



to recover for injuries allegedly sustained when he fell from a concrete panel being installed as part of the stadia, or step-like surface for the seating, at Madison Square Garden.

Defendant MSG Holdings, L.P., owned the premises and retained defendant Turner Construction Company to undertake a renovation of the premises pursuant to a construction management agreement. Turner subcontracted structural steel work to Helmark Steel, Inc., which sub-subcontracted the structural steel erection to plaintiff's employer, Falcon Steel Company.

Plaintiff testified at his deposition that on the day of the accident, he was working with a gang erecting precast concrete panels for the stadium seating. A crane on the arena floor lifted the panels onto a steel structure that had been installed. A steel "raker" beam ascended at an angle to form the pitch of the stairs. Sitting atop the raker at ever higher intervals were steel plates. The crane was rigged to rings protruding from pins inserted into each concrete panel at four points, and it raised the panels onto the steel plates atop the raker. After the crane landed a panel, plaintiff's crew used pry bars to move the panel into place and bolted it to the plates.

The accident occurred as plaintiff attempted to help a coworker who was having difficulty moving a panel. Plaintiff, who was standing six inches to a foot from the edge of the panel

that he was attempting to move, lost his balance and fell off the panel. He was wearing a harness but he was not tied off, because there was no place tie off. Plaintiff also stated that he was told to follow federal Occupational Safety and Health Administration's (OSHA) rules referred to as subpart R that did not require a tie-off at the elevation at which he was working.<sup>1</sup>

Rodrigo Caro, a Turner site safety manager, testified that while Falcon was to comply with subpart R in installing of steel, in installing precast concrete Falcon was to comply with subpart M, which requires protection for workers on surfaces with an unprotected edge more than six feet high (29 CFR 1926.501[b]).

We find that plaintiff was not provided with an appropriate tie-off notwithstanding defendants' claim that he was instructed to follow subpart M. "Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold . . . or other protective devise proved inadequate to shield the injured worker from harm directly flowing from the application of gravity to an object or person" (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d

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<sup>1</sup> 29 CFR part 1926, subpart R, which sets forth requirements to protect employees from hazards associated with "steel erection activities" (29 CFR 1926.750[a]), requires fall protection for connectors and workers on a leading edge of a controlled decking zone working at a height greater than 30 feet (29 CFR 1926.760[a][3]). A connector is "an employee who, working with hoisting equipment, is placing and connecting structural members and/or components" (29 CFR 1926.751).

494, 501 [1993] [emphasis deleted]). To prevail on a section 240(1) claim, the plaintiff must show that the statute was violated, and that this violation was a proximate cause of his injuries (*Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]).

Plaintiff established prima facie that while subjected to an elevation-related risk, he was injured due to defendants' failure to provide him with proper fall protection, namely, an appropriate place to which to attach his harness.

Defendants argue that plaintiff is not entitled to the protection of Labor Law § 240(1) because he was the sole proximate cause of his injury (see *Kosavick v Tishman Constr. Corp. of N.Y.*, 50 AD3d 287 [1st Dept 2008]). They contend that plaintiff was instructed to comply with OSHA subpart M, which requires the use of a safety device for work at an elevation of six feet or higher while installing prefabricated concrete panels, and that he refused to attach the harness that was provided. However, defendants have not sufficiently refuted plaintiff's testimony that there was no place for him to tie off the harness (*Myiow v City of New York*, \_\_\_ AD3d \_\_\_, 2016 Slip Op 06461, \*3 [1st Dept 2016]; *Hoffman v SJP TS, LLC*, 111 AD3d 467, 467 [1st Dept 2013]; *Phillip v 525 E. 80th St. Condominium*, 93 AD3d 578, 579 [1st Dept 2012]).

The record demonstrates that the only place to tie off to was below the level of plaintiff's feet. Indeed, Caro testified that there were no guardrails or life nets where plaintiff was working and that he could not recall any independent lines above the workers installing the panels for them to tie off to. He testified that plaintiff's only option was to tie off to the inserts in the most recently placed panels behind him, below his feet. In fact, he testified that tying off to the raker beam was an option only for the installation of the first panel. After that, the anchorage points were the only tie off points. Accordingly, "[t]he tie off to the inserts was what was determined by the Falcon Management [plaintiff's employer]. That's the plan they provided. So that was what was available for the guy to tie off." He acknowledged, however, that OSHA does not recommend tying off below the feet.

Caro's testimony was supported by Brian O'Shaughnessy, another site safety manager for Falcon, who testified that tying off below the feet would be a violation of subpart M. And, although, according to O'Shaughnessy, tying-off above the head is a safer option, "[a]ny tie-off point would be better than no tie-off point." Be that as it may, refusing to tie off to an anchorage point that is inconsistent with OSHA regulations does not make plaintiff the sole proximate cause, and comparative

negligence is not a defense to a Labor Law § 240(1) claim (see *Bland v Manocherian*, 66 NY2d 452, 460 [1985]; *Hernandez v Bethel United Methodist Church of N.Y.*, 49 AD3d 251, 253 [1st Dept 2008] ["the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence. It is absolutely clear that 'if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it'"], quoting *Blake v Neighborhood Hous. Servs.*, 1 NY3d at 290)).

The fact that both Caro and O'Shaughnessy, as well as defendants' expert, later claimed in affidavits that plaintiff could have tied off to a raker beam above his head is of no moment, inasmuch as there is no evidence in the record that plaintiff was ever instructed or knew to use such points to tie off. While a passage in "Falcon's Safety and Fall Protection Plan" states that "[a]ll employees shall be provided with the necessary means to tie off at all times, including . . . anchorage points on the steel," there is no indication that this refers to the holes in the plates on the raker beam during the erection of the precast concrete panels, as opposed to other anchorage points provided during the steel erection. Moreover, even assuming the passage refers to holes in the plates on raker beams during the erection of precast concrete panels, there is no indication that it was communicated to plaintiff.

Notably, as indicated, Caro had testified that the only places for plaintiff to tie off, as determined by Falcon management, were the inserts in the precast concrete panels. Similarly, O'Shaughnessy stated in his affidavit that ironworkers were instructed to tie off to the inserts in the precast concrete panels. And, although he also stated in his affidavit that rakers beams were also available as tie-off anchor points, he never stated that plaintiff or the other iron workers were instructed that they could tie off to the raker beam.

Nevertheless, mirroring the assertion of defendants' expert, Caro would later state in an affidavit that the raker beam was also available to tie off. However, an injured worker's failure to use safety devices will not constitute the sole proximate cause of the accident unless the worker knew that he or she "was expected to use them but for no good reason chose not to do so" (*Gallagher v New York Post*, 14 NY3d 83, 88 [2010]). Regardless of whether the raker beam was an appropriate tie-off point, because defendants point to no evidence that plaintiff knew to tie off to it, his failure to do so cannot be the sole proximate cause of the accident.

Labor Law § 241(6) imposes a nondelegable duty on owners and contractors to "provide reasonable and adequate protection and safety" to workers (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d

at 501-502). Industrial Code (12 NYCRR) § 23-1.16(b), which applies to the proper use, instruction, maintenance and measurements for safety belts, harnesses, tail lines and life lines, is sufficiently specific to sustain a claim under Labor Law § 241(6) (see *Jerez v Tishman Constr. Corp. of N.Y.*, 118 AD3d 617, 618 [1st Dept 2014]). Specifically, NYCRR 23-1.16(b) provides:

“(b) Attachment required. Every approved safety belt or harness provided or furnished to an employee for his personal safety shall be used by such employee in the performance of his work whenever required by this Part (rule) and whenever so directed by his employer. At all times during use such approved safety belt or harness shall be properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline. Such attachments shall be so arranged that if the user should fall such fall shall not exceed five feet.”

While plaintiff was provided with a safety harness, he was not provided with a proper place to which to tie off his harness.

Therefore, plaintiff is entitled to summary judgment as to liability on the Labor Law § 241(6) claim predicated on a violation of NYCRR 23-1.16(b).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Renwick, J.P., Moskowitz, Kapnick, Kahn, Gesmer, JJ.

2178-

Index 304663/10

2178A Hector L. Serrano, et al.,  
Plaintiffs-Appellants,

-against-

Consolidated Edison Company  
of New York Inc.,  
Defendant-Respondent.

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

Gordon Rees Scully Mansukhani, LLP, New York (Ryan J. Sestack of  
counsel), for respondent.

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Orders, Supreme Court, Bronx County (Julia I. Rodriguez,  
J.), entered on or about September 17, 2015, which denied  
plaintiffs' motion for partial summary judgment on the Labor Law  
§§ 240(1) and 241(6) claims, and granted defendant's motion for  
summary judgment dismissing the complaint, unanimously modified,  
on the law, to deny defendant's motion as to the Labor Law §  
241(6) claim insofar as predicated on a violation of Industrial  
Code (12 NYCRR) § 23-1.7(e)(2), and to grant plaintiffs' motion  
for partial summary judgment on that claim, and otherwise  
affirmed, without costs.

Plaintiff Hector L. Serrano testified that he slipped and  
fell on a scaffold platform on which he had been performing his  
work of painting exposed structural steel on the exterior of

defendant's building and that after he fell he saw a mixture of paint chips and dust on the platform. The dust was generated by his and his coworker's previous dusting and scraping of paint from the steel. Plaintiff inferred that he must have slipped on the dust and paint chips because he saw nothing else on the platform that could have caused his fall.

Plaintiff established his entitlement to partial summary judgment on the Labor Law § 241(6) claim predicated on a violation of Industrial Code (12 NYCRR) § 23-1.7(e)(2) by his uncontradicted testimony that the accident was caused by "accumulations of ... debris" on the scaffold platform (12 NYCRR 23-1.7[e][2]). "[T]hat plaintiff 'slipped,' rather than 'tripped' ... does not render 12 NYCRR 23-1.7(e)(2) ... inapplicable to his case" (*DeMaria v RBNB 20 Owner, LLC*, 129 AD3d 623, 625 [1st Dept 2015]; *accord Lois v Flintlock Constr. Servs., LLC*, 137 AD3d 446 [1st Dept 2016]; *but see Velasquez v 795 Columbus LLC*, 103 AD3d 541 [1st Dept 2013]).

The Labor Law § 240(1) claim was correctly dismissed since plaintiff's injuries "result[ed] from a separate hazard wholly unrelated to the danger that brought about the need for the safety device[s] in the first instance" (*Nieves v Five Boro A.C. & Refrig. Corp.*, 93 NY2d 914, 916 [1999]; *see Melber v 6333 Main St.*, 91 NY2d 759 [1998]). Plaintiff does not point to any

evidence that he was injured as a result of any attempts to avoid falling off the scaffold (see *Pesca v City of New York*, 298 AD2d 292 [1st Dept 2002]). The accumulation of paint chips and dust on the platform on which plaintiff was working "was one of the usual and ordinary dangers at a construction site[,] to which the extraordinary protections of Labor Law § 240(1) [do not] extend" (*Cohen v Memorial Sloan-Kettering Cancer Ctr.*, 11 NY3d 823, 825 [2008] [internal quotation marks and citation omitted]).

The Labor Law § 200 and common-law negligence claims were correctly dismissed since the evidence that defendant's safety officer instructed plaintiff and his coworkers on safety rules, exercised general oversight over site safety, and conducted site walk-throughs does not establish that defendant exercised supervisory control over the means or methods of plaintiff's work (see *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 380-381 [1st Dept 2007]).

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: JANUARY 3, 2017

  
CLERK

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

2338 In re Broadway Bretton, Inc.,  
Petitioner-Appellant,

100222/14

-against-

New York State Division of  
Housing and Community Renewal,  
Respondent-Respondent,

Bretton Hall Tenants Association,  
Respondent-Intervenor-Respondent.

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Seyfarth Shaw LLP, New York (Jerry A. Montag of counsel), for  
appellant.

Mark F. Palomino, New York (Jack Kuttner of counsel), for New  
York State Division of Housing and Community Renewal, respondent.

Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP, New York  
(David Hershey-Webb of counsel), for Bretton Hall Tenants  
Association, respondent.

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Judgment, Supreme Court, New York County (Peter H. Moulton,  
J.), entered December 22, 2014, denying the petition to annul a  
determination of respondent New York State Division of Housing  
and Community Renewal (DHCR), dated December 27, 2013, which  
affirmed an order of the DHCR Rent Administrator denying  
petitioner owner's application for a major capital improvement  
(MCI) rent increase, and dismissing the proceeding brought  
pursuant to CPLR article 78, unanimously reversed, without costs,  
on the law and in the exercise of discretion, the judgment  
vacated, respondent's determination annulled, the petition

granted, and the matter remanded to DHCR for further proceedings.

Under the circumstances of this case, where DHCR concedes that its investigator erred, and petitioner submitted the requested architect's report, albeit tardily, it was arbitrary for DHCR to deny the MCI application (see *305 W. 18 Assoc. v New York State Div. of Hous. & Community Renewal*, 158 Ad2d 377 [1st Dept 1990]).

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

ENTERED: JANUARY 3, 2017

  
CLERK



Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2593 Wells Fargo Bank, N.A., Index 381152/13  
Plaintiff-Respondent,

-against-

Josephine Kissi,  
Defendant-Appellant,

The New York City Environmental  
Control Board, et al.,  
Defendants.

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Robert Levy, Glen Cove, for appellant.

Reed Smith LLP, New York (Andrew B. Messite of counsel), for  
respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.),  
entered September 30, 2015, which, inter alia, granted  
plaintiff's motion for a judgment of foreclosure, and denied  
defendant Josephine Kissi's cross motion to vacate her default,  
unanimously affirmed, without costs.

Defendant's conclusory, undocumented assertion in her  
affidavit that she had moved, when she had not notified either  
the post office or the lender of any change of address, was  
insufficient to rebut the presumption of proper service, even by  
nail and mail, created by the process server's affidavit (see  
*Sharbat v Law Offs. of Michael B. Wolk, P.C.*, 121 AD3d 426, 427  
[1st Dept 2014]; *U.S. Bank Natl. Assn. v Vanvliet*, 24 AD3d 906,

908 [3d Dept 2005]). Defendant's conclusory "incorporation by reference" of her proposed verified complaint and counterclaim, without any attempt to make a legal argument or explain her theories, was insufficient to establish a meritorious defense under CPLR 5015(a)(1). In any event, the principal claims appear to be under the Truth in Lending Act (15 USC § 1601 *et seq.*), and are time-barred (see 15 USC §§ 1640[e], 1635[f]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2594 In re Walter S., Jr.,  
Petitioner-Appellant,

-against-

Cynthia H.,  
Respondent-Respondent.

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

Tennille M. Tatum-Evans, New York, for respondent.

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

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Appeal from order, Family Court, New York County (Gail A. Adams, Referee), entered on or about December 7, 2015, which transferred the petition to modify visitation to Suffolk County Family Court, unanimously dismissed, without costs, as taken from a nonappealable paper.

The order transferring the petition to Suffolk County is not a final order of disposition and is not appealable as of right (see Family Court Act § 1112[a]; *Matter of Lydia D. v Thomas B.*, 99 AD3d 586 [1st Dept 2012]). Moreover, the father did not object to the transfer of the petition, and his claim that it was an improvident exercise of the court's discretion is therefore unpreserved (see e.g. *Roberta P. v Vanessa J. P.*, 140 AD3d 457, 458 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]). Furthermore,

since the petition has since been dismissed, the issue is academic.

Were we to consider the merits, we would find that the court did not improvidently exercise its discretion in transferring the petition to Suffolk County, where the mother's family offense petition was pending, in order to accommodate the child's school schedule and where the mother and the child reside (see e.g. *Greenblum v Greenblum*, 136 AD3d 595 [1st Dept 2016]). The father failed to demonstrate that the transfer was a hardship to him due to his health.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: JANUARY 3, 2017

  
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sidewalk (see Administrative Code of City of NY § 7-210). The documents submitted by plaintiffs failed to rebut the presumption that the deed was delivered and accepted (see *M&T Real Estate Trust v Doyle*, 20 NY3d 563, 568 [2013]). Further, although plaintiffs alleged that the Harney defendants operated and controlled the premises, plaintiffs did not allege that the Harney defendants did so to the exclusion of O'Hathairne Brothers (see *Worthy v New York City Hous. Auth.*, 21 AD3d 284, 288 [1st Dept 2005]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2598 In re Pablo B.,

A Person Alleged to be a  
Juvenile Delinquent,  
Appellant.

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Presentment Agency

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about June 9, 2015, 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 sexual abuse in the first degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility.

The court properly permitted the seven-year-old complainant to give sworn testimony because her voir dire responses "established that she sufficiently understood the difference between truth and falsity, the significance of an oath, and the wrongfulness and consequences of lying" (*Matter of Dominick S.*,

91 AD3d 576 [1st Dept 2012]; see also *People v Cordero*, 257 AD2d 372 [1st Dept 1999], *lv denied* 93 NY2d 968 [1999]).

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

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has been shown to justify a further stay of execution of the warrant of eviction (see *Chelsea 19 Assoc. v James*, 67 AD3d 601 [1st Dept 2009]).

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ENTERED: JANUARY 3, 2017

  
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meaning of the recorded conversation nor relied on the other facts of the case in translating the handful of slang expressions about which he testified. The record of the expert's testimony, viewed as a whole, demonstrates that the court did not permit the expert to state what the slang terms meant in the context of the case; that determination was left for the jury to make. To the extent any slight portion of the testimony could be viewed as interpreting the conversation, the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). Defendant's argument that the expert's description of his police experience and qualifications in translating slang tended to connect defendant with gang or drug activity is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

The court properly permitted the victim to testify about an anonymous threatening phone call he received approximately 10 hours after he was attacked, warning him not to pursue the matter. The evidence was admissible, notwithstanding that the People could not demonstrate that defendant knew the caller or authorized the call, because it was not introduced to prove consciousness of guilt, but rather to support particular aspects of the People's theory of the case (*see generally People v Scarola*, 71 NY2d 769, 777 [1988]). Specifically, in conjunction

with elements of defendant's recorded call, the anonymous threatening call tended to support the theory that someone who knew the victim and his travel habits, and bore a grudge against him, paid defendant to attack him.

The court correctly denied defendant's suppression motion. The police had reasonable suspicion to detain defendant for a showup identification, based on a radioed description that was sufficiently specific, in context, because the extremely close spatial and temporal proximity between the crime and the police observation of defendant made it "highly unlikely that the suspect had departed and that, almost at the same moment, an innocent person of identical appearance coincidentally arrived on the scene" (*People v Johnson*, 63 AD3d 518 [2009], *lv denied* 13 NY3d 797 [2009]). At the very least, the police acquired reasonable suspicion when defendant fled after the police pulled their car in front of him to cut him off. Defendant did not preserve his claim that the officers' conduct in blocking his path was a seizure that already required reasonable suspicion, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Stevenson*, 55 AD3d 486 [1st Dept 2008], *lv denied* 12 NY3d 788 [2009]). The showup identification procedure conducted following the stop was not unduly suggestive, because "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.

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

ENTERED: JANUARY 3, 2017

  
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Labor Law § 200 is whether the owner created the dangerous or defective condition or had actual or constructive notice thereof," not whether the accident arose out of the means and methods of plaintiff's work (*Chowdhury v Rodriguez*, 57 AD3d 121, 123 [2d Dept 2008]; see *Cevallos v Morning Dun Realty, Corp.*, 78 AD3d 547, 549 [1st Dept 2010]; *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223, 224-225 [1st Dept 1999]).

The conflicting deposition testimony submitted by the parties shows that there is a triable issue as to whether defendants provided plaintiff with the allegedly defective ladder. Moreover, plaintiff's testimony that the ladder was missing its feet was sufficient to raise an issue of fact as to whether defendants had constructive notice of the defect because of its visible and apparent nature (see *Patrikis v Arniotis*, 129 AD3d 928, 929 [2d Dept 2015]; *Higgins*, 261 AD2d at 225).

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

ENTERED: JANUARY 3, 2017

  
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Although the People's case was based in part on circumstantial inferences, those inferences were compelling, and the evidence established all the required elements, including the victim's incapacity to consent by reason of physical helplessness during the sex crimes (see Penal Law § 130.35[2]) and the unlawful entry element of burglary.

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: JANUARY 3, 2017

  
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outweighed by the egregious circumstances of his underlying criminal activity against a child.

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2607 American Transit Insurance Company, Index 651602/15  
Plaintiff-Respondent,

-against-

Gerbert Baucage, et al.,  
Defendants,

Innovative Medical Heights, P.C.,  
Defendant-Appellant.

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Law Office of Gregory A. Goodman, P.C., Hauppauge (Gregory A. Goodman of counsel), for appellant.

Law Offices of Daniel J. Tucker, Brooklyn (Joshua M. Goldberg of counsel), for respondent.

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Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered July 11, 2016, which granted plaintiff's motion for a default judgment pursuant to CPLR 3215 declaring that it owes no duty to pay any pending or future no-fault claims arising out of a September 24, 2014 motor vehicle accident, and denied the cross motion of defendant Innovative Medical Heights, P.C. (Innovative Medical) for summary judgment dismissing the complaint as against it and for attorneys' fees, unanimously affirmed, without costs.

Supreme Court properly granted plaintiff's motion for a default judgment. The record demonstrates that plaintiff submitted proof that it served Innovative Medical with the

summons and complaint, Innovative Medical does not deny that it was received, and Innovative Medical failed to set forth a reasonable excuse as to why it failed to timely answer the complaint (see CPLR 3215[a], [f]). Innovative Medical's claim that plaintiff accepted its untimely answer by failing to reject it fails, because plaintiff moved for the default judgment within 13 days of its receipt (see e.g. *Katz v Perl*, 22 AD3d 806, 807 [2d Dept 2005]).

Furthermore, Innovative Medical's cross motion was properly denied. Since Innovative Medical never properly filed an answer, it may not ask the court to reach the merits of the action because CPLR 3212(a) expressly provides that a motion for summary judgment may only be made after joinder of issue (see *Afco Credit Corp. v Mohr*, 156 AD2d 287 [1st Dept 1989]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2608           In re Dayvon G.,  
                  Petitioner-Appellant,  
  
                  Amber B.,  
                  Respondent-Respondent.

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Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), appellant.

Aleza Ross, Patchogue, for respondent.

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

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Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about June 5, 2015, which, in this custody matter, awarded sole legal and physical custody of the parties' child to respondent mother, and granted petitioner father visitation, unanimously affirmed, without costs.

The Referee's custody determination has a sound and substantial basis in the record. The Referee appropriately considered the best interests of the child in light of the totality of the circumstances (*see Eschbach v Eschbach*, 56 NY2d 167, 172-174 [1982]; *Friedwitzer v Friedwitzer*, 55 NY2d 89, 93-94 [1982]), and the father has identified no grounds to disturb the

determination (see *Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]; *Matter of Carl T. v Yajaira A.C.*, 95 AD3d 640, 641 [1st Dept 2012]).

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

ENTERED: JANUARY 3, 2017

  
CLERK



Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2610 Mary Petitt, Index 652968/15  
Plaintiff-Appellant,

-against-

LMZ Soluble Coffee, Inc.,  
Defendant-Respondent.

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McLaughlin & Stern, LLP, New York (Steven J. Hyman of counsel),  
for appellant.

Proskauer Rose LLP, New York (Kathleen M. McKenna of counsel),  
for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.),  
entered April 15, 2016, which granted defendant's motion to  
dismiss the complaint, unanimously reversed, on the law, without  
costs, and the motion denied.

The subject employment agreement contains an ambiguous  
provision regarding deferred compensation that can be read as  
indicating that plaintiff was to be employed for five years.  
Considered in conjunction with the five-year payment schedules  
and targets in the agreement, this ambiguous provision precludes

a determination as a matter of law of the parties' intentions as to the term of plaintiff's employment (see *Crabtree v Elizabeth Arden Sales Corp.*, 305 NY 48 [1953]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2611            915 2nd Pub, Inc. doing business as            Index 604047/07  
                 Thady Con's Bar & Restaurant, et al.,  
                 Plaintiffs-Respondents,

-against-

QBE Insurance Corporation,  
Defendant-Appellant.

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Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Chris Christofides of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (James M. Carman of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered April 14, 2016, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, and granted plaintiffs' cross motion for summary judgment as to liability on the first cause of action, unanimously reversed, on the law, with costs, defendant's motion granted, and plaintiffs' motion denied. The Clerk is directed to enter judgment dismissing the complaint.

After excavation work on the adjacent property caused structural damage to plaintiffs' building, plaintiffs both submitted an insurance claim to defendant and negotiated a sale of the property to the owner of the adjacent property, i.e., the tortfeasor. The purchaser paid what its principal called "a

crazy price for the property value" in the acknowledged hope of disposing of all liability arising from the excavation damage. Plaintiffs brought this action to recover payment under the insurance policy.

By selling the damaged building to the entity that damaged it, plaintiffs violated the terms of the policy that required them to "do everything necessary to secure" and "do nothing after loss to impair" defendant's subrogation rights, i.e., defendant's right to pursue any claim that plaintiffs had against the tortfeasor (see *Chemical Bank v Meltzer*, 93 NY2d 296, 304 [1999]). Thus, defendant is not required to pay plaintiffs' claim (*Tropic Pollo I Corp. v National Specialty Ins. Co., Inc.*, 818 F Supp 2d 559, 562 [ED NY 2011]).

The sale of the building also violated plaintiffs' obligation to cooperate with defendant in its investigation of their claim (see e.g. *Somerstein Caterers of Lawrence v Insurance Co. of State of Pa.*, 262 AD2d 252 [1st Dept 1999]). Immediately after the sale, the purchaser demolished the building, leaving

nothing to investigate, at a time when the parties had yet to reach an agreement on the amount to be paid under the policy.

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

ENTERED: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2612- Ind. 2095/13  
2612A The People of the State of New York, 433/14  
Respondent,

-against-

Kissima Sawo,  
Defendant-Appellant.

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

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Judgments, Supreme Court, Bronx County (Margaret Clancy, J.), 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: JANUARY 3, 2017

  
CLERK

Friedman, J.P., Sweeny, Richter, Manzanet-Daniels, Kapnick, JJ.

2613-

Index 158486/14

2614N Joseph Veltre, et al.,  
Plaintiffs-Respondents,

-against-

Rainbow Convenience Store, Inc.,  
Defendant,

Eureka Realty Corp.,  
Defendant-Appellant,

PEC, LLC,  
Defendant.

- - - - -

[And a Third-Party Action]

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Hannum Feretic Prendergast & Merlino, LLC, New York (Matthew J. Zizzamia of counsel), for appellant.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered October 16, 2015, which, to the extent appealed from, granted plaintiffs' motion to compel defendant Eureka Realty Corp. to produce a copy of its insurer's claims files, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered on or about March 30, 2016, which denied defendant's motion for reargument, unanimously dismissed, without costs.

Contrary to defendant's contention, plaintiffs made a demand

for the entire claims file from defendant's insurer by letter from their attorney, and obtained, over defendant's objection, an order to disclose the file (see CPLR 3124). Nevertheless, the file is immune from discovery, because it was created by defendant's liability insurer (see *Recant v Harwood*, 222 AD2d 372 [1st Dept 1995]), and plaintiffs failed to demonstrate either that they could not otherwise obtain "a substantial equivalent" of the material without undue hardship (see *id.* at 374) or that defendant waived the privilege by relying upon the material in support of a defense (see *Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 43 AD3d 56 [1st Dept 2007]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: JANUARY 3, 2017

  
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Defendant is not aggrieved by alleged defects in charges of which he was not convicted.

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

ENTERED: JANUARY 3, 2017

  
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to adjust her teaching methods to comply with her supervisors' appropriate directives (*Matter of Webb v City of New York*, 140 AD3d 411, 411 [1st Dept 2016]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2618           In re Selvin Adolph F., Jr.,  
A Dependent Child under Age Eighteen,  
etc.,

Thelma Lynn W.,  
Respondent-Appellant.,

Edwin Gould Services for  
Children and Families,  
Petitioner-Respondent.

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

John R. Eyerman, New York, for respondent.

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

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Order of disposition, Family Court, Bronx County (Sarah P.  
Cooper, J.), entered on or about December 22, 2014, which  
terminated respondent mother's parental rights to the subject  
child upon a finding of permanent neglect and transferred custody  
of the child to the Commissioner of the Administration for  
Children's Services and Edwin Gould Services for Children and  
Families for purposes of adoption, unanimously affirmed, without  
costs.

This Court previously determined that the agency met its  
burden of establishing permanent neglect (*Matter of Selvin Adolph  
F. [Thelma Lynn F.]*, 117 AD3d 495, 496 [1st Dept 2014]). On

remand, the Family Court properly determined that termination of the mother's parental rights was in the child's best interests, and was thus the appropriate disposition (see Family Court Act § 631; *Matter of Star Leslie W.*, 63 NY2d 136, 147 [1984]).

The record establishes that the mother has refused to avail herself of mental health services despite being repeatedly ordered and encouraged to do so. This Court has already rejected the mother's argument that no such services are necessary (see *Selvin Adolph F.*, 117 AD3d at 497-498). Moreover, the subject child, now 17 years old, has not resided with the mother since he was 9 months old, and has resided with his foster mother for the majority of his life, bonded with her, and wants to be adopted by her (see *Matter of Amarnee T.T. [Tanya T.]*, 140 AD3d 452, 453 [1st Dept 2016]; *Matter of Jayden S. [Kim C.]*, 124 AD3d 488, 489 [1st Dept 2015]; *Matter of Jeffrey R.*, 63 AD3d 546, 546-547 [1st Dept 2009], *lv denied* 13 NY3d 706 [2009]).

A suspended judgment is not appropriate because there is no evidence that further delay will result in a different outcome, as the mother has given no indication that she will attend mental health counseling in the future (*Matter of Alexandria D. [Brenda D.]*, 136 AD3d 604, 604 [1st Dept 2016]). The child deserves

permanency after this extended period of uncertainty (see *id.*; *Matter of Autumn P. [Alisa R.]*, 129 AD3d 519, 520 [1st Dept 2015]). If the child wants to continue visitation with his biological mother, there is nothing preventing him from doing so.

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

ENTERED: JANUARY 3, 2017

  
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Apple Map in the area where plaintiff tripped over a raised manhole cover, also applied to the manhole cover which would have been considered part of the sidewalk, was competent evidence of the business or professional custom or practice of the designations used by the company (see *Soltis v State of New York*, 188 AD2d 201 [3d Dept 1993]; see e.g. *Reyes v City of New York*, 20 Misc 3d 1134[A] [Sup Ct, Bronx County 2008], *affd* 63 AD3d 615 [1st Dept 2009], *lv denied* 13 NY2d 710 [2009]). As such, it raised a triable issue of fact as to whether the Big Apple Map gave the City prior written notice of the defect, and the court should have denied the City's motion for summary judgment predicated on the lack of such notice.

The court properly denied defendant 601-142 Realty L.L.C.'s motion for summary judgment on the ground that it was untimely and defendant failed to offer good cause for its late filing (see *Brill v City of New York*, 2 NY3d 648, 652 [2004]). Law office failure is insufficient to demonstrate the good cause necessary to permit an untimely summary judgment motion (see *Quinones v Joan & Sanford I. Weill Med. Coll. & Graduate Sch. of Med. Sciences of Cornell Univ.*, 114 AD3d 472, 473-473 [1st Dept 2014]; *Matter of Hibbert*, 137 AD3d 786, 787 [1st Dept 2016]). Moreover, defendant's purported cross motion was "an improper vehicle for seeking relief from a nonmoving party" (*Kershaw v Hospital for*

*Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; see also *Genger v Genger*, 120 AD3d 1102, 1103 [1st Dept 2014]).

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

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

ENTERED: JANUARY 3, 2017

  
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Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2620 Margaret Bantamoi, Index 307931/09  
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,  
Defendant-Respondent.

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Law Office of Sandra M. Prowley and Associates LLC, Bronx (Sandra M. Prowley of counsel), for appellant.

Epstein, Becker & Green, P.C., New York (John F. Fullerton III of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 15, 2015, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing plaintiff's cause of action for retaliation in violation of the New York City Human Rights Law (City HRL), unanimously affirmed, without costs.

The five month time period between plaintiff's protected activity, the June 2008 filing of a discrimination complaint with the U.S. Equal Employment Opportunity Commission, and defendant's referral of plaintiff for psychiatric evaluation and her placement on a medical leave of absence in November 2008, is not sufficient temporal proximity to establish the requisite causal connection between the protected activity and the disadvantageous actions for purposes of plaintiff's claim for retaliation under

the City HRL (see *Matter of Parris v New York City Dept. of Educ.*, 111 AD3d 528, 529 [1st Dept 2013], *lv denied* 23 NY3d 903 [2014]). Nor do the disciplinary investigations undertaken by defendant in October 2008 evidence any retaliatory intent, since no actions were taken against plaintiff as a result of those investigations (see *Silvis v City of New York*, 95 AD3d 665, 665 [1st Dept 2012], *lv denied* 20 NY3d 861 [2013]).

Even assuming that plaintiff made out a prima facie case of retaliation, defendant met its corresponding burden of proffering legitimate, nondiscriminatory reasons for the allegedly disadvantageous actions, most notably, the opinion of the independent psychiatrist who examined plaintiff that she was “not capacitated to work” (see *Bendeck v NYU Hosps. Ctr.*, 77 AD3d 552, 553-554 [1st Dept 2010]).

In response, plaintiff failed to show that those reasons were mere pretexts (see *Delrio v City of New York*, 91 AD3d 900, 901 [2d Dept 2012]). We note that, in the absence of any evidence of retaliatory animus or pretext, we have no occasion to consider whether the alternative “mixed-motive” framework, which plaintiff also advances, may be applied in City HRL retaliation cases (compare *University of Tex. S.W. Med. Ctr. v Nassar*, \_\_\_ US \_\_\_, 133 S Ct 2517, 2533 [2013] with *Alfano v Starbucks Corp.*, 2012 NY Slip Op 31548[U], at \*\*6-7 [Sup Ct, NY County 2012]).

We have considered plaintiff's remaining contentions and find them to be unpreserved or otherwise unavailing.

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

ENTERED: JANUARY 3, 2017

  
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defendant's claim of suggestiveness (*see generally People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]), which is largely based on trial, rather than hearing, testimony (*see People v Abrew*, 95 NY2d 806, 808 [2000]).

THIS CONSTITUTES THE DECISION AND ORDER  
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negligently.

The court properly dismissed the fourth cause of action alleging negligence against B&V, and seeking the cost of remediation and repair of B&V's negligent work, because plaintiff cannot recover contract damages under a negligence theory (see *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280 [2001]; *Residential Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th Assoc.*, 190 AD2d 636 [1st Dept 1993]). The fact that B&V's work had to do with fire-safing and fire-stopping the premises is not sufficient to create an independent duty to plaintiff (see *Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]), and there is no allegation that B&V launched a force or instrument of harm (see *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

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

ENTERED: JANUARY 3, 2017

  
CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2623           In re Ja'Vaughn Kiaymonie S.,  
  
          A Dependent Child Under Eighteen  
          Years of Age, etc.,  
  
          Nathaniel S.,  
                  Respondent-Appellant,  
  
          Administration for Children's Services,  
                  Petitioner-Respondent,  
  
          Antoinette S.,  
                  Respondent.

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Neal D. Futerfas, White Plains, for appellant.

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

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

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Order of fact-finding, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 19, 2015, which determined, after a hearing, that respondent father had neglected the subject child, unanimously affirmed, without costs.

Although Family Court should have stated the grounds for its determination (see Family Ct Act § 1051), there is no need to dismiss the petition, because this Court has the authority to state the grounds (see *Matter of Poli K.*, 34 AD3d 354, 355 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]).

Family Court's determination was supported by a

preponderance of the evidence showing that the father had neglected the child because he knew or should have known that respondent mother was abusing narcotics while she was pregnant with the child, but failed to take any steps to stop her drug use (see Family Ct Act §§ 1046[b][i]; 1012[f][i][B]; *Matter of Ashante M.*, 19 AD3d 249, 249 [1st Dept 2005]; *Matter of Niviya K. [Alfonzo M.]*, 89 AD3d 1027, 1028 [2d Dept 2011]).

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

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

ENTERED: JANUARY 3, 2017

  
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incarceration" (*People v Urbaez*, 10 NY3d 773, 774 [2008] [internal citations and quotation marks omitted]; see also *People v Foy*, 88 NY2d 742, 745 [1996]). "An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious" (*Lewis v United States*, 518 US 322, 326 [1996]). Despite the gravity of the impact of deportation on a convicted defendant (see *Padilla v Kentucky*, 559 US 356 [2010]), deportation consequences are still collateral (see *People v Peque*, 22 NY3d 168, 191-192 [2013]), and do not render an otherwise petty offense "serious" for jury trial purposes.

Furthermore, under defendant's approach, in order to decide whether to grant a jury trial to a noncitizen charged with B misdemeanors, the court would need to analyze the immigration consequences of a particular conviction on the particular defendant, and we find this to be highly impracticable. We note that the immigration impact of this defendant's conviction is unclear. He is already deportable as an undocumented alien, and only claims that the conviction would block any hypothetical effort to legalize his status.

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

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

ENTERED: JANUARY 3, 2017

  
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vehicles listed on their NYS Department of Motor Vehicles ("DMV") Plate Registration Record that were not involved in the subject accident. By order dated May 6, 2015, the court (Laura Douglas, J.), had granted defendants' motion to strike the note of issue and set a schedule for completion of outstanding discovery, ordering plaintiff to produce all insurance policies, primary and excess covering the subject vehicle and driver on the date of loss, as well as his registration plate records for "all vehicles" listed within 45 days of that order. CPLR 3101(a) provides for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Under this standard, disclosure is required "of any facts . . . which will assist preparation for trial by sharpening the issues and reducing delay and prolixity," with the test being "one of usefulness and reason" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]).

Although the issue of venue and plaintiffs' residence has since been resolved (see 139 AD3d 475 [1st Dept 2016]), and the trial court has broad discretion concerning discovery, on this

record the trial court abused that power by not enforcing an extant order that directed production of the specified insurance policies.

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

ENTERED: JANUARY 3, 2017

  
CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2627           In re Aly T.,  
                  Petitioner-Appellant,

-against-

                  Francisco B.,  
                  Respondent-Respondent.

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Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

Joan L. Beranbaum, New York (Bruce K. Bentley of counsel), for respondent.

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Order, Family Court, Bronx County (Lauren Norton Lerner, Referee), entered on or about November 18, 2015, which denied and dismissed petitioner mother's petition for modification of a final order of custody and parenting time, unanimously reversed, on the law, on the facts, and in the exercise of discretion, without costs, to the extent of finding that there has been a change of circumstances, and remanding the matter for further proceedings to address the mother's request for modification of the custody order to permit the parties to travel during vacation periods with the children, including by providing for both parents to have summer vacation time with the children.

Although petitioner's request to travel with the children to the Dominican Republic, during the period of December 24, 2015 to January 6, 2016, is now moot, the important issue regarding

vacation time will likely arise in the future and therefore should be addressed (see *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714 [1980]).

Furthermore, the mother demonstrated a sufficient change in circumstances requiring a modification of the custody order in the children's best interests in that the parties' relationship has continued to deteriorate, and they have been unable to resolve the mother's reasonable requests to travel with the children to the Dominican Republic to visit her family there, and for extended summer vacation time with the children (*Gaudette v. Gaudette*, 262 AD2d 804, 805 [3d Dept 1999], *lv denied* 94 NY2d 790 [1999]). In addition, both the Family Court Judge who referred the custody trial to a Referee and the Referee stated on the record (in 2012 and 2013, respectively) that the mother's request that the father be directed to cooperate to obtain passports for the children so that she could take them to visit her extended family in the Dominican Republic (Tr 7/25/12 at 16; TR 1/7/13 at 20) would be addressed before the close of the custody trial. Neither the custody trial transcripts nor the custody fact finding determination issued on July 31, 2014 were included with the record on this appeal. However, it does not appear that the Family Court ever addressed the mother's request. The father has stated, on the record and in his opposition to the mother's

motion, that he is opposed to the mother traveling with the children because he fears that she may not return. Under these circumstances, it was improper not to address the mother's request and the father's opposition, as it will clearly continue to be a source of conflict between the parties, which is not in the children's best interests.

The current custody order fails to address summer vacation time for petitioner, the custodial parent, and does not provide sufficient time during other school holiday periods to travel with the children, effectively depriving her of the opportunity to vacation with her children and failing to properly consider the importance of the children's relationship with their mother and her extended family (*see Matter of Felty v Felty*, 108 AD3d 705, 708-709 [2d Dept 2013]). Accordingly, it appears that modification is necessary to address appropriate vacation time for both parties.

Further, to the extent the custody order provides for potentially overlapping parenting time during school breaks and on specific holidays, modification is necessary to resolve any

conflicts that may arise under those circumstances (see e.g. *Matter of Grunwald v Grunwald*, 108 AD3d 537 [2d Dept 2013]).

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

ENTERED: JANUARY 3, 2017

  
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We perceive no basis for reducing the sentence.

As the People concede, the surcharge and fee should be reduced to the amounts applicable at the time of the crime.

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: JANUARY 3, 2017

  
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to state a cause of action for retaliation (see *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; Executive Law § 296[7]). Plaintiff had a full and fair opportunity to litigate the issue in the course of the four-day arbitration hearing (see *Buechel v Bain*, 97 NY2d at 304). Contrary to her contention, “prior arbitration awards may be given preclusive effect in a subsequent judicial action” (*Bernard v Proskauer Rose, LLP*, 87 AD3d 412, 415 [1st Dept 2011]; see also *Okocha v City of New York*, 122 AD3d 550, 550-551 [1st Dept 2014], *lv denied* 25 NY3d 910 [2015]).

Since none of the remaining alleged adverse employment actions amount to a materially adverse change in the terms and conditions of her employment (see *Messinger v Girl Scouts of U.S.A.*, 16 AD3d 314, 314-315 [1st Dept 2005]), plaintiff failed to state a cause of action for retaliation.

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

ENTERED: JANUARY 3, 2017

  
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Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2632 Nova Casualty, et al., Index 116359/10  
Plaintiffs-Respondents,

-against-

Harleysville Worchester  
Insurance Company,  
Defendant-Appellant,

Coastal Sheet Metal Corp.,  
Defendant.

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Gallo Vitucci Klar LLP, New York (Kimberly A. Ricciardi of  
counsel), for appellant.

Melito & Adolfsen P.C., New York (Michael F. Panayotou of  
counsel), for respondents.

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Order, Supreme Court, New York County (Lucy Billings, J.),  
entered October 23, 2015, which, to the extent appealed from as  
limited by the briefs, granted plaintiffs' motion for summary  
judgment declaring that defendant Harleysville Worchester  
Insurance Company owes plaintiff Dart Mechanical Corp. a primary  
duty to defend and indemnify it in the underlying personal injury  
action, and so declared, and denied said defendant's cross motion  
for summary judgment declaring in its favor, unanimously  
affirmed, with costs.

Harleysville argues that it has no obligation to defend or  
indemnify plaintiff Dart Mechanical Corp. in the underlying  
action, because Dart's contract with Harleysville's named

insured, plaintiff Coastal Sheet Metal Corp., did not require Coastal to obtain insurance naming Dart as an additional insured. Harleysville bases this argument on the fact that paragraph 20.1(C) of the subcontract leaves the coverage limits blank. It contends that the entire provision was rendered inoperative and therefore that Coastal was required only to obtain coverage in accordance with the requirements imposed on Dart in the prime contract with the City, which did not contain language requiring Dart to be added as an additional insured. We reject this interpretation, because it renders a portion of the contract meaningless and fails to read all contractual clauses together contextually (see *Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421, 422 [1st Dept 2011]).

Harleysville's interpretation would render meaningless the phrase "whichever limits are greater" in the introductory section of paragraph 20.1 requiring Coastal to procure either insurance for Dart that was comparable to the insurance Dart was required to procure under the prime contract or the insurance set forth thereafter; it would also render meaningless the final sentence in subparagraph C, "DART MUST BE INCLUDED AS AN ADDITIONAL INSURED ON A PRIMARY BASIS." Reading contextually, it is evident that since the prime contract's limits of \$5 million per occurrence and \$5 million in the aggregate were greater than the

\$1 million per occurrence and \$2 million in the aggregate set forth in paragraph 20.9.1 of the subcontract, Coastal was required to obtain coverage with \$5 million liability limits, naming Dart as an additional insured on its insurance policy.

The complaint in the underlying action alleges that the injured plaintiff was working at the construction site "when an unsecured and/or inadequately secured duct fell causing [him] to be injured." Although the complaint alleges that the defendants, which included Coastal, were negligent, negligence is not required to trigger coverage for Dart as an additional insured. Harleysville is obligated to provide a defense and indemnity for Dart, even if Coastal is ultimately found to have no liability in the underlying action (*see National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.*, 103 AD3d 473 [1st Dept 2013]; *Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 105 AD3d 512 [1st Dept 2013], *mod on other grounds* 24 NY3d 578 [2014]).

THIS CONSTITUTES THE DECISION AND ORDER  
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ENTERED: JANUARY 3, 2017

  
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another part of the same statement, which also implicated defendant and others. The eliciting of the additional portion of the statement "did no more than to explain, clarify and fully elicit a [statement] only partially examined by the defense" (*People v Ochoa*, 14 NY3d 180, 186 [2010]). The rule against bolstering by prior consistent statements does not apply to the introduction of additional portions of a statement that has been elicited in part (*People v Torre*, 42 NY2d 1036, 1037 [1977]).

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

ENTERED: JANUARY 3, 2017

  
CLERK



Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2637 Iqbal Hussain, Index 112140/11

Plaintiff-Appellant,

-against-

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

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Law Offices of William Pager, Brooklyn (William Pager of  
counsel), for appellant.

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

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Order, Supreme Court, New York County (Margaret A. Chan,  
J.), entered on or about March 25, 2015, which, to the extent  
appealed from as limited by the briefs, granted defendants'  
motion pursuant to CPLR 3211 to dismiss the fifth and sixth  
causes of action as against defendant City of New York,  
unanimously affirmed, without costs.

Supreme Court correctly dismissed the fifth cause of action  
alleging negligence, since the allegations, to the extent not  
conclusory, allege intentional torts, not negligence (*Salemeh v  
Toussaint*, 25 AD3d 411, 412 [1st Dept 2006]; accord *Smiley v  
North Gen. Hosp.*, 59 AD2d 179, 180 [1st Dept 2009]). Also, the  
complaint does not state a cause of action for negligent hiring,  
retention, training, or supervision, and plaintiff may not rely  
on such a theory on appeal to save his negligence claim (*Davila v*

*City of New York*, 95 AD3d 560, 561 [1st Dept 2012]).

Supreme Court also correctly dismissed the sixth cause of action alleging civil rights violations. A municipality may not be held vicariously liable for constitutional violations pursuant to 42 USC § 1983, but rather may only be liable pursuant to the statute where the municipality itself caused the constitutional violation through an official policy or custom (*Monell v New York City Dept. of Social Servs.*, 436 US 658, 694 [1978]; *Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]). Plaintiff's complaint failed to allege any such custom or practice; defendant police officers' testimony cited by plaintiff does not describe a policy or custom of detaining working taxi drivers for psychiatric evaluations.

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: JANUARY 3, 2017

  
CLERK

Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2638N Rachel Gourvitch, Index 153131/15  
Plaintiff-Respondent,

-against-

92nd and 3rd Rest Corp.,  
Defendant-Appellant,

Bist Realtors, LLC,  
Defendant.

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White & McSpedon, P.C., New York (Joseph W. Sands of counsel),  
for appellant.

The Schlitt Law Firm, Huntington, New York (Carol L. Schlitt of  
counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez,  
J.), entered April 15, 2016, which denied the motion of defendant  
92nd and 3rd Rest Corp. to vacate the default judgment entered  
against it, unanimously affirmed, without costs.

Plaintiff's noncompliance with the "additional service"  
requirement of CPLR 3215(g)(4)(i) does not warrant vacatur of the  
default judgment absent a showing of a reasonable excuse for the  
default and a meritorious defense (see CPLR 5015[a][1]; *Lopez v*  
*Trucking & Stratford*, 299 AD2d 187 [1st Dept 2002]; *Mauro v 1896*  
*Stillwell Ave., Inc.*, 39 AD3d 506 [2d Dept 2007]). The motion  
court properly denied vacatur on the ground that 92nd and 3rd  
Rest Corp.'s conclusory denial of receipt of the summons and

complaint was insufficient to rebut the presumption of service created by the affidavit of service reflecting service through the Secretary of State (see *Gonzalez v City of New York*, 106 AD3d 436 [1st Dept 2013]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704 [2d Dept 2012]).

We have considered 92nd and 3rd Rest Corp.'s remaining arguments and find them unavailing.

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

ENTERED: JANUARY 3, 2017

  
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Saxe, J.P., Moskowitz, Gische, Kahn, Gesmer, JJ.

2639            In re James Melvin Lee,  
[M-4731]            Petitioner,

Ind. 74/16

-against-

The People of The State of New York, et al.,  
Respondents.

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James Melvin Lee, petitioner pro se.

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

John W. McConnell, Office of Court Administration, New York  
(Margaret W. Martin of counsel), for Appellate Division, First  
Department and New York State Court of Appeals, respondents.

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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:    JANUARY 3, 2017

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

2104 NYC C.L.A.S.H., et al., Index 152723/14  
Plaintiffs-Appellants,

-against-

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

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Joshpe Law Group LLP, New York (Edward A. Paltzik of counsel),  
for appellants.

Zachary W. Carter, Corporation Counsel, New York (Benjamin  
Welikson of counsel), for respondents.

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Order, Supreme Court, New York County (Frank P. Nervo, J.),  
entered May 11, 2015, modified, on the law, solely to declare  
that Local Law 152 is enforceable and not violative of the New  
York State Constitution or statutory law, and as so modified,  
affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.  
David B. Saxe  
Karla Moskowitz  
Marcy L. Kahn  
Ellen Gesmer, JJ.

2104  
Index 152723/14

x

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NYC C.L.A.S.H., et al.,  
Plaintiffs-Appellants,

-against-

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

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x

Plaintiffs appeal from the order of the Supreme Court, New York County (Frank P. Nervo, J.), entered May 11, 2015, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment.

Joshpe Law Group LLP, New York (Edward A. Paltzik of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Benjamin Welikson and Richard Dearing of counsel), for respondents.

SAXE, J.

In this declaratory judgment action, plaintiffs, NYC C.L.A.S.H.<sup>1</sup> (CLASH) and Russell Wishtart, seek a declaration that Local Law No. 152 of City of New York (2013) is unconstitutional. Local Law 152 amended Administrative Code of City of New York, title 17, chapter 5, the "Smoke-Free Air Act," to add regulation of electronic cigarettes, or e-cigarettes. Plaintiffs contend that Local Law 152 violates the so-called "one-subject rule" established by New York Constitution article III, § 15, Municipal Home Rule Law § 20(3), and New York City Charter § 32.

Smoking in public places in New York City was first regulated by the enactment of Local Law 2 of 1988, which added chapter 5 to title 17 of the Administrative Code (§§ 17-501 - 17-514), entitled the "Clean Indoor Air Act." In 1995, the City Council enacted Local Law 5, which renamed chapter 5 the "Smoke-Free Air Act" and expanded the restrictions on smoking in public areas, adding recreational areas and children's institutions (see Administrative Code §§ 17-501 - 17-504). In 2002, chapter 5 of the Administrative Code was further amended by Local Law 47, which further extended restrictions on smoking, eliminating smoking in restaurants and bars, with certain exceptions, and

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<sup>1</sup>New York City Citizens Lobbying Against Smoker Harassment.

prohibiting smoking in day care centers and elementary and middle schools. Chapter 5 was amended yet again by Local Law 50 of 2009 (regulating smoking in outdoor areas of hospitals) and Local Law 11 of 2011 (public parks and beaches).

Local Law 152 of 2013 further amended chapter 5 of Administrative Code title 17, by adding to the law the regulation of the use of electronic cigarettes in addition to the regulation of smoking tobacco cigarettes. For example, NYC Administrative Code § 17-503 was amended as follows:

*"Prohibition of smoking and use of electronic cigarettes. a. Smoking [is], and using electronic cigarettes, are prohibited in all enclosed areas within public places"* [additions to the original text are in italics, removal of the original text is bracketed]).

Before enacting this law, the City Council held a series of hearings, at which it heard testimony from, among others, public health advocates, representatives of electronic cigarette manufacturers, and members of the public, including plaintiff Wishtart and the founder of plaintiff NYC CLASH. The Committee report issued following the hearings explained that electronic cigarettes are devices that contain a liquid containing nicotine, as well as varying compositions of flavorings, propylene glycol, glycerin, and other ingredients, that is heated into a vapor that the user inhales. Although they have been marketed as a safer alternative to traditional cigarettes since they were introduced

in the U.S. in 2006, the U.S. Food and Drug Administration and the Centers for Disease Control have expressed concern about e-cigarettes' safety for the user and non-user, samples having tested positive for carcinogens, as well as the concern that they may lead to the use of other nicotine products by young people (see <https://www.cdc.gov/tobacco/stateandcommunity/pdfs/cdc-osh-information-on-e-cigarettes-november-2015.pdf>; <https://www.fda.gov/ForConsumers/ConsumerUpdates/ucm506676.htm#safer> [last accessed 12/12/16]).

Plaintiffs' contention -- that the enactment of Local Rule 152 violated the one-subject rule by impermissibly lumping into the same law two subjects, smoking traditional cigarettes and smoking e-cigarettes -- is based on a fundamental misapprehension of that rule.

The one-subject rule contained in article III, § 15, was first included in the New York Constitution in 1846, "as a result of the success of Aaron Burr in persuading the Legislature to grant him a charter for a water company which had hidden among its provisions a clause enabling him to found a bank" (*Burke v Kern*, 287 NY 203, 213 [1941], citing *Matter of City of New York [Clinton Avenue]*, 57 App Div 166 [2d Dept 1901], *affd* 167 NY 624 [1901]). As is described in greater detail in the Second Department decision that the Court of Appeals cited in *Burke v*

*Kern*, Aaron Burr wanted to form a bank to compete with the Bank of New York, which was owned and controlled by Alexander Hamilton, but the Federalist-controlled Legislature would not grant him a charter for a bank. He got around that obstacle by asking the Legislature for a charter for the Manhattan Company, a business ostensibly formed to supply desperately needed clean drinking water in New York, and including in his charter proposal an authorization for the company to raise capital of \$2,000,000 and a provision allowing any surplus capital to be used "in any way not inconsistent with the laws and Constitution of the United States or of the State of New York" (57 App Div at 169). The charter, in this form, was granted, and Aaron Burr went on to use capital to cause the Manhattan Company to function primarily as a bank. So, what appeared to be an act authorizing a water company actually created what became "one of the strongest banking institutions of the city of New York" (57 App Div at 168-169, citing 1 Hammond's Polit. Hist. New York, 325; see also John Kendrick Bangs, *A Historic Institution: The Manhattan Company - 1799-1899*, Harper's New Monthly Magazine, vol XCVIII, at 971-976 [May 1899]).

The one-subject rule was created as a result. As the Court of Appeals explained in *Economic Power & Constr. Co. v City of Buffalo*, 195 NY 286, 296 [1909]),

"The [one-subject] provision of the Constitution was adopted to check and prevent certain evils of legislation .... Its object was twofold. First, to prevent a combination of measures in local bills and secure their passage by a union of interests commonly known as 'log-rolling.' Second, to require an announcement of the subject of every such bill to prevent the fraudulent insertion of provisions upon subjects foreign to that indicated in the title. It was intended that every local subject should stand upon its own merits, and that the title of each bill should indicate the subject of its provisions so that neither legislators nor the public would be misled or deceived" (emphasis deleted).

The problem of legislative "logrolling" as referred to in the above-quoted language is "the uniting of various objects having no necessary or natural connection with each other, in one bill, for the purpose of combining various pecuniary interests in support of the whole, which could not be combined in favor of either by itself" (*Conner v Mayor of City of N.Y.*, 5 NY 285, 293 [1851]).

However, the Constitution's one-subject rule applies only to bills passed by the State Legislature, since by its terms it relates only to "[t]he legislative power of this state" (NY Const art 3, § 1). It is therefore inapplicable in the present case (see *Matter of Mitrione v City of Glens Falls*, 14 AD2d 716 [3d Dept 1961]).

The equivalent statutory provisions that directly govern local laws are those contained in the subsequently enacted

provisions of the New York City Charter and the Municipal Home Rule Law. Municipal Home Rule Law § 20(3) states that “[e]very such local law shall embrace only one subject. The title shall briefly refer to the subject matter”; the New York City Charter provides that “[e]very local law shall embrace only one subject. The title shall briefly refer to the subject-matter” (NY City Charter § 32).

Local Law 152 does not violate those requirements. It was titled “A Local Law to amend the administrative code ..., in relation to the regulation of electronic cigarettes.” The regulation of electronic cigarettes was the only subject of the bill and that subject was clearly stated in its title. Therefore, the bill met the transparency requirement of the one-subject rule and adequately apprised the City Council and members of the public of its contents and purpose (see *Burke v Kern*, 287 NY at 213; *Conner v Mayor of City of N.Y.*, 5 NY at 292-293).

Plaintiffs’ reliance on *Astor v New York Arcade Ry. Co.* (113 NY 93 [1889]) in support of their interpretation of the one-subject rule is misplaced. The *Astor* Court disapproved an 1873 law that, by its title, purported merely to supplement an 1868 law, but actually granted far greater authority to the defendant to construct an entirely different and far more substantial infrastructure -- an underground railway system -- than that

authorized in the 1868 law. The existing local law, enacted in 1868, was "to provide for the transmission of letters, packages, and merchandise in the cities of New York and Brooklyn ... by means of pneumatic tubes, to be constructed beneath the surface" (*id.* at 102, quoting L 1868, ch 842). The act of 1873 was enacted after it became apparent that the creation of the contemplated pneumatic tube system was impracticable, and it authorized the defendant "to construct, maintain, and operate an underground railway, for the transportation of passengers and property" (*Astor*, 113 NY at 107, quoting L 1873, ch 185). Yet, the title of the 1873 act, "An act supplementary to chapter 842 of the Laws of 1868, in relation to carrying letters, packages, and merchandise by means of pneumatic tubes, in New York and Brooklyn, and to provide for the transportation of passengers in said tubes," was, according to the *Astor* Court, "well calculated to deceive any persons to whose attention it came while the act was under consideration" (*id.* at 106), since "a person reading the title alone would have no clue whatever to the great railway scheme actually authorized by the act" (*id.* at 110).

In contrast to the legislation considered in *Astor*, which attempted to hide the creation of an underground railway system within pneumatic tubes legislation, here, Local Law 152 had a single purpose, which was proclaimed in its title and openly

debated before the Council, namely, to add e-cigarettes to existing smoking legislation.

That the title of chapter 5 of the Administrative Code, in which Local Law 152 was codified, refers to smoke-free air, does not affect the legitimacy of the challenged Local Law. "Titles are to be distinguished from headings of chapters or sections of a code, which are sometimes treated as part of the act itself" (McKinney's Cons Laws of NY, Book 1, Statutes § 123[a], Comment). "Statutory titles ... are of little significance" and "may not alter or limit the effect of unambiguous language in the body of the statute itself" (*People v Taylor*, 42 AD3d 13, 18 [2d Dept 2007] [internal quotation marks omitted], *lv dismissed* 9 NY3d 887 [2007]).

Accordingly, the order of the Supreme Court, New York County (Frank P. Nervo, J.), entered May 11, 2015, which granted defendants' motion for summary judgment dismissing the complaint and denied plaintiffs' motion for summary judgment, should be modified, on the law, solely to declare that Local Law 152 is

enforceable and not violative of the New York State Constitution or statutory law, and as so modified, affirmed, without costs.

All concur.

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

ENTERED: JANUARY 3, 2017

  
CLERK