SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 12, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Tom, Mazzarelli, Kern, Singh, JJ.

6607 Index 156151/13

Jeffrey White,
Plaintiff-Respondent,

-against-

31-01 Steinway, LLC, et al.,
Defendants,

Express, LLC, et al.,
Defendants-Respondents,

Russco, Inc.,
Defendant-Appellant.

- - - - -

[And Third-Party Action]

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Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for appellant.

Block O'Toole & Murphy, New York (David L. Scher of counsel), for Jeffrey White, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for Express, LLC., respondent.

Woods Oviatt Gilman, LLP, Rochester (Jennifer M. Schauerman of counsel), for John F. Ruggles, Jr., and Ruggles Sign Company, Inc., respondents.

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Order, Supreme Court, New York County (Jennifer G. Schecter, J.), entered October 30, 2017 which, insofar as appealed from as

limited by the briefs, denied defendant Russco, Inc.'s (Russco) motion for summary judgment dismissing the Labor Law § 240(1) claim as against it and to amend its answer to assert a cross claim for contractual indemnification against defendant Ruggles Sign Company, Inc. (Ruggles), granted Ruggles's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it, granted defendant Express, LLC's (Express) motion for summary judgment against Russco on its contractual indemnification claim, and granted plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim as against Russco, unanimously modified, on the law, to deny plaintiff's, Ruggles's and Express's motions, and otherwise affirmed, without costs.

Plaintiff, Jeffrey White, commenced the instant action alleging that, on April 15, 2013, while employed by nonparty Capitol Design & Construction Service (Capitol) as a sign installer, he fell from a ladder and suffered personal injuries. The work was being performed at 31-01 Steinway Street in Queens in preparation for the opening of a new retail store owned and operated by defendant Express.

Express hired defendant Russco to act as the general contractor on the store renovation project and to hire all necessary subcontractors for the renovation with the exception of

the signage and awning work. For the signage and awning work, Express had a preexisting vendor contract with defendant Ruggles, a national fabricator and installer of signage and awnings, which agreed to manufacture and install signage and awnings at the project. Ruggles was also required to supply all labor, materials, tools, equipment and supervision with regard to the signage and awnings. Ruggles subcontracted the installation of the signage and awnings at the project to Capitol, plaintiff's employer.

As an initial matter, Russco's motion for summary judgment dismissing the Labor Law § 240(1) claim as against it on the ground that it is not a proper defendant under the Labor Law was correctly denied, as there is an issue of fact as to whether its obligations as the general contractor on the project extended to the work performed by plaintiff. The contract between Express and Russco includes a carve-out provision stating that all signage and awning work on the project would be furnished and completed by a separate vendor hired by Express, which, in this case, was Ruggles. Russco's only responsibility vis-à-vis Ruggles was to provide Ruggles access to the project site and to coordinate the timing of the work Ruggles was hired to perform. Based solely on a reading of the carve-out provision, Russco would not have any liability to plaintiff under Labor Law §

240(1), as it had no authority to control the work plaintiff was performing. However, the contract also provides that Russco is responsible for "taking all reasonable safety precautions to prevent injury or death to persons or damage to property" and that such responsibility extends "to the protection of *all employees on the Project* and all other persons who may be affected by the Work in any way" (emphasis added). The project is defined in the contract as "construction of all Tenant Improvements for a retail store." Reading these contractual provisions together creates ambiguity as to whether Russco's site safety obligations extended to the signage and awning work that plaintiff was performing when his accident occurred. Further, Douglas Berry, Russco's project manager, testified that Russco was not responsible for the signage and awning work and that if he saw unsafe behavior by a contractor that Russco did not hire, he would only "make note of it and escalate" the issue by calling or sending an email to Express, because Russco had no authority to manage the owner's other contractors. As we cannot say, as a matter of law, that Russco was not responsible for plaintiff's safety while he was working on the project, Russco is not entitled to summary judgment dismissing the Labor Law § 240(1) claim as against it.

However, as there is an issue of fact as to whether Russco

may be held liable for plaintiff's injuries under Labor Law § 240(1), both plaintiff's motion for summary judgment on his Labor Law § 240(1) claim as against Russco and Express's motion for summary judgment against Russco on its contractual indemnification claim should be denied.

The motion court properly denied Russco's motion to amend its answer to assert a cross claim against Ruggles for contractual indemnification, as there is no contractual agreement between Russco and Ruggles.

The Labor Law § 240(1) claim should not be dismissed as against Ruggles. "Labor Law § 240(1) imposes a nondelegable duty upon owners, general contractors, *and their agents* to provide proper protection to persons working upon elevated structures" (*Headen v Progressive Painting Corp.*, 160 AD2d 319, 320 [1st Dept 1990] [emphasis added]). "To be treated as a statutory agent, the subcontractor must have been 'delegated the supervision and control either over the specific work area involved or the work which [gave] rise to the injury'" (*Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 193 [1st Dept 2011], quoting *Headen*, 160 AD2d at 320). "[O]nce a subcontractor qualifies as a statutory agent, it may not escape liability by the simple expedient of delegating that work to another entity" (*Nascimento*, 86 AD3d at 195).

Ruggles is a proper Labor Law § 240(1) defendant because it was a statutory agent of Express, the owner of the project. It is undisputed that Express hired Ruggles as the sole contractor responsible for the manufacture and installation of all signage and awning work on the project, which was the work that plaintiff was performing when he sustained his injuries. Although Russco may be found liable based on its site safety obligations with regard to the signage and awning work, there is no question that, pursuant to the contract between Ruggles and Express, Ruggles was delegated the supervision and control over such work. Moreover, Ruggles may not escape liability under Labor Law § 240(1) based on its delegation of the signage and awning work to Capitol, plaintiff's employer.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6836 The People of the State of New York, Respondent, Ind. 2930/15

-against-

Szymon Chodakowski, Defendant-Appellant.

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Brafman & Associates, P.C., New York (Mark M. Baker of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Mandelbaum, J.), rendered November 29, 2016, convicting defendant, after a jury trial, of rape in the first degree and sexual abuse in the first degree, and sentencing him to concurrent terms of 5 years, unanimously affirmed.

The People met their burden of establishing defendant's guilt of first-degree rape and first-degree sexual abuse by proving beyond a reasonable doubt that defendant subjected the victim to sexual intercourse while she was unable to consent due to being physically helpless, since she was asleep when the intercourse started. Although it is undisputed that defendant had been drinking heavily that night, defendant failed to meet his burden of establishing by a preponderance of the evidence (Penal Law § 25.00[2]) that he did not know that the victim was

asleep while having had sexual intercourse with her (Penal Law § 130.10[1]).

Defendant's CPL 330.30(2) claims are unpreserved based upon his failure to file the appropriate motion in Supreme Court for the relief he seeks here. In fact, prior to sentencing, defense counsel never specifically requested a new trial or hearing on the grounds now raised on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6837-
6838 Index 153717/15

Rebel Jones,
Plaintiff-Appellant,

-against-

The New York City Transit
Authority, et al.,
Defendants-Respondents.

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Zuller Law Offices, New York (Michael E. Zuller of counsel), for appellant.

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

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered July 28, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 4, 2017, which deemed plaintiff's motion to renew and reargue as a motion to reargue only and denied the motion, unanimously dismissed, without costs, as taken from a nonappealable paper.

The motion court properly invoked the emergency doctrine in finding that no issues of fact exist as to defendants' negligence given plaintiff's failure in opposition to adduce any evidence tending to show that the bus operator, defendant Garcia, created the emergency or could have avoided a collision with the nonparty

livery taxi by taking some action other than applying his brakes (*see Brooks v New York City Tr. Auth.*, 19 AD3d 162, 163 [1st Dept 2005]). The sudden unexpected swerving of the livery taxi into the bus's lane required Garcia to take immediate action (*see Orsos v Hudson Tr. Corp.*, 111 AD3d 561 [1st Dept 2013]*; Nieves v Manhattan & Bronx Surface Tr. Operating Auth.*, 31 AD2d 359, 360 [1st Dept 1969], *appeal denied* 24 NY2d 1030 [1969]). Garcia's reaction of pressing the brakes with enough force to prevent an impact between his bus and the taxi and swerving the bus to the right was a reasonable response to the emergency that was not of his own making (*see Wu Kai Ming v Grossman*, 133 AD3d 742, 743 [2d Dept 2015]). That Garcia was aware that taxis often cut buses off does not require a different result.

The court properly viewed plaintiff's motion to renew and reargue as a reargument motion only, the denial of which is not appealable (*see Garcia v New York Times Co.*, 106 AD3d 452, 453 [1st Dept 2013]).

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6839 In re Thaiheed O.H., etc.,

A Child Under Eighteen Years
of Age, etc.,

Willie H.,
Respondent-Appellant,

-against-

New York Foundling Hospital,
Petitioner-Respondent.

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Daniel R. Katz, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

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Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about October 5, 2016, which, upon a finding that respondent father abandoned the subject child, after a hearing, terminated respondent's parental rights and transferred custody and guardianship of the child to the Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Respondent advances no substantive arguments in support of reversing the court's findings that he abandoned the child and that terminating his parental rights would be in the child's best interests. These findings are amply supported in the record.

Instead, he argues that he was denied effective assistance of counsel and that the court improperly inserted itself into the proceedings, thereby denying him due process. These arguments are without merit.

Respondent contends first that he was deprived of effective assistance of counsel by his attorney's decision not to cross-examine the agency's witness at fact-finding. Respondent's counsel chose not to participate in the hearing, which proceeded upon inquest, in order to preserve respondent's right to seek to vacate his default. This tactical decision did not deprive respondent of meaningful representation. In any event, the witness's brief testimony firmly established respondent's abandonment of the child, and the record suggests no basis for impeaching the testimony.

Respondent argues next that he received ineffective assistance because his attorney failed to submit a memorandum of law on the issue of "diligent efforts." Although the court permitted respondent to submit a brief, he was not required to do so. In any event, in an abandonment proceeding, there is no requirement that the agency show diligent efforts (Social Services Law § 384-b[5][b]; *Matter of Gabrielle HH.*, 1 NY3d 549, 550 [2003]). Thus, respondent was not prejudiced by his counsel's failure to submit a brief on this issue.

Finally, respondent argues that the court deprived him of a fair trial by "[taking] on the function of an advocate" for the agency. This argument is unpreserved, as respondent concedes, and in any event without merit.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6840 & M-1462 DB, an Infant by His Mother and Natural Guardian, Arlene B., Plaintiff-Respondent,

-against-

Montefiore Medical Center, et al., Defendants-Appellants.

Index 350479/10

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellants.

The Fitzgerald Law Firm, P.C., Yonkers (Mitchell L. Gittin of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about January 13, 2017, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants argue that plaintiff's theory that his injuries were caused by hypoxia ischemia brought about by intercranial pressure should not be considered, because it was improperly raised for the first time in opposition to their motion. We find that the theory was sufficiently pleaded in the bill of particulars to avoid surprise and prejudice to defendants (*compare e.g. Valenti v Camins*, 95 AD3d 519, 522 [1st Dept 2012] [theory based on placement of screw at spinal level C7 caused no surprise since question of precise placement of screw was

identified at depositions], *with Biondi v Behrman*, 149 AD3d 562, 563-564 [1st Dept 2017] [defendants had no notice of new theory never mentioned in pleadings or at depositions], *lv dismissed in part, denied in part* 30 NY3d 1012 [2017]). The bill of particulars alleged a hypoxic ischemic injury to the fetus due to, inter alia, the contraindicated use of Pitocin, the failure to accurately estimate fetal size and position and the progress of labor, the failure to prevent injury from trauma during labor and delivery, and the failure to timely perform a cesarean section. While it did not allege specifically that the ischemic injury was caused by the shunting of blood away from the brain due to pressure caused by contractions and resulting from the above alleged deviations, defendants' demand for a bill of particulars did not seek that level of detail (*see generally Miccarelli v Fleiss*, 219 AD2d 469 [1st Dept 1995]).

Defendants also argue that the intercranial pressure theory should not be considered because it is not recognized or accepted in the medical or scientific community (*see Frye v United States*, 293 F 1013 [DC Cir 1923]; *see also Cumberbatch v Blanchette*, 35 AD3d 341 [2d Dept 2006]; *Saulpaugh ex rel. Saulpaugh v Krafte*, 5 AD3d 934 [3d Dept 2004], *lv denied* 3 NY3d 610 [2004]). Since defendants raised this argument for the first time in reply, the record before us is not sufficiently developed to permit us to

determine whether the medical evidence and expert opinions offered by plaintiff are based on theories of medicine that are generally accepted within the medical community. We note that a motion by defendants for a *Frye* hearing, made in accordance with the order on appeal, is currently sub judice, and therefore that issue is not before us.

We have considered the parties remaining arguments and find them unavailing.

M-1462 - *D.B., an Infant by His Mother and Natural Guardian Arlene B. v Montefiore Medical Center*

Motion to strike portions of brief denied as academic.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6841 In re Congregation Shaare Zedek, Index 155623/17
Petitioner-Respondent,

-against-

Steven R. Leventhal,
Objector-Appellant.

_____

Michael M. Buchman, New York, for appellant.

Axinn, Veltrop & Harkrider LLP, New York (Russel M. Steinthal of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 27, 2017, which, insofar as appealed from as limited by the briefs, denied appellant's objection to the petition for lack of standing, unanimously affirmed, without costs.

Petitioner religious corporation seeks authorization pursuant to Religious Corporations Law § 12 and Not-for-Profit Corporation Law §§ 510 and 511 to redevelop the site of its synagogue building into a mixed-use synagogue and residential condominium. Appellant opposes petitioner's project. However, he lacks standing to be heard in opposition to the petition, because he is not a "member, officer or creditor" of petitioner, (Not-for-Profit Corporations Law § 511[b]; *see Female Academy of the Sacred Heart v Doane Stuart School*, 91 AD3d 1254 [3d Dept 2012]; *Matter of Bridge to Spiritual Freedom*, 304 AD2d 574 [2d

Dept 2003]; *Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]). Appellant's status as a potential creditor, by virtue of the fact that he is the plaintiff in a pending action against petitioner, does not constitute status as a judgment creditor or otherwise suffice to confer standing.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6842- Ind. 3587/14
6843 The People of the State of New York,
Respondent,

-against-

Damien Fraser,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Kevin Jagnandan,
Defendant-Appellant.

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Law Office of Meredith S. Heller PLLC, New York (Meredith S. Heller of counsel), for Damien Fraser, appellant.

Koch Law, New York (Lee A. Koch of counsel), for Kevin Jagnandan, appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Judgments, Supreme Court, Bronx County (Margaret L. Clancy, J. at suppression hearing; April A. Newbauer, J. at jury trial and sentencing), rendered June 14, 2017, convicting both defendants of attempted gang assault in the first degree, criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the third degree, sentencing defendant Fraser to an aggregate term of 10½ years, and sentencing defendant Jagnandan to an aggregate term of 12

years, unanimously affirmed.

The court properly denied defendants' suppression motions. The record supports the court's finding, based on the factors discussed in *People v McBride* (14 NY3d 440, 446 [2010], *cert denied* 562 US 931 [2010]), that exigent circumstances justified the warrantless entry into an auto body shop owned by defendants. When the police responded to a serious assault, the victim's girlfriend reported that a large group of attackers had beaten the victim with baseball bats, retreated into the shop and closed its gate. She also stated that one of the men had announced his intention to retrieve a firearm from the shop and shoot the witness. This provided reliable information as to the presence of a firearm and the danger that it might be used, even though no firearm had been displayed. Although the police were guarding the entrance to the shop, there was still a danger that a large group of armed and violent suspects might emerge (*see People v Hallman*, 237 AD2d 17, 22-23 [1st Dept 1997], *affd* 92 NY2d 840 [1998]). This danger did not dissipate during the 45 minutes that passed before the entry was made, which is accounted for by the need to await the arrival of an officer capable of opening the security gate by manipulating its electronic controls, as well as more officers to deal with the large number of possibly violent suspects. We have considered and rejected defendants'

remaining suppression arguments.

The court providently exercised its discretion when it qualified a detective from the Computer Crime Squad as an expert in digital file analysis, and permitted him to authenticate a surveillance videotape (*see generally People v Patterson*, 93 NY2d 80, 84-85 [1999]). The detective had specialized training and extensive experience regarding such matters as handling and preserving digital evidence, using different software applications to extract digital information, and identifying files that had been altered or corrupted. Under these circumstances, any alleged inadequacy in his expertise went to weight rather than admissibility.

Defendants' challenge to DNA evidence is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Gonzalez*, 155 AD3d 507, 508 [1st Dept 2017], *lv denied* 30 NY3d 1115 [2018]).

Jagnandan's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since Jagnandan has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be

addressed on appeal. In the alternative, to the extent the existing record permits review, we find that he received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We reject Jagnandan's claim that the verdict convicting him was 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 eyewitness testimony establishing Jagnandan's personal participation in the attack on the victim, evidence of Jagnandan's accessorial liability for the attack, and evidence of both his personal and constructive possession of the weapons found in the body shop.

The court lawfully imposed consecutive sentences for the attempted gang assault and the separate and distinct act of possession of a pistol, with the requisite mental state, because this pistol was not possessed by any of the attackers during the assault (*see* Penal Law 70.25[2]; *People v McKnight*, 16 NY3d 43, 48-49 [2010]). Fraser's Eighth Amendment claim is unpreserved

and without merit. We perceive no basis for reducing either defendant's sentence in the interest of justice.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6844 936 Coogan's Bluff, Inc., Index 850011/13
Plaintiff,

-against-

936-938 Cliffcrest Housing
Development Fund Corporation,
et al.,
Defendants.

- - - - -

936-938 Cliffcrest Housing
Development Fund Corporation,
Third-Party Plaintiff-Respondent,

-against-

The Wavecrest Management Team Ltd., et al.,
Third-Party Defendants-Appellants.

- - - - -

[And a Second Third-Party Action]

_____

Lydecker Diaz, Melville (Louis Brett Goldman of counsel), for appellants.

The Kurland Group, New York (Yetta G. Kurland of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 31, 2017, which, insofar as appealed from, upon reargument, adhered to the original determination denying third-party defendants The Wavecrest Management Team Ltd., Lee Warshavsky, and Shuhab Housing Development Fund Corporation's (Shuhab defendants) motion to dismiss the third-party causes of action for fraud and conspiracy to commit fraud, unanimously

affirmed, without costs.

The third-party complaint alleges that the Shuhab defendants, along with third-party defendant Department of Housing Preservation and Development (HPD), conspired together to induce the residents of the subject building to purchase units by making knowingly false representations about their intention to complete renovation work, which, among other things, was contracted to an entity that was defunct at the time the contract was entered into, and that the residents relied on these representations and gave the proceeds of loans they took out to the Shuhab defendants, who, along with HPD, diverted the funds and left the residents with shoddy, defective homes, and an uninhabitable building. These allegations are sufficiently detailed to state the causes of action for fraud and conspiracy to commit fraud (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; CPLR 3016[b]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6845- Index 651932/10
6845A John P. Gourary, etc.,
Plaintiff-Appellant,

-against-

Elizabeth Laster, etc., et al.,
Defendants-Respondents,

Alice Green, etc., et al.,
Defendants.

_____

Wollmuth Maher & Deutsch LLP, New York (Randall R. Rainer of counsel), for appellant.

Wilk Auslander LLP, New York (Stuart M. Riback of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered November 8, 2017, dismissing the complaint, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 13, 2017, which granted the CPLR 3211(a)(7) motion of defendants Elizabeth Laster, as executor of the estate of Oliver Laster, and Scott A. Macomber (defendants) to dismiss the complaint as against them, and denied leave to amend the complaint, unanimously dismissed, as subsumed in the appeal from the judgment.

Plaintiff, the administrator of the estate of his deceased father, Paul Gourary, alleges that in connection with the May 2006 sale of Gourary's 50% interest in a New York S-corporation

to defendant Macomber, the son-in-law of the corporation's other 50% shareholder, decedent Oliver Laster, Laster and Macomber, in collusion with Gourary's attorney, Paul Green (deceased), fraudulently concealed the fair market value of Gourary's interest, enabling Macomber to purchase it at a steep discount.

It is law of the case that the 2006 transaction was consistent with Gourary's objectives; attorney Green provided Gourary with effective representation, and did not simultaneously represent both Gourary and Macomber during the transaction; because both Gourary and Green are deceased, it is not possible to determine whether the former would have executed the transaction had he received different legal advice; and plaintiff's claim of proximately-caused damages is based upon speculation (*Gourary v Green*, 143 AD3d 580 [1st Dept 2016]).

Plaintiff's allegation that attorney Green represented both Gourary and Laster during the transaction represents a new theory of liability, improperly raised long after discovery was concluded and the note of issue was filed (*Panasia Estate, Inc. v Broche*, 89 AD3d 498 [1st Dept 2011]). Moreover, the allegation has no evidentiary support in the record. Plaintiff's attempt to hold Laster liable under the doctrine of constructive fraud is misguided, as the doctrine applies only with regard to "the relations *between . . . contracting parties*" (*Matter of Aoki v*

Aoki, 27 NY3d 32, 39-40 [2016] [emphasis in original]), and Laster was not a party to the transaction at issue.

While Laster, as Gourary's business partner, owed Gourary a fiduciary duty which was independent of his duties to the corporation (*Serino v Lipper*, 123 AD3d 34, 39-40 [1st Dept 2014]), it does not follow that Laster breached that duty and caused damages by failing to question the price Macomber paid for Gourary's interest in the corporation. As noted, it is law of the case that the transaction, including the sale price, waa consistent with Gourary's intention. Further, there is no indication that Laster was in exclusive possession of essential information regarding the transaction's sale price, and it was not his responsibility to ensure that Gourary properly evaluated corporate assets before settling on a price (*see Centro Empresarial Cempresa S.A. v América Móvil S.A.B. de C.V.*, 17 NY3d 269, 279 [2011]).

Contrary to plaintiff's argument, defendants' motion was not actually an untimely motion for summary judgment. Defendants could seek dismissal under section 3211(a)(7) even though their answer did not allege as a defense the failure to state a claim (*Riland v Todman & Co.*, 56 AD2d 350, 351 [1st Dept 1977]), and their reliance upon this Court's prior decision as law of the case did not transform their motion into one for summary

judgment.

Supreme Court providently denied leave to amend the complaint, as the amended complaint suffered from the same defects as the original (*see Bishop v Maurer*, 83 AD3d 483 [1st Dept 2011]).

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6846 Frank Aspromonte, Index 155793/14
Plaintiff-Appellant,

-against-

Judlau Contracting, Inc., et al.,
Defendants-Respondents,

Skanska USA Civil Inc., et al.,
Defendants.

_____

Hach & Rose, LLP, New York (Robert F. Garnsey of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for respondents.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered May 18, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim as against defendants Judlau Contracting, Inc. and the Metropolitan Transportation Authority, unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law through his testimony that a rail improperly wedged against a wall broke or gave way when he leaned on it while moving a broken light fixture out of the way, causing him to fall a considerable distance down a shaft. Plaintiff also submitted the testimony of

his coworker, his foreman, and defendants' safety personnel regarding their observations shortly after the accident, which was consistent with plaintiff's account (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 449-450 [1st Dept 2013]; *Cassidy v Highrise Hoisting & Scaffolding, Inc.*, 89 AD3d 510, 510-511 [1st Dept 2011]).

In opposition, defendants raised a triable issue of fact as to whether the accident occurred in the manner described by plaintiff. Defendants submitted the expert affidavits of a neuroradiologist and a biomechanical engineer, who both opined that plaintiff's injuries are inconsistent with the alleged fall (*see e.g. Vargas v Sabri*, 115 AD3d 505 [1st Dept 2014]; *Valentine v Grossman*, 283 AD2d 571, 573 [2d Dept 2001]). Contrary to plaintiff's contention, the fact that the expert's conclusions contradict plaintiff's account and other evidence corroborating his account does not render the experts' conclusions speculative.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6847 In re Harrison J. Weisner, File 3783/J91
Petitioner-Appellant,

-against-

Melvin Ginsberg, et al.,
Respondents-Respondents.

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Farrell Fritz, P.C., Uniondale (John R. Morken of counsel), for appellant.

Akerman LLP, New York (Lansing R. Palmer of counsel), for Melvin Ginsberg, respondent.

The Law office of Alfreida B. Kenny, New York (Alfreida B. Kenny of counsel), for Jessica Fieber, respondent.

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Order, Surrogate's Court, New York County (Rita Mella, S.), entered July 12, 2017, which, in a will construction proceeding, denied petitioner's motion for partial summary judgment and for his appointment as successor co-trustee, and granted the cross motions of respondents for partial summary judgment, unanimously affirmed, without costs.

A will construction proceeding primarily seeks to ascertain and give effect to the testator's intent. The words used to express that intent are to be given their ordinary and natural meaning (*see Matter of Singer*, 13 NY3d 447, 451 [2009]; *Matter of Gustafson*, 74 NY2d 448, 451 [1989]). Such intent is to be gleaned from "a sympathetic reading of the will as an entirety

and in view of all the facts and circumstances under which the provisions of the will were framed" (*see Matter of Fabbri*, 2 NY2d 236, 239-240 [1957]). If a dominant plan of distribution is evident, the various provisions must be interpreted in light of that purpose (*see Matter of Larkin*, 9 NY2d 88, 91 [1961]).

Petitioner argues that sentence 3 of the codicil to decedent's will deprived the named co-trustee of the authority to appoint a successor because that co-trustee was qualified and acted as a co-trustee. He contends that decedent's intent, as revealed in the will and codicil taken together, was that after the resignation or death of decedent's contemporaries and friends, petitioner would have attained sufficient maturity to act as a co-trustee with a corporate co-trustee; and that decedent never intended for the trusts to be managed exclusively by corporate trustees to the exclusion of his son.

The interpretation of sentence 3 provided by petitioner appears to be at odds with decedent's testamentary plan to have trusted friends and advisors serve as co-trustees of the trusts for the benefit of his children and to limit the involvement of his children in the management of the trusts (*see Matter of Miner*, 146 NY 121, 130-131 [1895]).

In the will, petitioner could not be appointed co-trustee until and unless each of the nominated individuals and their

named successors no longer served, and, in that event, only with a corporate co-trustee. It appears that the codicil intended to retain that structure without specifically naming the successor trustees. As the court noted, it is difficult to believe that decedent intended to provide his named co-trustees with the power to appoint their successors only in the situation where they or any of them did not qualify as a co-trustee or never took any action, but to deprive them of that authority where they actually served. This is especially clear in light of sentence 4, which gave the named co-trustees the authority to select a successor to another named co-trustee. It is likely that the omission of the phrase "continues to act" in sentence 3 of the codicil was a misguided attempt at linguistic economy rather than a reflection of decedent's intention to deprive one of the co-trustees of the power to appoint his own successor.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6848 The People of the State of New York, Ind. 385/14
Respondent,

-against-

Derek Glover,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss 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, Bronx County (Robert Sackett, J.), rendered October 26, 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.

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

ENTERED: JUNE 12, 2018

CLERK

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

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6849 Shawmut Woodworking & Supply, Inc., doing business as Shawmut Design and Construction,
Plaintiff-Respondent,

-against-

ASICS America Corporation,
Defendant-Appellant,

3BP Property Owner LLC, et al.,
Defendants.

Index 653350/15

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Akin Gump Strauss Hauer & Feld LLP, Washington, DC (James E. Tysse of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellant.

Cohen Seglias Pallas Greenhall & Furman, P.C., New York (George E. Pallas of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered October 30, 2017, which, to the extent appealed from, denied defendant ASICS America Corporation's motion to dismiss the breach of contract cause of action against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against ASICS.

Plaintiff seeks to hold defendant ASICS liable for the balance of payment due for work it performed at an ASICS store pursuant to a contract with defendant Windsor Financial Group, LLC, ASICS's franchisee.

There is no basis in the complaint and supporting materials for applying the doctrine of piercing the corporate veil, which indeed plaintiff did not rely on (*see generally Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The complaint does not allege that ASICS and Windsor had any corporate relationship or overlapping ownership. It does not allege that Windsor was a dummy corporation or that ASICS had complete control over Windsor and used that control to perpetrate a fraud or wrong against plaintiff.

To the extent plaintiff relies on agency principles to hold ASICS liable on the contract with Windsor, the complaint fails to allege actual or apparent agency. It does not allege that ASICS actually authorized Windsor to enter into the contract *on behalf of ASICS* (*see Great Lakes Motor Corp. v Johnson*, 156 AD3d 1369, 1372 [4th Dept 2017], citing *Industrial Mfrs., Inc. v Bangor Mills, Inc.*, 283 App Div 113, 116 [1st Dept 1953], *affd* 307 NY 746 [1954]]). To the contrary, the master retail agreement between ASICS and Windsor makes clear that Windsor was an independent contractor, did not have the authority to bind ASICS, and was not authorized to act as ASICS's agent, and that ASICS would not assume Windsor's liabilities.

Nor does the complaint allege that plaintiff relied on any representations or conduct by ASICS that would "give rise to the

appearance and belief that [Windsor] possesse[d] authority to enter into [the contract]" on ASICS's behalf (*Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997], quoting *Hallock v State of New York*, 64 NY2d 224, 231 [1984]).

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6850 3-G Services Limited, Index 650583/13
Plaintiff-Appellant,

-against-

SAP V/Atlas 845 WEA Associates NF L.L.C.,
Defendant-Respondent,

B&B Construction, Inc., et al.,
Defendants.

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Law Office of Mary T. Dempsey, P.C., New York (Mary T. Dempsey of counsel), for appellant.

Tannenbaum Helpern Syracuse & Hirschtritt LLP, New York (Kenneth M. Block of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 28, 2017, which, insofar as appealed from as limited by the briefs, granted defendant SAP V/Atlas 845 WEA Associates NF L.L.C.'s (SAP) motion for summary judgment dismissing the first cause of action, foreclosure on plaintiff's mechanic's lien, unanimously affirmed, without costs.

Plaintiff seeks to enforce a mechanic's lien for monies allegedly owed in connection with its work as a subcontractor on a construction project owned by defendant SAP. SAP's motion for summary judgment was properly granted.

SAP made a prima facie showing that it did not owe any money to the general contractor when the lien was filed, and plaintiff

failed to raise any issues of fact in opposition (*see* Lien Law § 4[1]; *Matros Automated Elec. Constr. Corp. v Libman*, 37 AD3d 313, 313 [1st Dept 2007]).

The record does not support plaintiff's contention that SAP's final payment to the general contractor (for all work completed to date) was invalid because it was an advance payment made to avoid the Lien Law (*see* Lien Law § 7). SAP made this payment when it became due, upon SAP's termination of the contract for convenience (*see Streever Lbr. Co. v Mitchell*, 183 AD 129, 132-133 [3d Dept 1918]; *Van Cott & Son v Gallon*, 163 Misc 914, 921 [Delaware County Ct 1937]).

That SAP knew when it made the final payment that the general contractor still owed money to plaintiff, but failed to notify plaintiff of its intention to terminate, is insufficient to establish bad faith (*see Streever*, 183 AD at 133; *Wagner v Butler*, 155 AD 425, 427 [2d Dept 1913]; *NY Plumbers' Specialties Co. v W&C Feldman, Inc.*, 125 NYS2d 377, 378 [Sup Ct, NY County 1953]; *Van Cott*, 163 Misc at 922). The fact that SAP opted to terminate for convenience instead of for cause (for nonpayment of subcontractors) is also not sufficient to demonstrate bad faith, as SAP was free to terminate on either ground.

The cases on which plaintiff relies are distinguishable because the payments at issue in those cases were made in advance

of when they were due and there was more persuasive evidence of bad faith (*see Glens Falls Portland Cement Co. v Schenectady County Coal Co.*, 163 AD 757, 759-763 [3d Dept 1914]; *Lawrence v Dawson*, 34 AD 211, 212-215 [2d Dept 1898]).

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6851- Index 21907/15E
6852 Henry Nolan,
Plaintiff-Respondent,

-against-

The Port Authority of New York and New Jersey, et al.,
Defendants-Appellants,

Silverstein Properties, Inc.,
Defendant.

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Shaub, Ahmuty, Citrin & Spratt LLP, Lake Success (Christopher Simone of counsel), for appellants.

O'Dwyer & Bernstien, LLP, New York (Steven Aripotch of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 26, 2017, in favor of plaintiff on the issue of liability under Labor Law § 240(1), pursuant to an order, same court and Justice, entered May 22, 2017, which granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff made a prima facie showing of entitlement to partial summary judgment on the issue of liability on his Labor

Law § 240(1) claim with his testimony that the makeshift ladder on which he was descending after detaching a crane cable from the top of an eight-foot C-box slid out from under him (*see Panek v County of Albany*, 99 NY2d 452, 458 [2003]; *Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526 [1st Dept 2014]).

In opposition, defendants failed to raise a triable issue of fact. The affidavit of plaintiff's coworker, who stated that "[he] observed [plaintiff] fall from the ladder after he appeared to have 'missed' the last step," does not raise a triable issue as to whether plaintiff was the sole proximate cause of the accident, as it does not refute plaintiff's assertion that the ladder slid out from beneath him (*see Garcia v Church of St. Joseph of the Holy Family of the City of N.Y.*, 146 AD3d 524, 525-526 [1st Dept 2017).

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

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6853 The People of the State of New York, Respondent, Ind. 3726N/14

-against-

Gerald Walters, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered September 30, 2015, convicting defendant, after a jury trial, of 10 counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to concurrent terms of 10 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's mistrial motion, made when, in response to a question calling for confidential police information, a detective warned that if defendant learned this information he could "make phone calls out of Rikers Island." The court struck this remark and gave a thorough curative instruction, the language of which was approved by defendant, although he still sought the drastic and unwarranted remedy of a mistrial. The court's curative actions were sufficient to prevent any prejudice (*see People v Santiago*,

52 NY2d 865 [1981]). In any event, any error was harmless in view of the overwhelming evidence of defendant's guilt.

Defendant's claim that his attorney was ineffective for failing to request an adverse inference instruction regarding the loss by the police of certain text messages and a memo book is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Regardless of whether counsel should have requested an adverse inference charge, defendant has not shown that, if so instructed, there is a reasonable probability that the jurors would have actually drawn such an inference regarding this plainly inadvertent loss of discoverable material, or that even if they drew such an inference it would have affected the verdict.

The court's *Sandoval* ruling balanced the appropriate factors

and was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). In any event, any error in the court's ruling was harmless (*see People v Grant*, 7 NY3d 421, 424-425 [2006]).

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6856N & M-2382 Index 154111/15

Teddy Charles,
Plaintiff-Appellant,

-against-

William Penn Life Insurance Company of New York,
Defendant-Respondent.

Miller Eisenman & Kanuck, LLP, New York (Michael P. Eisenman of counsel), for appellant.

Bleakley Platt & Schmidt, LLP, White Plains (Robert D. Meade of counsel), for respondent.

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 19, 2017, which, to the extent appealed from, granted defendant's motion for leave to file an amended answer with two new affirmative defenses, unanimously affirmed, without costs.

The motion court providently exercised its discretion in granting leave to amend the answer to assert a second and third affirmative defense (*see* CPLR 3025[b]). The delay in seeking the amendment was short and there is no indication of any significant trouble or expense that could have been avoided had defendant asserted the proposed defenses earlier, as discovery has been limited (*see Powe v City of Albany*, 130 AD2d 823 [3d Dept 1987]). The amendments were also based upon the decedent's medical

records, which were made available to plaintiff after the first claim denial, but prior to the commencement of this action (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]). In any event, discovery can still be taken (*see Williams v Tompkins*, 132 AD3d 532, 533 [1st Dept 2015]).

Plaintiff's argument that defendant waived the proposed affirmative defenses, is unavailing because the defenses are not jurisdictional defenses and can be raised in an amended answer in the absence of prejudice (*see Ficorp, Ltd. v Gourian*, 263 AD2d 392, 392-393 [1st Dept 1999], *lv dismissed in part, denied in part* 94 NY2d 889 [2000]), and here, all three defenses were based on the decedent's medical records, which plaintiff had prior to the commencement of the action (*see Kerrigan v Metropolitan Life Ins. Co.*, 117 AD3d 562, 563-564 [1st Dept 2014], *lv denied* 24

NY3d 912 [2014]; *see also Masterwear Corp. v Bernard*, 3 AD3d 305, 306 [1st Dept 2004]).

M-2382 - *Teddy Charles v William Penn Life Insurance Co. of New York*

Motion to strike Point III of the reply brief denied.

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

ENTERED: JUNE 12, 2018

CLERK

Richter, J.P., Webber, Kahn, Kern, Oing, JJ.

6857 In re Kaseem Williams, Ind. 66/13
[M-1059] Petitioner, OP 136/18

-against-

Hon. Ralph Fabrizio, etc., et al.,
Respondents.

_____

Kaseem Williams, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (Angel M. Guardiola II of counsel), for Hon. Ralph Fabrizio, respondent.

Darcel D. Clarke, District Attorney, Bronx (Waleska Suero Garcia of counsel), for Darcel D. Clark, respondent.

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

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

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

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

ENTERED: JUNE 12, 2018

CLERK