearing; Richard D. Carruthers, J. at pretrial proceedings, jury trial and sentencing), rendered November 10, 2014, convicting defendant of criminal possession of a controlled substance in the third and fifth degrees and two counts of criminally using drug paraphernalia in the second degree, and sentencing him, as a second felony drug offender, to an aggregate term of two 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 credibility determinations. There was ample evidence to connect defendant with the contraband found.

When defendant requested unspecified "paperwork" concerning an unrelated search warrant executed by the same team of officers on the day they executed the warrant that led to defendant's arrest, this request was insufficient to alert the court to defendant's present claim that he was entitled to these documents as *Rosario* material (*People v Rosario*, 9 NY2d 286 [1961], *cert denied* 368 US 866 [1961]). We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. Assuming that the undisclosed materials included any statements by a witness who testified at defendant's trial, there is nothing to indicate that these statements concerning the other search warrant would have "relate[d] to the subject matter of the witness's testimony" (CPL 240.45[1]; *People v Mack*, 100 AD3d 460 [1st Dept 2012], *lv denied* 20 NY3d 1012 [2013]).

Neither *Miranda* warnings nor CPL 710.30(1)(a) notice was required with respect to defendant's statement, in response to a detective's pedigree question, that his residence was the apartment where the police had executed a search warrant and discovered contraband. The detective's routine administrative questioning was not designed to elicit an incriminating response (*see Pennsylvania v Muniz*, 496 US 582, 601-602 [1990]; *People v*

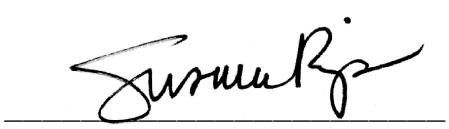
Rodney, 85 NY2d 289, 292-294 [1995]; *People v Watts*, 309 AD2d 628 [1st Dept 2003], *lv denied* 1 NY3d 582 [2003]), even if the answer was reasonably likely to be incriminating (*see People v Alleyne*, 34 AD3d 367 [2006], *lv denied* 8 NY3d 918 [2007], *cert denied* 552 US 878 [2007]).

The court did not delegate control of a portion of jury selection to a court officer, and there was no mode of proceedings error. When the officer reported to the court and parties that a prospective juror was pacing in the hallway and making rambling, belligerent remarks, the court, without objection, directed that the panelist be excused. The officer did not perform any judicial function, but "simply supplied information upon which the court made its own determination" (*People v Singletary*, 66 AD3d 564, 566 [1st Dept 2009], *lv denied* 13 NY3d 941 [2010]) that the panelist was unqualified to serve, and the circumstances did not require a direct colloquy between the panelist and the court.

Based on our review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]), we find that there was probable cause for the issuance of the search warrant.

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3151 NRT New York, LLC, doing business as Corcoran Group,
Plaintiff,

Charles Rutenberg, LLC,
Plaintiff-Appellant,

-against-

Christopher Morin, et al.,
Defendants-Respondents.

- - - - -

Christopher Morin, et al.,
Third-Party Plaintiffs-Appellants.

-against-

Natalie Esposito,
Third-Party Defendant-Respondent.

Index 152678/13

_____

Capuder Fazio Giacoia LLP, New York (Alfred M. Fazio of counsel), for Charles Rutenberg, LLC, appellant, and Natalie Esposito, respondent.

Greenberg Freeman LLP, New York (Sanford H. Greenberg of counsel), for respondents/appellants.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about October 19, 2015, which, to the extent appealed from, denied plaintiff Charles Rutenberg, LLC's (Rutenberg) motion for summary judgment on its breach of contract claim, denied Rutenberg's CPLR 3211 motion to dismiss defendants' counterclaims and affirmative defenses, and granted Rutenberg and

third-party defendant Natalie Esposito's (Esposito) motion to dismiss the third-party complaint against Esposito, unanimously affirmed, without costs.

The motion court correctly denied Rutenberg's motion, because defendants have adequately stated a counterclaim for breach of fiduciary duty, which, if successful, could defeat Rutenberg's right to a broker commission (*see Douglas Elliman LLC v Tretter*, 84 AD3d 446, 448 [1st Dept 2011], *affd* 20 NY3d 875 [2012]; *Brown Harris Stevens Residential Sales v Oxford Capital Corp.*, 306 AD2d 112, 112 [1st Dept 2003]). To state a claim for breach of fiduciary duty, a plaintiff must allege that the defendant owed him a fiduciary duty, that the defendant committed misconduct, and that the plaintiff suffered damages caused by that misconduct (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). As defendants' real estate broker, Rutenberg owed defendants a fiduciary duty of loyalty and an obligation to act in their best interests (*Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]). Further, defendants pleaded misconduct by alleging that Rutenberg induced them into signing a lease by misrepresenting that it would not seek a sales commission after the expiration of the five-month term in the brokerage agreement. Defendants also pleaded damages by alleging

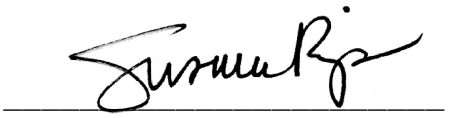
that they sold the apartment to the tenants at a lower price in reliance on Rutenberg's alleged false promise that it would not seek a sales commission.

The motion court correctly dismissed the third-party complaint against Esposito, as she was merely acting as an agent for Rutenberg, a disclosed principal, and there was no indication that she intended to be personally bound by the brokerage agreement (*see JDF Realty, Inc. v Sartiano*, 93 AD3d 410, 410 [1st Dept 2012]).

We have considered the appealing parties' remaining contentions and find them unavailing.

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3152-
3152A In re Averty C.P.,
Petitioner-Appellant,

-against-

Mirlande D.,
Respondent-Respondent.

_____

Larry S. Bachner, Jamaica, for appellant.

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

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child.

_____

Appeal from order, Family Court, New York County (Carol Goldstein, J.), entered on or about July 29, 2015, which dismissed petitioner father's supplemental petition to modify a final visitation order, unanimously dismissed, without costs, as moot. Order, same court and Judge, entered on or about July 29, 2015, which, upon respondent mother's motion, directed that neither party file additional petitions to modify the final custody or visitation order absent the Judge's permission or, if the Judge is not sitting in Family Court, New York County, the permission of any Family Court Judge, unanimously affirmed, without costs.

The father's modification petition sought narrow and time-sensitive relief — namely, that he receive parenting time over the summer of 2015 and that the mother be prohibited from taking the child to Haiti without his consent. As the father recognizes, both issues are now moot because the relief requested involved events that have long since passed (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]; *Matter of Puerto v Doar*, 142 AD3d 34, 43 [1st Dept 2016]). The exception to the mootness doctrine does not apply (*see Matter of Hearst*, 50 NY2d at 714-715; *Matter of Puerto*, 142 AD3d at 44).

Family Court providently exercised its discretion in enjoining the parties to the extent indicated (*Matter of Molinari v Tuthill*, 59 AD3d 722, 723 [2d Dept 2009]; *see also Board of Educ. of Farmingdale Union Free School Dist. v Farmingdale Classroom Teachers Assn., Local 1889, AFT AFL-CIO*, 38 NY2d 397, 404 [1975]). The father's abuse of the judicial process is evident from the record, particularly in light of his unsupported

allegations of racism and many filings that appear to have been motivated by spite and control of the proceedings rather than a genuine desire to visit his son.

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

ENTERED: FEBRUARY 21, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3155 The People of the State of New York, Ind. 2099/14
Respondent,

-against-

Arthur Blake,
Defendant-Appellant.

_____

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

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

_____

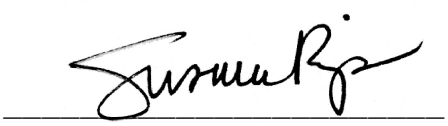
Judgment, Supreme Court, New York County (Neil E. Ross, J.), rendered March 2, 2015, convicting defendant, upon his plea of guilty, of burglary in the third degree and two counts of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 6½ to 13 years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant concerning the waiver went well beyond the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]), and defendant also acknowledged that he understood a written waiver, which supplemented the oral waiver.

Review of defendant's claims is foreclosed by the waiver. Alternatively, we find these claims unavailing.

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3156-
3157 Index 154378/15

John Robert Brooker,
Plaintiff-Appellant,

-against-

Richard Brian Hunt, et al.,
Defendants-Respondents.

_____

Roger S. Blank, P.C., New York (Roger S. Blank of counsel), for appellant.

Young Basile Hanlon & MacFarlane, P.C., Troy, MI (George S. Fish of the bar of the State of Michigan, admitted pro hac vice, of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered September 25, 2015 and October 16, 2015, which granted defendants' motion to dismiss the verified complaint as untimely, unanimously affirmed, without costs.

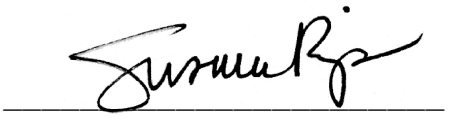
All of the causes of action accrued in the mid-1980s and were therefore barred by the statutes of limitations. Defendants were not equitably estopped from asserting the limitations defenses because plaintiff failed to sufficiently allege that defendants' subsequent wrongdoing intentionally concealed the wrongs pleaded, were done for the purpose of causing plaintiff to refrain from bringing suit in a timely fashion and actually caused him to refrain from doing so (*see Corsello v Verizon N.Y.*,

Inc., 18 NY3d 777, 789 [2012]). Moreover, it cannot be shown that plaintiff reasonably relied on his deceased alleged partner's representations as to both the value of plaintiff's interest in the endangered giant elands that are the subjects of the parties' alleged contract and plaintiff's right to sell his interest with or without the unanimous consent of the other alleged partners, as these facts could have been discovered by plaintiff through the exercise of ordinary diligence (see *Simcuski v Saeli*, 44 NY2d 442, 449 [1978]).

We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3158 Probate Proceeding, Estate of Shirley A. West, Deceased. SCI 2218/10

- - - - -

Joseph A. Smith,
Proponent-Respondent,

-against-

Patrick D. West, et al.,
Objectants-Appellants,

Lorraine West,
Objectant,

Diane Snell, et al.,
Respondents.

_____

Sweetbaum & Sweetbaum, Lake Success (Joel A. Sweetbaum of counsel), for appellants.

White & Case LLP, New York (Joshua D. Weedman of counsel), for respondent.

_____

Decree, Surrogate's Court, New York County (Nora S. Anderson, S.), entered October 19, 2015, admitting a will to probate, and bringing up for review an order, same court and Surrogate, entered July 8, 2015, which granted proponent's motion for summary judgment dismissing the objections to probate, unanimously affirmed, with costs.

Proponent made a prima facie showing of due execution of the will, through the submission of the will's attestation clause,

the self-proving affidavit of the attesting witnesses, and the testimony of the witnesses (*see Matter of Halpern*, 76 AD3d 429, 432 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). In opposition, objectants failed to raise a triable issue of fact (*id.*).

Proponent also made a prima facie showing of decedent's testamentary capacity at the time of the will's execution, and objectants failed to present evidence sufficient to raise a triable issue of fact (*see Matter of Schlaeger*, 74 AD3d 405, 406 [1st Dept 2010]). The self-proving affidavit and testimony of the witnesses indicate that decedent was of sound mind on the day of the will's execution and had engaged in lucid conversation. The medical records concerning her hospitalization later that day do not indicate any mental infirmity sufficient to call her testamentary capacity into question, and, upon discharge, she was not diagnosed with dementia or other diminished mental capacity.

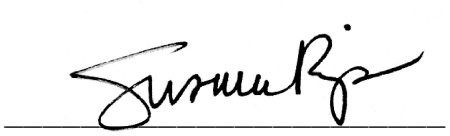
Surrogate's Court properly dismissed objectants' undue influence claim, as there was no evidence that proponent or the primary beneficiary took any action of a substantial nature that unduly influenced decedent to dispose of her property in a manner inconsistent with her wishes (*see Matter of Walther*, 6 NY2d 49, 54-56 [1959]). It is undisputed that decedent was an independent, strong-minded person, unlikely to act contrary to

her desires.

Surrogate's Court properly determined that objectants failed to set forth a fraud claim, because they did not cite any false statements made to decedent that caused her to execute the will or to modify its provisions (*see Matter of Eastman*, 63 AD3d 738, 740 [2d Dept 2009]).

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3160 In re Jasmine G., and Others,

Children Under the Age of
Eighteen Years, etc.,

Pamela G.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Law Offices of Susan Barrie, New York (Susan Barrie of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child, Jasmine G.

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child, Jackie B.

_____

Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about November 2, 2015, which, after a hearing, determined that respondent mother neglected the subject child Jasmine G. and derivatively neglected the subject child Jackie B., unanimously affirmed, without costs.

The court's finding of neglect was supported by a preponderance of the evidence showing that the mother neglected the older daughter, then age 13, by impairing her physical,

mental or emotional condition (*see* Family Court Act § 1012[f][i][A] and [B]). The mother impaired the subject child's physical condition by making her sit outside the home in freezing temperatures for hours at a time, without sufficient clothing or proper food, while yelling and cursing at her from inside (*see Matter of Jessica DiB.*, 6 AD3d 533, 534 [2nd Dept 2004]). The mother also withheld food from the child, or offered her foods that she did not like or was allergic to, so that the younger daughter would have to sneak food to her sister, at the risk of getting into trouble. As she previously did with her oldest child, a son, the mother emotionally rejected the subject child, stating in front of her that the petitioner agency could "keep" her (*Matter of Jason G. [Pamela G.]*, 126 AD3d 489, 490 [1st Dept 2015]; *see Matter of Shawntay S. [Stephanie R.]*, 114 AD3d 502 [1st Dept 2014]).

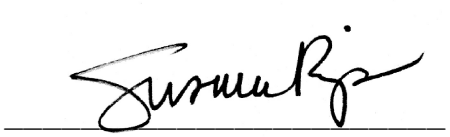
These actions and lack of insight demonstrated a flawed understanding of her parental responsibilities sufficient to support the derivative finding of neglect with respect to her

youngest child, who witnessed the treatment of her sister (*see Matter of Vincent M.*, 193 AD2d 398 [1st Dept 1993]).

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

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3161 The People of the State of New York, Ind. 5322/14
Respondent,

-against-

Michael Virdree,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

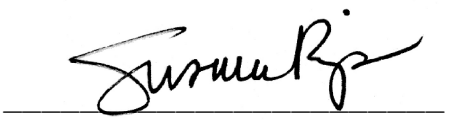
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered July 29, 2015,

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

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

ENTERED: FEBRUARY 21, 2017



CLERK

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

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3162 Cadlerock Joint Venture II, L.P., Index 304493/08
Plaintiff-Appellant,

-against-

Evelyn Carrion, et al.,
Defendants-Respondents.

_____

Vlock & Associates, P.C., New York (Steven P. Giordano of counsel), for appellant.

Evelyn Carrion, respondent pro se.

Anthony Carrion, respondent pro se.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about June 8, 2012, which, following a traverse hearing, granted defendants' motion to vacate a default judgment for lack of personal jurisdiction, unanimously affirmed, without costs.

Because plaintiff did not appeal from the separate order granting a traverse hearing, we will not address its arguments directed to that order.

The appellate record shows that the purpose of defendants' first appearance was to assert a jurisdictional defense based on improper service. Under the circumstances, we do not find that defendants waived their jurisdictional defense (*cf. McGowan v*

Hoffmeister, 15 AD3d 297, 382 [1st Dept 2005]).

The court's determination that defendants were not personally served turned in large part on its finding that the testimony of defendant Evelyn Carrion was more credible than that of the process server. There is no basis to disturb the court's credibility determinations, which are entitled to deference on appeal (*Arrufat v Bhikhi*, 101 AD3d 441, 442 [1st Dept 2012]).

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

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

ENTERED: FEBRUARY 21, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3163-
3163A The People of the State of New York, Ind. 4948/13
4949/13
Respondent,

-against-

Laura Caparla,
Defendant-Appellant.

_____

Galluzzo & Arnone LLP, New York (Matthew J. Galluzzo of counsel), for appellant.

_____

Judgments, Supreme Court, New York County (Maxwell Wiley, J.), rendered April 16, 2015, unanimously affirmed.

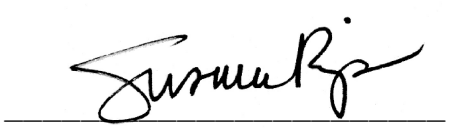
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised 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: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3164 Certain Underwriters at Lloyd's, London, Plaintiff-Respondent, Index 653019/15

-against-

Essex Global Trading, Inc., Defendant-Appellant.

- - - - -

Essex Global Trading, Inc., Third-Party Plaintiff-Appellant,

-against-

Great Lakes Reinsurance (UK) PLC, Third-Party Defendant-Respondent.

_____

Clayman & Rosenberg LLP, New York (Paul S. Hugel of counsel), for appellant.

Wade Clark Mulcahy, New York (Dennis M. Wade of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Shirley Werner Kornreich, J.), which granted plaintiff Certain Underwriters at Lloyd's, London (Underwriters) and third-party defendant Great Lakes Reinsurance (UK) PLC's (Great Lakes) motion for summary judgment; declared that defendant/third-party plaintiff Essex Global Trading, Inc. (Essex) was fully compensated by Underwriters, and that Great Lakes' excess policy was never triggered because the primary policy issued by

Underwriters was not exhausted; denied Essex's cross motion for summary judgment as to liability on its breach of contract counterclaim against plaintiff; and dismissed Essex's counterclaim and third-party claim, unanimously affirmed, with costs.

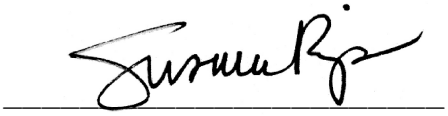
The motion court correctly determined that the "[v]aluation" and "[b]ooks [a]nd [r]ecords" clauses in the insurance policy issued to plaintiff was clear and unambiguous and that Essex was fully compensated by Underwriters. When reading the two clauses together, it is clear that the value for any insured item, including the diamonds at issue here, was to be based solely on the value that had been declared to Essex's shipper and insurance broker. This is particularly true given the "[n]otwithstanding" provision in the books and records clause (*see RJE Corp. v Northville Industries Corp.*, 2002 WL 1396991, *4, 2002 US Dist LEXIS 11741, *13-14 [ED NY, June 25, 2002, No. 01-CV-2749 (FB)]).

Because the policy language is unambiguous, extrinsic evidence should not be considered (*see Westchester Fire Ins. Co. v MCI Communications Corp.*, 74 AD3d 551 [1st Dept 2010]). Nor is

there a need to resort to the doctrine of contra proferentum, which, in any event, is inapplicable to Essex, a sophisticated policyholder (*id.*).

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3165 The People of the State of New York, Ind. 2373/14
Respondent,

-against-

Demetrius Williams,
Defendant-Appellant.

_____

Leonard J. Levenson, New York, for appellant.

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

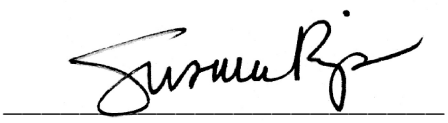
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 19, 2015,

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

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

ENTERED: FEBRUARY 21, 2017



CLERK

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

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3166 Benjamin Weisman, Index 111957/10
Plaintiff-Appellant,

-against-

MONY Life Insurance Company, etc., et al.,
Defendants-Respondents.

_____

Akiva Tessler, Staten Island, for appellant.

Rivkin Radler LLP, Uniondale (Cheryl F. Korman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered August 26, 2015 which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The record demonstrates conclusively that plaintiff never submitted a claim for total disability. His attending physicians

certified to his partial disability only (*see generally Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798 [1987]).

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

ENTERED: FEBRUARY 21, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3167 Catherine Sull, Index 150748/12
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent,

Metropolitan Transportation
Authority (MTA), et al.,
Defendants.

_____

Longo & D'Apice, Brooklyn (Mark A. Longo of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for respondent.

_____

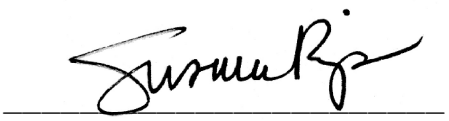
Order, Supreme Court, New York County (Margaret A. Chan, J.), entered August 14, 2015, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish its entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff was caused to fall by an allegedly defectively installed bus pad *(see Carlucci v Village of Scarsdale*, 104 AD3d 797, 798-799 [2d Dept 2013]; *see also Taveras v 1149 Webster Realty Corp.*, 134 AD3d 495, 496 [1st Dept 2015], *affd* 28 NY3d 958 [2016]). The affidavit of defendant's employee who conducted the

paper records search did not indicate that his search encompassed records of the installation of concrete pads at bus stop locations, and the City employee produced for a deposition did not know whether the paper search would have included bus pad records. Furthermore, defendant limited its search to only two years, despite the fact that its employees testified that 10 to 13 years of records would have been available. That defendant limited the discovery it provided does not relieve it of its burden on moving for summary judgment to establish that the bus pad was properly installed (*see e.g. Finkelstein v Cornell Univ. Med. Coll.*, 269 AD2d 114, 117 [1st Dept 2000]).

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

ENTERED: FEBRUARY 21, 2017



CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3168 Gwenneth Turner, et al., Index 303531/08
Plaintiffs-Appellants,

-against-

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

_____

Kenneth R. Berman, Forest Hills, for appellants.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 5, 2015, dismissing the complaint, pursuant to an order, same court and Justice, entered October 17, 2014, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3404 and denied plaintiffs' cross motion to deem the new note of issue properly filed, unanimously reversed, on the law, without costs, defendants' motion denied, and plaintiffs' cross motion granted.

The motion court erred in dismissing the negligence action pursuant to CPLR 3404. When the action was removed from the trial calendar, the court indicated that it should be continued as a pre-note of issue case. CPLR 3404 does not apply to cases in which no note of issue has been filed or the note of issue has

been vacated (*see Tejeda v Dyal*, 83 AD3d 539, 540 [1st Dept 2011], *lv dismissed* 17 NY3d 923 [2011]). Rather, avenues for dismissal are limited to CPLR 3216 and/or 22 NYCRR 202.27 (*id.*). The latter is inapplicable to the facts of this case, and defendants failed to comply with the preconditions of the former (*id.*).

Defendants failed to preserve their argument that the note of issue should not be reinstated because the conditions for reinstatement set forth in 22 NYCRR 202.21(f) were not met (*see Diarrassouba v Consolidated Edison Co. of N.Y. Inc.*, 123 AD3d 525, 525 [1st Dept 2014]). In any event, plaintiffs' counsel's affirmation was sufficient to meet the requirements of that rule.

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

ENTERED: FEBRUARY 21, 2017

CLERK

Acosta, J.P., Renwick, Moskowitz, Feinman, Gesmer, JJ.

3169 Patrick Wunderlich, et al., Index 157126/12
Plaintiffs,

-against-

Turner Construction Company, et al.,
Defendants-Appellants,

Safway Services, LLC, et al.,
Defendants.

- - - - -

LVI Environmental Services, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Irwin Seating Company,
Third-Party Defendant-Appellant.

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Cullen & Dykman LLP, New York (Molly Blaase of counsel), for appellants.

Gordon & Silber, P.C., New York (William L. Hahn of counsel), for respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered April 12, 2016, which, insofar as appealed from as limited by the briefs, denied defendants Turner Construction Company and MSG Holdings, L.P. (defendants) and third-party defendant Irwin Seating Company's motion for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to grant the motion as to the claim for contractual

indemnification, and otherwise affirmed, without costs, and the appeal therefrom, to the extent it denied said defendants and third-party defendant's motion to dismiss the Labor Law § 241(6) claim based on 12 NYCRR 23-1.7(e)(2) and the Labor Law § 200 claim, unanimously dismissed, without costs as abandoned.

Contrary to the motion court's conclusion, the movants presented arguments in favor of summary judgment dismissing the third-party complaint, beginning with the absence of a contract between third-party plaintiff (LVI) and third-party defendant (Irwin). Moreover, LVI does not dispute that there was no contractual relationship between itself and Irwin that would have entitled it to contractual indemnification.

However, issues of fact preclude summary judgment dismissing LVI's claims for common-law indemnification and contribution (*see Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012] [common-law indemnification]; *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1st Dept 1999] [contribution]). It cannot be determined as a matter of law on this record whether the bolt on which plaintiff Patrick Wunderlich was injured was left over from the removal of seats by LVI or was newly installed as part of the work plaintiff was performing installing the platform. Plaintiff's coworker testified that, in viewing photographs of

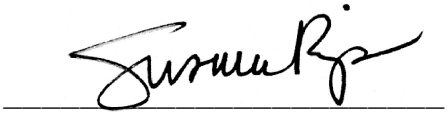
the accident site, he could not tell whether the protruding bolts were old or newly installed as part of the platform installation.

Further, to the extent the bolt constituted a dangerous site condition as a result of the removal of seats, issues of fact exist as to whether it was LVI or Irwin that removed the specific seats at issue. LVI's project manager testified that LVI did not remove the last three rows of seats around the lower bowl where the platform was to be installed. Irwin's project manager testified that, while there was no provision in Irwin's contract for it to remove chairs in the areas where the platforms would be installed, its contract was amended to remove approximately 400 seats, and he did not know where the seats that Irwin was responsible for removing were located. To the extent plaintiff's injury may have resulted from the means and methods of the work, given that plaintiff gained access to the area via the risers

with the newly installed bolts instead of aisle stairways, an issue of fact exists as to the extent to which Irwin controlled plaintiff's work.

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

ENTERED: FEBRUARY 21, 2017



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

2553- Index 106422/09
2553A Marino Severino, etc., et al.,
Plaintiffs-Respondents,

-against-

Mark Weller, M.D., et al.,
Defendants-Appellants.

James Lee, M.D., et al.,
Defendants.

_____

Marulli, Lindenbaum & Tomaszewski, LLP, New York (Gerard J. Marulli of counsel), for Mark Weller, M.D., appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi DiFolco of counsel), for the New York and Presbyterian Hospital, appellant.

The Fitzgerald Law Firm, P.C., Yonkers (Ann B. Chase of counsel), for respondents.

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Orders, Supreme Court, New York County (Joan B. Lobis, J.), entered September 9, 2015, affirmed, without costs.

Opinion by Renwick, J.P. All concur except Andrias and Saxe, JJ. who dissent in a separate Opinion by Andrias, J.

Order filed.

CORRECTED ORDER - FEBRUARY 27, 2017

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

2965 In the Matter of Darcel D. Clark, Petitioner, Ind. 1245/15

-against-

Hon. April A. Newbauer, etc., et al., Respondents.

_____

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for petitioner.

Seymour W. James, Jr., The Legal Aid Society, New York (Jeremy R. Davidson of counsel), for Ronnell Joseph, respondent.

_____

Petition pursuant to CPLR article 78 granted, and respondent Justice is prohibited from enforcing the order of Supreme Court, Bronx County, entered on or about December 16, 2016. **Justice Newbauer has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.**

Opinion by Gische, J. All concur.

Order filed.

CORRECTED OPINION - FEBRUARY 27, 2017

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B. Saxe
Judith J. Gische
Barbara R. Kapnick, JJ.

2965 [M-6423]
Ind. 1245/15

_____x

In the Matter of Darcel D. Clark,
Petitioner,

-against-

Hon. April A. Newbauer, etc., et al.,
Respondents.

_____x

In this original proceeding pursuant to CPLR article 78 of the Civil Practice Law and Rules, petitioner seeks a writ of prohibition to prohibit respondent Supreme Court Justice from enforcing the order of Supreme Court, Bronx County, entered on December 16, 2016.

Darcel D. Clark, District Attorney, Bronx (Rafael Curbelo of counsel), for petitioner.

Seymour W. James, Jr., The Legal Aid Society, New York (Jeremy R. Davidson of counsel), for Ronnell Joseph, respondent.

GISCHE, J.

The People seek a writ of prohibition enjoining enforcement of the trial court's December 12, 2016 ruling[1] in the case *People v. Ronnell Joseph*, precluding them from introducing at trial any evidence about a firearm. The court ruled that the grand jury's vote to dismiss certain charges against the defendant was entitled to collateral estoppel effect, resulting in the preclusion. In accordance with the multilevel analysis required in evaluating the People's challenge to the trial court's ruling, we hold that the issue raised is reviewable by this Court as an excess of the trial court's authority and we exercise our discretion to review the ruling. Upon review, we grant the writ of prohibition.

By indictment number 1245/2015, filed on May 5, 2015, a Bronx County Grand Jury charged the defendant with the crimes of robbery in the third degree (Penal Law § 160.05), two counts of grand larceny in the fourth degree (Penal Law § 155.30[5]) and petit larceny (Penal Law § 155.25), all in connection with an incident that occurred on February 28, 2015. The following charges, also presented to the grand jury based on the same incident, were dismissed: robbery in the first degree (Penal Law

[1]The December 12, 2016 ruling on the record was memorialized in an order entered December 16, 2016.

§ 160.15[4]) and menacing in the second degree (Penal Law § 120.14[1]).

The complainant's testimony before the grand jury consisted of the following facts: before the incident, the complainant and the defendant had known each other for more than 30 years. On February 28, 2015, at about 9:00 p.m., the complainant was giving the defendant a ride home from a convention they had both attended. The defendant told the complainant to pull the car over at the corner of Nereid and Monticello Avenues in the Bronx. Once they stopped, the defendant removed a small black pistol with a pearl handle from his right coat pocket and pointed it at the complainant's mid-section. The defendant then told the complainant, "You know what this is," before reaching to grab a gold chain and medallion worth about $7,500 from the complainant's neck. The complainant did not testify to any resulting injury. The defendant also demanded that the complainant turn over the money in his pocket. The complainant, fearing for his life, handed the defendant approximately $800 in cash. After the chain was taken and the money handed over, and while the gun was still pointed at the complainant, the defendant stated, "God forgive me what I'm about to do." The defendant exited the car, after which the complainant drove away and called 911.

The defendant also testified before the grand jury. He denied having a gun or any item that appeared to be a gun, or displaying what appeared to be a gun, on the day of the incident. No gun or any item that appeared to be a gun was ever recovered in this case.

Insofar as relevant here, the prosecutor charged the grand jury on the elements of robbery in the first degree and robbery in the third degree. The grand jury returned a true bill on the charge of robbery in the third degree, but dismissed the charge of robbery in the first degree. Before trial, defendant moved in limine to preclude any testimony about the gun, arguing that the grand jury's dismissal of the charge of robbery in the first degree was necessarily a rejection of the disputed factual claim that he had displayed what appeared to be a firearm during the incident. The People, in presenting the charge of first degree robbery to the grand jury, relied on Penal Law § 160.15(4) which provides:

> "A person is guilty of robbery in the first degree when he forcibly steals property and when, in the course of the commission of the crime or of immediate flight therefrom, he or another participant in the crime ... [d]isplays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm."

The charge of robbery in the third degree (Penal Law § 160.05) provides:

> "A person is guilty of robbery in the third degree when

he forcibly steals property."

The trial court held that in dismissing the charge of robbery in the first degree, the grand jury necessarily found that the defendant had not displayed what appeared to be a pistol or other firearm. Relying on the doctrine of collateral estoppel, the trial court precluded the People from making any evidentiary reference to a gun at trial. The ruling prevents the People from proving the element of force required for third degree robbery by making reference to a gun. The People contend that the trial court improperly applied collateral estoppel to a nonfinal determination (that of the grand jury). The defendant argues that the ruling was legally correct, but even if it were erroneous, the writ of prohibition sought from this Court is not available to correct what is, at most, a legal error. **Justice Newbauer has elected, pursuant to CPLR 7804(i), not to appear in this proceeding.**

A writ of prohibition is an extraordinary remedy, only available to prevent a court from either acting without jurisdiction or in excess of its authorized powers in a proceeding over which it otherwise has jurisdiction (*Matter of Holtzman* v *Goldman*, 71 NY2d 564, 569 [1988]; *Matter of Johnson v Sackett*, 109 AD3d 427 [1st Dept 2013], *lv. denied* 22 NY3d 857 [2013]). Prohibition is not available to review mere errors of

law, even when the errors are truly egregious (*Matter of Johnson v Price*, 28 AD3d 79, 81 [1st Dept 2006]).

"Although the distinction between legal errors and actions made in excess of authority is not always easily made, abuses of power may be identified by their impact on the entire proceeding as distinguished from an error in a proceeding itself" (*Matter of Holtzman*, 71 NY2d at 569). The trial court's ruling in this case was an error that affected the entire proceeding and thus constituted an excess of the court's authority. The ruling prevents the People from proving the element of force required under third degree robbery because the gun was the only evidence of force that was presented to the grand jury. The People cannot present different facts at trial in support of the indictment (*see* CPL 200.70). Although the court did not actually dismiss the third degree robbery charge, the charge cannot withstand a claim of legal insufficiency, because there are no other facts on which the prosecution can rely to prove force, a necessary element of the charge. While a gun is not the only proof that would satisfy the forcible element required for robbery in the third degree (*see e.g. People v Jorge*, 71 AD3d 604 [1st Dept 2010][use of mace], *lv denied* 15 NY3d 893 [2010]; *People v Gonzalez*, 60 AD3d 447 [1st Dept 2009], *lv denied* 12 NY3d 915 [2009][kicking, pushing, fighting]), in this case there was

simply no other evidence presented to the grand jury that could separately satisfy the element. Merely grabbing or snatching stolen property, without more, will not satisfy this element (*see e.g. People v Harvey*, 117 AD3d 873 [2nd Dept 2014], *lv denied* 23 NY3d 1037 [2014][verdict was against weight of evidence where victim's purse was taken from her, but there was no evidence of use or threat of use of physical force]; *People v Simmons*, 31 AD3d 1051 [3rd Dept 2006], *lv denied* 7 NY3d 929 [2006][swelling and red burn-like marks on victim's neck, together with proof that defendant jerked wallet from lanyard around victims neck established requisite physical force]; *People v Dobbs*, 24 AD3d 1043 [3rd Dept 2005][third degree robbery was not established by evidence that defendant tugged and grabbed victim's purse and ran]; *People v Henry*, 204 AD2d 187 [1st Dept 1994], *lv denied* 84 NY2d 826 [1994][third degree robbery established where defendant took complainant's gold chain and threatened to punch complainant in the face]; *People v Rivera*, 160 AD2d 419 [1st Dept 1990], *lv denied* 76 NY2d 1024 [1990] [third degree robbery established where defendant forcibly yanked four chains from victim's neck, breaking the clasps, and hit her chest in the process]). Contrary to the trial court's reasoning, the defendant's recitation of a biblical passage only after the property was taken, while remorseful, was not threatening in itself. What

made it threatening was the continued presence of a gun.

A writ of prohibition will lie where a trial court's erroneous ruling affects the proceeding in a conclusive manner, by terminating the case (*Matter of Holtzman,* 71 NY2d at 570. At bar, although the ruling did not actually terminate the case, it effectively terminated the ability of the People to prosecute the highest count in the indictment (*see Matter of Cosgrove v Ward*, 48 AD3d 1150 [4th Dept 2008]; *Shay v Mullen*, 215 AD2d 935 [3rd Dept 1995]). We therefore find that the court's ruling is reviewable by way of a writ of prohibition.

Even where, as here, the remedy of prohibition is available, the decision to prohibit is still a matter within this Court's discretion (*Matter of Holtzman,* 71 NY2d at 569; *Matter of Neal v White*, 46 AD3d 156, 159 [1st Dept 2007]). Extraordinary remedies, including prohibition, will not lie if there is an available remedy at law (*Matter of State of New York v King*, 36 NY2d 59, 62 [1975]). If, however, the ruling is not reviewable, that is an important consideration but alone may not necessarily provide a basis for reviewing errors by way of a collateral proceeding (*id.* at 62). The preclusion order challenged in this petition is not appealable, and absent the granting of this writ, the prosecution has no remedy or way to obtain appellate review (*see Matter of Johnson Sackett,* 109 AD3d 427, 431 [1st Dept

2013], *supra*). Additionally, the underlying issue regarding collateral estoppel in criminal proceedings remains a complex issue of ongoing and recent relevant legal concern, warranting our consideration (*see e.g. Bravo-Fernandez v United States*, __ US __, 137 S Ct 352 [2016]; *People v Ortiz*, 26 NY3d 430 [2015]). It is for these reasons that we exercise our discretion to reach the legal issue underlying this petition.

We hold that the trial court should not have given collateral estoppel effect to the grand jury vote to dismiss the charge of Robbery in the First Degree.

"The doctrine of collateral estoppel originated in civil litigation as a means of ensuring the swift and peaceful resolution of disputes" (*Ortiz*, 26 NY3d at 435). "It applies in criminal prosecutions to bar re-litigation of issues resolved in a defendant's favor at an earlier trial" (*id.* at 437; *People v O'Toole*, 22 NY3d 335 [2013]; *People v Acevedo*, 69 NY2d 478 [1987]). The following factors must be present in order for the doctrine to apply. There must be an identity of the parties (*People v Berkowitz*, 50 NY2d 333, 345 [1980]; *People v McGriff*, 130 AD2d 141, 149-150 [1st Dept 1987]). There must also be an identity of the issues involved (*People ex rel. Dowdy v Smith*, 48 NY2d 477, 482 [1979]). A final judgment on the merits must have resolved the particular issue in question only after the parties

had a full and fair opportunity to litigate such issue (*People v Sailor*, 65 NY2d 224, 229 [1985], *cert denied* 474 US 982 [1985]; *see also Matter of McGrath v Gold*, 36 NY2d 406, 411 [1975]).

The Court of Appeals has recognized, however, that for policy reasons collateral estoppel is not as liberally applied in criminal prosecutions as in civil actions (*Acevedo*, 69 NY2d at 485). The rigid application of collateral estoppel must yield to society's preeminent and overwhelming interest in ensuring the correctness of determinations of guilt or innocence (*Ortiz*, 26 NY3d at 436; *Sailor*, 65 NY2d at 228; *People v Plevy*, 52 NY2d 58, 64 [1980]). "Thus, if ... collateral estoppel 'cannot practicably be followed if a necessary witness is to give truthful testimony, then [the doctrine] should not be applied'" (*Ortiz*, 26 NY3d at 436, quoting *O'Toole*, 22 NY3d at 339).

In this case, collateral estoppel does not preclude evidence of a gun at trial because the decision by the grand jury to dismiss a charge is not a final adjudication. It is not a proceeding designed to give the parties a full and fair opportunity to litigate issues. All four departments of the Appellate Division have considered the issue of whether a grand jury vote is entitled to collateral estoppel effect. They have all concluded that it is not, because grand jury action is not final (*see People v Terry*, 38 AD3d 297 [1st Dept 2007], *lv denied*

9 NY3d 927 [2007]; *People v Stokes*, 247 AD2d 919 [4th Dept 1998], *lv denied* 91 NY2d 977 [1998]; *People v Estes*, 202 AD2d 516 [2d Dept 1994], *lv denied* 84 NY2d 825 [1994]; *People ex rel. Pickett v Ruffo*, 96 AD2d 128 [3d Dept 1983]). A charge dismissed by a grand jury lacks finality because the same charge may be resubmitted to the grand jury if a court authorizes or so directs (CPL 190.75; *Ruffo*, 96 AD2d at 130). A new charge may also be presented to the grand jury on the same or similar facts without prior court approval (*People v Rodriguez*, 261 AD2d 111, 113 [1st Dept 1999], *lv denied* 93 NY2d 978 [1999]). "'Since a Grand Jury decision not to indict is not a final determination that the acts alleged did not occur, dismissal of the criminal charge by the Grand Jury cannot be dispositive of the outcome of [another] proceeding'" (*Terry*, 38 AD3d at 297, quoting *Ruffo*, 96 AD2d at 130). This reasoning is also in keeping with our understanding that "[a] Grand Jury proceeding is not a mini-trial, but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution" (*see People v Thompson*, 22 NY3d 687, 697 [2014] [internal quotation marks omitted]). It is not a forum designed for the full litigation of disputed issues. We reject defendant's argument that because the burden on the prosecution to get an indictment is less than would

be required to obtain a conviction at trial, a grand jury vote in favor of a defendant is entitled to collateral estoppel effect. This argument disregards the fact that the process itself, with its lack of finality, different standards of proof, only one side presenting, no presiding judge, and no rights of appeal, is fundamentally a different procedure with a different objective than a trial.

Additionally, the rigid application of collateral estoppel in this case must give way to the societal interest in having the complainant testify truthfully at trial. The grand jury decision to indict on third degree robbery but dismiss on first degree robbery is inconsistent because the presence of the gun was offered in support of each of the two charges. It is, therefore, unknowable which version of facts the grand jury believed when it dismissed first degree robbery while also permitting prosecution on third degree robbery. The seemingly inconsistent grand jury finding weighs heavily against according the dismissal preclusive effect (*see Bravo-Fernandez*, __US at__, 137 S Ct at 364). The trial court relied too heavily on *Acevedo* (69 NY2d 478), which is distinguishable. In *Acevedo*, the Court held that an acquittal after trial on first-degree robbery, based on the display of a firearm, collaterally estopped the People from prosecuting second-degree robbery based upon the same gun. The acquittal

occurred after trial and was not a dismissal based on grand jury action. Morever, in contrast to this case, in *Acevedo*, there were facts other than the presence of the gun to support the second degree robbery charge. Thus, the jury action of acquittal on first-degree robbery would not necessarily be inconsistent with a conviction on second-degree robbery.

Accordingly, the petition pursuant to CPLR article 78 for a writ of prohibition should be granted, without costs, and respondent Justice prohibited from enforcing the order of Supreme Court, Bronx County, entered December 16, 2016.

All concur.

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

ENTERED: FEBRUARY 21, 2017

CLERK