SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 25, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7127 The People of the State of New York, Respondent, Ind. 463/16

-against-

Robert Penn,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (James M. Burke, J.), rendered November 16, 2016, convicting defendant, upon his plea of guilty, of robbery in the first degree (three counts) and robbery in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 10 years, unanimously affirmed.

The search warrant for defendant's apartment was supported by probable cause. The warrant affidavit set forth extensive information, including DNA evidence, connecting defendant with several robberies. The affidavit's omission of facts raising

potential issues about some of the identification evidence did not undermine probable cause, which does not require proof beyond a reasonable doubt (*see Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]).

Even assuming that the warrant's authorization for the seizure and search of cell phones and other electronic devices was somewhat overbroad, the balance of the warrant, pursuant to which evidence implicating defendant in two of the charged robberies was recovered, was not invalidated (*see People v Brown*, 96 NY2d 80, 85 [2001]). Since there is no indication that any incriminating evidence was derived from the search of electronic devices, any deficiency in that aspect of the search warrant was plainly harmless.

By failing to call the motion court's attention to the fact that the issue remained unresolved, defendant abandoned his contention that the People failed to establish the timeliness of

the warrant's execution (*see e.g. People v Brimage*, 214 AD2d 454 [1995], *lv denied* 86 NY2d 732 [1995]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7128 Elise Adario-Caine, Index 107685/11
Plaintiff-Appellant,

-against-

69th Tenants Corp., et al.,
Defendants-Respondents.

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Beth J. Schlossman, Brooklyn (Steven I. Roth of counsel), for appellant.

Molod, Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

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Order, Supreme Court, New York County (Debra A. James, J.), entered April 28, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Plaintiff alleged that she fell outside of her apartment building due to a sidewalk crack filled with dirty ice. Defendants argue that they are entitled to summary judgment because the sidewalk crack was too trivial to be actionable and there was a storm in progress at the time of the accident.

While defendants demonstrated that the sidewalk crack alone would have been too trivial to be actionable, they failed to show that the alleged ice did not magnify the dangers the crack posed so as to unreasonably imperil the safety of a pedestrian (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 78 [2015]).

Moreover, the parties sharply dispute whether there was an accumulation of old ice in the area of the accident. Defendants presented testimony from their superintendent that he did not see anything out of the ordinary regarding the condition of the sidewalk, and testimony from an expert meteorologist that the ground was bare of snow and that ice could not have formed naturally from the meteorological conditions. In addition, defendants submitted photographs, however they do not clearly show whether or not there was ice in the sidewalk crack. In contrast, plaintiff testified that there was "dirty" ice on the sidewalk which caused her to fall, and submitted public meteorological records showing that there had been a significant snowfall 12 days before and intermittent freezing temperatures since that date. In light of this factual dispute, summary judgment is inappropriate.

Furthermore, defendants failed to make a prima facie showing that they did not have constructive notice of the allegedly dangerous condition. Defendants' superintendent testified that building porters inspected the sidewalk each morning, but failed to provide any specific testimony regarding the inspection on the accident date. Defendants' superintendent also could not recall whether there was ice on the ground, even though he examined the area after the incident. Plaintiff's testimony about "dirty" ice

creates a triable issue of fact because it indicates that the icy condition had existed for some time (*see Jones v New York City Hous. Auth.*, 157 AD3d 426, 426 [1st Dept 2018]; *Wright v Emigrant Sav. Bank*, 112 AD3d 401, 401-402 [1st Dept 2013]). The storm in progress doctrine has no application to this case because plaintiff does not allege that the storm on the accident date caused the dangerous condition (*see Baumann v Dawn Liqs., Inc.*, 148 AD3d 535, 537 [1st Dept 2017]; *Weinberger v 52 Duane Assoc. LLC*, 102 AD3d 618, 619 [1st Dept 2013]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7129 In re Don B.,
Petitioner-Appellant,

-against-

Camilla E.,
Respondent-Respondent.

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

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

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

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Order, Family Court, New York County (Tamara Schwartz, Referee), entered on or about July 12, 2017, which, to the extent appealed from as limited by the briefs, granted petitioner telephone contact and bimonthly visitation with the subject children, unanimously affirmed, without costs.

The determination that it was in the children's best interest to award petitioner bimonthly visitation, telephone communication, and further parenting time if either child desires it, has a sound and substantial basis in the record (*see Matter of Michael Evan W. v Pamela Lyn B.*, 152 AD3d 414, 414 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]; *Matter of Jamel W. [Stacey J.]*, 145 AD3d 433, 433 [1st Dept 2016]; *Nimkoff v Nimkoff*, 18 AD3d 344, 347 [1st Dept 2005). While petitioner contends that

respondent has influenced the children to avoid communication with him, it is apparent that other factors may have triggered the children's silent behavior, including petitioner's lack of communication or contact with them for more than three years.

In order to determine visitation based on the best interest of the children, the Family Court, prior to making its determination, considered the testimony of the parties and the children's wishes (*see Matter of Harry S. v Olivia S.A.*, 143 AD3d 531, 532 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). The court also considered respondent's consent to encourage phone communication and further visitations with petitioner (*see Matter of Ian C. v Desery C.*, 161 AD3d 621, 622 [1st Dept 2018]).

Accordingly, we find no reason to disturb the Family Court's determination (*see Matter of Louise E.S. v W. Stephen S.*, 64 NY2d 946, 947 [1985]; *Matter of Calvin B. v Tikema M.*, 161 AD3d 521, 521-522 [1st Dept 2018]).

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7130-
7131 The People of the State of New York,
Respondent,

-against-

Melvin Williams,
Defendant-Appellant.

Ind. 831/83

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Appeal from judgment, Supreme Court, Bronx County (George D. Covington, J.), rendered March 26, 1984, convicting defendant, after a jury trial, of rape in the first degree and sexual abuse in the first degree, and sentencing him, as a persistent violent felony offender, to an aggregate term of 15 years to life, unanimously dismissed.

In 1984 defendant absconded during trial, and was tried and convicted in absentia. His attorney filed a notice of appeal, but defendant did nothing to perfect his appeal, which was dismissed in 1998, on the People's motion, for failure to prosecute.

Meanwhile, in 1986, defendant was convicted of serious charges in North Carolina, and he served a lengthy sentence

there. Commencing in 2003, nearly 20 years after his conviction, when the New York Department of Correctional Services lodged a detainer in North Carolina based on the instant conviction, defendant filed various pro se motions in connection with his New York conviction. However, defendant did not move to reinstate his appeal until 2015, more than 30 years after his conviction.

In his 2015 motion, defendant argued, among other things, that his appeal should not have been dismissed without assignment of, and review of the record by, appellate counsel (*see People v Perez* (*Lopez*), 23 NY3d 89, 101-102 [2014]). This court granted the motion to the extent of reinstating the appeal without prejudice to a renewed dismissal motion by the People, and when the People then made such a motion, this Court denied it without prejudice to the People's assertion of arguments for dismissal in their appellate brief.

The People seek to dismiss defendant's appeal based on the "failure of timely prosecution or perfection thereof" pursuant to CPL 470.60(1). Where an absconding defendant's appeal remains pending for a long time, whether the appeal should be ultimately be permitted to proceed is "subject to the broad discretion of the Appellate Division" (*People v Taveras*, 10 NY3d 227, 233 [2008]; *see also Perez*, 23 NY3d at 101 [2014]). In exercising its discretion, this Court may consider factors including whether

defendant's flight caused "a significant interference with the operation of [the] appellate process"; whether defendant's absence "so delayed the administration of justice that the People would be prejudiced in locating witnesses and presenting evidence at any retrial should the defendant be successful on appeal"; the length of the defendant's absence; whether the defendant "voluntarily surrendered"; and the merits of the appeal (*Taveras*, 10 NY3d at 233).

Applying these standards, we exercise our discretion to dismiss the appeal. There was a delay of over 30 years from the date in 1984 when trial counsel, on his absent client's behalf, filed a notice of appeal, until defendant, by appellate counsel, moved to reinstate his appeal in 2015 (*see People v Perez*, 162 AD3d 571 [1st Dept 2018] [absconder's 30-year-old appeal dismissed]), and the appeal was finally perfected in 2017. The delay was caused by defendant's own conduct in absconding from trial, and in failing to take any steps to perfect his appeal in the interim. Although defendant was incarcerated in another state for much of this time, and thus was not "at large," there was nothing to prevent him from pursuing his appeal like any other incarcerated defendant. The People's knowledge of defendant's incarceration in North Carolina does not weigh against dismissal, because, unlike the People's obligation to

make diligent efforts to produce an incarcerated defendant for trial or sentencing, there was no similar burden to do anything to advance a sentenced defendant's appeal. Furthermore, an important transcript has been lost, and "it is unreasonable to expect a court to preserve such materials forever" (*Perez*, 162 AD3d at 572). A reconstruction hearing would be impracticable after the passage of multiple decades. The delay of over 30 years would also severely prejudice the People if they were required to retry the case after appeal. Finally, we do not find that the merits of the appeal (which raises issues, that, with some exceptions, are unpreserved or unreviewable) weigh against dismissal.

In the alternative, we find no basis for reversal or any other relief. To the extent any of defendant's arguments on appeal, including his argument based on jury selection, could be viewed as warranting reconstruction proceedings, we find, as noted, that the extensive delay attributable to defendant renders such proceedings impracticable.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7132- Index 805060/13
7133 Deborah Homan,
Plaintiff-Appellant,

-against-

David Seinfeld, M.D., PLLC, et al.,
Defendants-Respondents.

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

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered November 10, 2016, dismissing the complaint pursuant to an order, same court and Justice, entered on or about November 7, 2016, which granted defendants' motion for summary judgment, unanimously affirmed, without costs.

In this medical malpractice action, plaintiff claims that defendant David Seinfeld, her former internist and cardiologist, departed from accepted medical practice by failing to diagnose her endocarditis when he examined her on March 18 and 25, 2011. Although plaintiff was properly diagnosed approximately two weeks later, she asserts that as a result of the delay in diagnosis, the infection spread to her right hip and vegetation on her aortic valve grew to a point where surgical intervention was

ultimately required.

The record establishes that Seinfeld did not depart from the accepted standard of care by failing to diagnose plaintiff on March 18 or 25. Defendants' expert opined that, without any complaints of fever, weight loss, or shortness of breath, there was no basis for a diagnosis of endocarditis, and plaintiff's expert failed to address or rebut this assertion (*see Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238 [1st Dept 2005]).

Plaintiff's expert's assumption that plaintiff did, in fact, complain of fevers is not supported by the record. There is no contemporaneous evidence of fevers. In fact medical records affirmatively state plaintiff did not have a fever on March 24 or 25 (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]). It is further undisputed that plaintiff never claimed to have suffered weight loss, and plaintiff made only a fleeting claim of shortness of breath at her deposition, which was not relied upon by her expert.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7135- Ind. 1295/15
7135A The People of the State of New York, 525/15
Respondent,

-against-

Edward Polewacz,
Defendant-Appellant.

_____

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

_____

Judgments, Supreme Court, Bronx County (John S. Moore, J.), rendered April 21, 2015, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7136 In re Cushaun Charles, et al., Index 159985/17
Petitioners,

-against-

Sheila Poole, etc., et al.,
Respondents.

_____

Lansner & Kubitschek, New York (Carolyn A. Kubitschek of counsel), for petitioners.

Barbara D. Underwood, Attorney General, New York (Linda Fang of counsel), for respondents.

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Determination of respondent New York State Office of Children and Family Services (OCFS), dated July 12, 2017, which affirmed the determination of respondent New York City Administration for Children's Services, after a hearing, that allegations of child maltreatment against petitioners were "indicated" and that the underlying acts were relevant or reasonably related to child care, employment, the adoption of a child, or the provision of foster care, unanimously annulled, on the law, without costs, the petition brought pursuant to CPLR article 78 granted, and the proceeding (transferred to this Court pursuant to CPLR 7803[4] by order of the Supreme Court, New York County [Erika M. Edwards, J.], entered January 19, 2018) remitted to respondents to amend the child maltreatment report from "indicated" to "unfounded" and to seal the report.

OCFS's determination that child maltreatment by petitioners was "indicated" is not supported by substantial evidence (*see Matter of Nelke v Department of Motor Vehs. of the State of N.Y.*, 79 AD3d 433 [1st Dept 2010]; *see also Matter of Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). Petitioners were in compliance with the recommendations of the child's pediatrician during the period in question, and there is no evidence that their failure to seek regular visits with a hematologist or to administer a daily dose of penicillin to the child as a prophylaxis either impaired or risked imminently impairing the child's physical condition (*see generally Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). Medical records show that the child's hospitalizations in 2014 and a year later in 2015 were the result of a viral infection, which would not have been prevented by his seeing a hematologist regularly or taking penicillin, an antibiotic. After the 2015 hospitalization, the child's treating physician ratified a course of treatment that did not include a daily antibiotic. Further, petitioners' decision not to further vaccinate the child did not violate the pediatrician's directive (*see Matter of Hofbauer*, 47 NY2d 648, 655-656 [1979]).

Petitioners' request for fees and costs under CPLR 8601(a) is denied without prejudice to seeking recovery following remittitur in accordance with the procedures set forth in CPLR 8601(b).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Sweeny, J.P., Manzanet-Daniels, Tom, Gesmer, JJ.

7137 In re Ivan De Jesus, Index 100053/16
Petitioner-Appellant,

-against-

Teachers College, et al.,
Respondents-Respondents.

_____

Stewart Lee Karlin Law Group P.C., New York (Natalia Kapitonova of counsel), for appellant.

Nixon Peabody LLP, Jericho (Tony G. Dulgerian of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered April 26, 2017, which granted respondents' motion pursuant to CPLR 3211 and 7804(f) to deny the petition and dismiss the proceeding brought by petitioner pursuant to CPLR article 78 seeking an order annulling respondents' determination, dated November 25, 2015, terminating petitioner's enrollment in a Ph.D. program, unanimously affirmed, without costs.

The record establishes that respondents reasonably accommodated the known aspects of petitioner's learning disability by granting him, among other accommodations, double the amount of time (six hours) for a certification exam, with an additional hour for lunch to be used at his discretion. There is no record that respondents were ever apprised, until months after

petitioner had twice unsuccessfully sat for the exam, that the resulting length of the test could exacerbate petitioner's disability through fatigue. Petitioner thus failed to meet his burden, under the Americans with Disabilities Act (ADA), of showing that the additional accommodations he sought (i.e., to take the exam home or split the six hours over two days) were facially reasonable (*see Dean v University at Buffalo Sch. of Medicine & Biomedical Sciences*, 804 F3d 178, 190 [2d Cir 2015]). Moreover, the record establishes that respondents met their duty, in advance of both administrations of the exam, to engage in an interactive dialogue with petitioner (*see McBride v BIC Consumer Prods. Mfg. Co.*, 583 F3d 92, 99-101 [2d Cir 2009]).

Petitioner's claim for breach of implied contract also fails, as respondents' determination that petitioner did not pass the exam (and the resulting termination from the program) was rationally based in the record and, as an academic evaluation, is beyond further review (*see Matter of Susan M. v New York Law*

School, 76 NY2d 241, 245-246 [1990]; *Peterman v New York Coll. of Traditional Chinese Medicine*, 129 AD3d 474, 475 [1st Dept 2015]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7138 Paul W. Kaplan, et al., Index 159584/13
Plaintiffs-Respondents,

-against-

Anatoliy Tsirlin, et al.,
Defendants,

Priory Cab Corp., et al.,
Defendants-Appellants.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., Brooklyn (Robert D. Grace of counsel), for appellants.

Mitchell Dranow, Sea Cliff, for respondents.

_____

Order, Supreme Court, New York County (Leticia M. Ramirez, J.), entered on or about July 1, 2016, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for partial summary judgment on the issue of liability as against defendants Priory Cab Corp. and Sonam Tenzin, unanimously reversed, on the law, without costs, and the motion denied.

In this action arising from a three-car accident, defendant Tenzin testified that defendant Hoque's taxi suddenly cut into his lane of traffic and, although Tenzin honked and turned left, the Hoque taxi hit the front of his taxi. According to Tenzin, Hoque then returned to the middle lane but lost control of his vehicle, swerved and re-entered Tenzin's lane of traffic sideways. Tenzin honked, braked, and moved to the left of his

lane, but was unable to avoid hitting the side of Hoque's taxi. Defendant Tsirlin testified that the rear of Hoque's sideways taxi hit the side of his vehicle in the middle lane, but he was unsure about the sequence of events before that. The injured plaintiff was a passenger in Hoque's taxi and did not see how the accident occurred.

In view of the foregoing, the court properly found that plaintiffs established the injured plaintiff's lack of culpability as a matter of law (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]; *Mello v Narco Cab Corp.*, 105 AD3d 634 [1st Dept 2013]). However, the court erred in finding that the record also established the Tenzin defendants' liability as a matter of law. While plaintiffs contend that Tenzin's failure to notice Hoque's vehicle in the adjoining lane before the accident was negligent, the record as a whole presents triable issues as to whether Tenzin acted reasonably in reaction to a sudden emergency presented by Hoque's vehicle unexpectedly cutting into

his lane (*see Maisonet v Roman*, 139 AD3d 121 [1st Dept 2016], *appeal dismissed* 27 NY3d 1062 [2016]; *Weston v Castro*, 138 AD3d 517 [1st Dept 2016]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7139 In re Ivan J.,
Petitioner-Appellant,

-against-

Kathryn G.,
Respondent-Respondent.

_____

Law Office of Elisa Barnes, New York (Elisa Barnes of counsel), for appellant.

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

Carol L. Kahn, New York, attorney for the child.

_____

Order, Family Court, Bronx County (Brenda Rivera, J.), entered on or about November 8, 2017, which, insofar as appealed from as limited by the briefs, after a trial, denied the father's petition for custody of the subject child and granted the mother's petition for custody and relocation to Florida, unanimously affirmed, without costs.

In reviewing relocation and other custody issues, we defer to the determination rendered by the factfinder, "unless it lacks a sound and substantial basis in the record" (*Matter of Salena S. v Ahmad G.*, 152 AD3d 162 [1st Dept 2017], quoting *Matter of David J.B. v Monique H.*, 52 AD3d 414, 415 [1st Dept 2008] [internal quotation marks omitted]). Where, as here, there has been no prior custody order at the time of the parent's relocation, the

factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727, 739 [1996]) do not govern, and relocation should be considered as one factor in determining the child's best interests (*see Matter of Michael B. [Lillian B.]*, 145 AD3d 425, 430 (1st Dept 2016).

We decline to disturb Family Court's award of custody to the mother, as it has a sound and substantial basis in the record and was issued on the basis of first-hand observations of the parties and their credibility over nine days of testimony.

In assessing the relative stability of the parties' homes, the court acknowledged that the mother, after repeated relocations with the subject child and her other children, was living with her mother in an admittedly temporary situation. However, her plan for caring for the child reflected an ability and willingness to be regularly and fully available for the child in ways that the father cannot or does not (*see Andrews v Andrews*, 74 AD2d 546 [1st Dept 1980], *affd* 53 NY2d 787 [1981]).

Family Court correctly determined that the mother's testimony as to her gross salary and overall employment situation at the time of trial was credible. She testified to having obtained employment with the prospect of increasing salary and responsibility, and the father presented no evidence to the contrary.

The court also appropriately deemed the child's close

relationship with her sister, supported by the record, as a factor in favor of the mother's petition (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]), and we disagree that the testimony suggests that the sister no longer lives in Florida. The child has siblings in New York as well, but the father and his witnesses presented minimal testimony about her relationship with them, in contrast to the mother's testimony about the close bond between the child and her sister.

The absence of a probation report concerning an alleged domestic violence incident in Florida in the child's presence involving the mother and a former fiancé was not preserved on appeal. Even if the issue were before us, this would not change our decision, since the evidence at trial showed that the mother and her children no longer have any contact with the former fiancé.

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7140 The People of the State of New York, Ind. 1824/16
Respondent,

-against-

David Vasquez,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J. at plea; Mark Dwyer, J. at sentencing), rendered September 30, 2016,

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: SEPTEMBER 25, 2018

CLERK

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

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7141 The People of the State of New York, Ind. 1562/15
Respondent,

-against-

Kevin Hueston,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert McIver of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Raymond Bruce, J.), rendered October 14, 2016,

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: SEPTEMBER 25, 2018

CLERK

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

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7143-
7143A Second Ave. 1355 Realty LLC,
Plaintiff-Appellant,

-against-

1355 Second Owner LLC, et al.,
Defendants-Respondents.

Index 650507/16

Malek Moss PLLC, New York (Kevin N. Malek of counsel), for appellant.

Stempel Bennett Claman & Hochberg, P.C., New York (Richard L. Claman of counsel), for 1355 Second Owner LLC and SL Green Realty Corp., respondents.

Fidelity National Law Group, New York (Joyce A. Davis of counsel), for Fidelity National Title Insurance Services LLC, respondent.

Orders, Supreme Court, New York County (O. Peter Sherwood, J.), entered May 26, 2017 and November 6, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motions to dismiss the causes of action for breach of contract against defendant 1355 Second Owner LLC, breach of contract and of fiduciary duty against defendant Fidelity National Title Insurance Services LLC, and aiding and abetting breach of fiduciary duty against 1355 Second Owner and defendant SL Green Realty Corp., unanimously affirmed, with costs.

Plaintiff alleges that defendant 1355 Second Owner LLC (the buyer) breached the agreement pursuant to which it would purchase

from plaintiff a multi-use building in Manhattan. Plaintiff concedes that it failed to meet the condition precedent that it deliver the building "vacant, free of all residential tenancies and occupancies," which would relieve the buyer of its duty to close on the purchase (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 693 [1995]), but argues that the buyer waived the condition precedent.

The documentary evidence conclusively establishes that there was no waiver of the condition precedent (*see Jacoby & Meyers v Crispi*, 205 AD2d 312, 313 [1st Dept 1994]). The agreement required that any waiver be express and in writing. The January 6, 2016 letter and January 7, 2016 email written by buyer's counsel on which plaintiff relies do not mention either waiver or the vacancy condition precedent. Indeed, they do not appear to address these issues at all. They focus on a dispute over a different but related provision of the agreement, which obligated plaintiff to use its best efforts to bring about the fulfillment of the condition precedent.

Given the dismissal of the contract claim against the buyer, plaintiff's claim against the escrow agent (National Fidelity) for releasing the deposit to the buyer was limited to the contractual reimbursement amount of $70,000. That amount having been paid, the court correctly dismissed the breach of contract

and fiduciary duty claims against the escrow agent and the aiding and abetting breach of fiduciary duty claims.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7144-		Ind. 3297/11
7144A		3298/11
7144B		3299/11
7144C		3300/11
7144D		3301/11
7144E		3307/11
7144F & M-4167		2047/12
M-4314	The People of the State of New York, Respondent,	
	-against-	
	Jose Ramos, Defendant-Appellant.	

_____

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Steven L. Barrett, J. at removal of counsel; Michael A. Gross, J. at jury trial and sentencing), rendered December 10, 2014, convicting defendant of attempted grand larceny in the third degree, attempted robbery in the second degree and attempted criminal possession of a controlled substance in the first degree, and sentencing him to consecutive terms of one to three years, 2½ years and nine years, unanimously modified, on the law, to the extent of reducing the attempted robbery conviction to attempted petit larceny and reducing the sentence on that conviction to time served, and

otherwise affirmed. Judgments (Michael A. Gross, J.), rendered January 13, 2015, convicting defendant, upon his pleas of guilty, of conspiracy in the second degree, grand larceny in the third degree, failure to disclose the origin of a recording in the first degree, reckless endangerment in the second degree, official misconduct and obstructing governmental administration in the second degree, and sentencing him to concurrent terms of three to nine years, one to three years, one to three years, and one year, one year and one year, unanimously affirmed.

There was legally insufficient evidence of force to support the conviction for attempted second-degree robbery. When defendant, a corrupt police officer, threatened to make an arrest, there was no actual or threatened physical contact, and the element of force was not established under the principles set forth in *People v Smith* (22 NY3d 1092 [2014]). However, the evidence established attempted petit larceny, which qualifies as a lesser included offense under the impossibility test of *People v Glover* (57 NY2d 61 [1982]), and we reduce the conviction and sentence accordingly.

We reject defendant's arguments concerning the sufficiency and weight of the evidence supporting his attempted possession of a controlled substance conviction (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supports an

inference that defendant believed he was transporting a large quantity of heroin, as planned, rather than making a "dry run" without drugs.

Defendant's challenge under *People v O'Rama* (78 NY2d 270 [1991]) to what was originally his attempted robbery conviction is unavailing. There was no mode of proceedings error, because the court read the jury note in question into the record almost verbatim (*see People v Ramirez*, 60 AD3d 560, 561 [1st Dept 2009], *affd* 15 NY3d 824, 825-826 [2010]).

The court that presided over pretrial matters providently exercised its discretion when it removed defendant's counsel (*see generally People v Watson*, 26 NY3d 620, 624 [2016]). A court's "discretion is especially broad when the defendant's actions with respect to counsel place the court in the dilemma of having to choose between undesirable alternatives, either one of which would theoretically provide the defendant with a basis for appellate review" (*see People v Tineo*, 64 NY2d 531, 536 [1985]). Here, the totality of circumstances created a conflict that was too serious to be addressed by asking defendant whether he wanted to waive the conflict, and inquiring further. In the first place, the People had represented that the attorney at issue was a witness to material nonprivileged matters regarding defendant's indictment for conspiring to kill one of the witnesses in the

instant case, and that she would be called as a witness against her then-client, at least in the conspiracy case. After the court removed the attorney at issue from the conspiracy case (which ultimately resulted in one of the plea convictions presently on appeal), it came to light that the attorney was under investigation for misconduct relating to the instant case. Accordingly, the court providently replaced this attorney with the attorney who had been substituted on the conspiracy case. In any event, defendant ultimately expressed his approval of this outcome.

Except, as noted, in connection with our reduction of one of the felony convictions to a misdemeanor, we perceive no basis for reducing the sentences.

M-4167 - *People v Jose Ramos*
M-4134

Motion to enlarge the appellate record and cross motion to strike portions of the People's brief denied.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7145 The People of the State of New York, Respondent, Ind. 2010/14

-against-

Samuel Santana, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered July 30, 2015, unanimously affirmed.

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

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

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7146- Ind. 2515/13
7147 The People of the State of New York,
Respondent,

-against-

Alexx Kinley,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J. at plea; Raymond Bruce, J. at sentencing), rendered April 30, 2015, and from a judgment of resentence, same court (George Villegas, J.), rendered August 4, 2017,

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

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

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

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7148 The People of the State of New York, Respondent, Ind. 3334/14

-against-

Ellis Wilson, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered January 14, 2016, 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: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7149N Zulema Cantave, et al., Index 160758/16
Plaintiffs-Appellants,

-against-

170 West 85 Street Housing
Development Fund Corp.,
Defendant-Respondent.

_____

Thomas J. Hillgardner, Jamaica, for appellants.

Thomas S. Fleishell & Associates, P.C., New York (Michael Stevens of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered April 5, 2018, which denied plaintiffs' motion for a default judgment, and granted defendant's cross motion to, inter alia, compel plaintiff to accept its answer, unanimously affirmed, without costs.

The motion court providently exercised its discretion in considering the factors under CPLR 3012(d). The delay in answering was neither short nor particularly lengthy, and the excuse for the delay was properly found not reasonable because the answer was already late at the time plaintiffs served the second complaint that defendant claimed had led it to believe that the instant complaint had been abandoned by plaintiffs. Nevertheless, the defense that the claim for declaratory relief in the instant complaint was moot had merit, there was no showing

of either wilfulness or prejudice as a result of the delay, and the policy of resolving disputes on the merits all militatated in favor of the relief granted to defendant (*see Artcorp Inc. v Citirich Realty Corp.*, 140 AD3d 417 [1st Dept 2016]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Acosta, P.J., Sweeny, Manzanet-Daniels, Gesmer, Singh, JJ.

7150 In re Cory Reid, Ind. 4445/17
[M-2769] Petitioner, OP 152/18

-against-

Hon. Moses, etc., et al.,
Respondents.

_____

Cory Reid, petitioner pro se.

Barbara D. Underwood, Attorney General, New York (Charles F. Sanders of counsel), for respondents.

_____

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: SEPTEMBER 25, 2018

CLERK

Tom, J.P., Mazzarelli, Andrias, Kern, JJ.

6616 In re Northwest 5th & 45th Realty Corp., Petitioner-Respondent, Index 150344/13

-against-

Mitchell, Maxwell & Jackson, Inc., et al., Respondents-Appellants,

Jeffrey Jackson, etc., et al., Respondents.

Shaw & Binder P.C., New York (Stuart F. Shaw and Daniel S. Lopresti of counsel), for appellants.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered October 31, 2016, in petitioner's favor against respondent Steven Knobel in the amount of $661,526.64, unanimously reversed, on the law, with costs, the judgment vacated, and respondents' cross motion to dismiss the petition granted. The Clerk is directed to enter an amended judgment dismissing the proceeding.

In this special proceeding, petitioner seeks to enforce, against Knobel, two judgments that it obtained against respondent Mitchell, Maxwell & Jackson, Inc. (MMJ) in a plenary action. The petition invoked Debtor and Creditor Law § 273, which requires

insolvency. The petition also quoted Debtor and Creditor Law § 271(1), which states, "A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." Despite this, the petition made no allegations about the fair salable value of MMJ's assets; thus, it failed to make a prima facie case (*see Kenyon & Kenyon LLP v SightSound Tech., LLC,* 151 AD3d 530, 531 [1st Dept 2017]).

Because a special proceeding is treated like a summary judgment motion (*see* CPLR 409[b]; *Matter of Port of N.Y. Auth. [62 Cortlandt St. Realty Co.],* 18 NY2d 250, 255 [1966], *cert denied sub nom. McInness v Port of N.Y. Auth.,* 385 US 1006 [1967]), petitioner could not cure the deficiency of proof in its petition in reply (*see Henry v Peguero,* 72 AD3d 600, 602 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]).

In addition to alleging fraudulent conveyance, the petition sought to pierce MMJ's corporate veil to hold Knobel (MMJ's 50% shareholder) liable for the judgment against MMJ. Such veil-piercing was neither factually nor legally justified in this case (*see e.g. 210 E. 86th St. Corp. v Grasso,* 305 AD2d 156 [1st Dept 2003]).

The Decision and Order of this Court entered herein on May 17, 2018 is hereby recalled and vacated (*see* M-3641 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7105 The People of the State of New York, Ind. 270/14
Respondent,

-against-

Manuel Ortiz,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Daniel R. Lambright of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (James M. Burke at motion; Roger S. Hayes, J. at plea and sentencing), rendered July 28, 2015, convicting defendant of criminal possession of a controlled substance in the second degree and criminal possession of a weapon in the second degree, and sentencing him to concurrent terms of 3½ years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses his suppression claims. The court's oral colloquy with defendant, supplemented by a detailed written waiver, satisfied the requirements for a valid waiver (*see People v Bryant*, 28 NY3d 1094 [2016]). In particular, the court made it clear to defendant that he was waiving appellate review of the legality of the search conducted by the police, which is the only issue he now seeks to raise on appeal.

Regardless of whether defendant made a valid waiver of his right to appeal, we reject his challenges to the search warrant.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7106 Lionel F. Mackenzie, Index 310625/10
Plaintiff-Appellant,

-against-

Emigrant Mortgage Company, Inc.,
Defendant-Respondent.

_____

Fedrizzi & Associates, P.C., Astoria (Linda F. Fedrizzi of counsel), for appellant.

Stagg, Terenzi, Confusione & Wabnik, LLP, Garden City (Ronald M. Terenzi of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about June 20, 2017, which granted defendant's motion to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(1) and (7) and CPLR 3212, unanimously affirmed, with costs.

Defendant demonstrated that it is not obligated to proceed with a proposed loan to plaintiff at an interest rate of 4.375%. Contrary to plaintiff's contention, the loan documents are complete, clear and unambiguous, and therefore must be enforced in accordance with their plain meaning (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). The loan commitment letters, dated October 15, 2010, and December 16, 2010, and the Interest Rate Election Agreement executed by the parties on September 8,

2010, provided that if the loan closed on or before November 7, 2010, then the interest rate would be 4.375%, and that if "for any reason" the loan did not close by that date, then the interest rate would be subject to change. The loan did not close on or before the November 7, 2010 lock-in expiration date. Plaintiff does not dispute that as of that date defendant had not received all the required documents listed in the loan commitment letter, a condition of closing.

Plaintiff's remaining arguments are unpreserved and in any event unavailing.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7107 Angella Mitchell, Index 21468/15E
Plaintiff-Respondent,

-against-

Dania Davidson, et al.,
Defendants-Appellants.

_____

Law Office of James Toomey, New York (Evy Kazansky of counsel), for appellants.

Taubman Kimelman & Soroka, LLP, New York (Antonette M. Milcetic of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered January 8, 2018, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when she slipped and fell on ice on the sidewalk in front of defendants' premises. Defendants submitted the opinion of a meteorologist, with certified climatological data showing that freezing rain and sleet was falling during the time of plaintiff's accident, which qualified as a storm (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]; *Prince v New York City Hous. Auth.*, 302 AD2d 285 [1st Dept 2003]). Thus,

defendants' duty to take reasonable measures to remedy any dangerous condition caused by the storm was suspended until a reasonable time after the storm ended (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735 [1st Dept 2005], *affd* 6 NY3d 734 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's expert meteorologist agreed with the defense expert's findings that freezing rain was falling at the time of plaintiff's fall (*see Weinberger* at 619). The opinion of plaintiff's expert concerning the sufficiency of defendants' salting of the sidewalk was insufficient to raise an issue of fact. Even if defendants had a duty to salt before any storm began, the expert's opinion was too speculative to raise an issue of fact as to whether defendants' upkeep efforts contributed to the allegedly dangerous condition (*see Rivas v New York City Hous. Auth.*, 140 AD3d 580, 581 [1st Dept 2016]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7108 The People of the State of New York, Ind. 799/14
Respondent,

-against-

Francisco Aguilar,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Richard Lee Price, J. at plea; Barbara F. Newman, J. at sentencing), rendered August 10, 2016, unanimously affirmed.

Although we find that defendant did not make a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7109 The People of the State of New York, Ind. 4662/11
Respondent,

-against-

Leon Ballard,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Steven J. Miraglia of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald Zweibel, J.), rendered August 2, 2012, 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: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7110 Roy Trujillo, Index 654442/16
Plaintiff-Appellant,

-against-

Transperfect Global, Inc., et al.,
Defendants-Respondents.

_____

Law Offices of Jason L. Abelove, Garden City (Jason L. Abelove of counsel), for appellant.

Kruzhkov Russo, PLLC, New York (Martin P. Russo of counsel), for Transperfect Global, Inc. and Transperfect Translations International Inc., respondent.

Kramer Levin Naftalis & Frankel LLP, New York (Jared I. Heller of counsel), for Elizabeth Elting, respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 9, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss plaintiff's claims for (1) breach of contract regarding certain "Phantom Stock," (2) intentional infliction of emotional distress, and (3) violation of Labor Law § 195(1), without leave to replead, unanimously affirmed, without costs.

The court properly held that the unsigned document, which contained handwritten dollar amounts and calculations, with no indication of their meaning or anyone's consent to them, was unenforceable. Thus, it cannot serve as a written contract for the basis of enforcing plaintiff's alleged claim to increases of

his "Phantom Stock" value. Moreover, plaintiff alleges that he is entitled to any increases in value of this stock in perpetuity, based on the 2013 agreement. However, as defendants' alleged continuing liability to plaintiff for such increases would necessarily extend beyond 2013, General Obligations Law § 5-701(a)(1) requires that any such agreement be in writing, as it cannot be performed in one year. As no sufficient writing exists, the court properly dismissed this cause of action without leave to replead.

The court also properly dismissed plaintiff's claim for intentional infliction of emotional distress, as plaintiff's allegations of wrongdoing by defendant Elting do not evince conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983][internal quotation marks omitted]; *see also Brown v Sears Roebuck & Co.*, 297 AD2d 205, 212 [1st Dept 2002]). At best, plaintiff's allegations demonstrate only "mere insults, indignities and annoyances," and "the fact that we view the alleged conduct as being deplorable and reprehensible does not necessarily lead to the conclusion that it arose to such a level that the law must provide a remedy" (*Leibowitz v Bank Leumi Trust*

Co. of N.Y., 152 AD2d 169, 182 [2d Dept 1989]). Nor do the allegations collectively rise to that level.

Finally, the court properly dismissed plaintiff's claim based on Labor Law § 195(1), as plaintiff has offered no support for the retroactive application of that statute to himself. He was hired eleven years before the statute became effective, and such retroactive application is not warranted (*see Gold v New York Life Ins. Co.*, 730 F3d 137, 143-144 [2d Cir 2013]).

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7111 Edith Wiener, et al., Index 654831/16
Plaintiffs-Appellants,

-against-

Richard Weissman, et al.,
Defendants-Respondents.

_____

Anderson & Ochs, LLP, New York (Mitchel H. Ochs of counsel), for appellants.

Farrell Fritz, P.C., New York (Peter A. Mahler of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered May 25, 2017, which, to the extent appealed from, denied plaintiffs' motion for summary judgment declaring, upon the first and second causes of action, that defendants' attempt to dissolve the partnerships was wrongful and directing defendants to cooperate with the refinancing of the Greystone property, unanimously affirmed, with costs.

The individual plaintiffs and the plaintiff trusts are partners of general partnership plaintiffs 5400 Co., Absar Realty Company, and Absar Gerard Associates, formed in 1982 as single-asset real estate holding companies for the purpose of owning and operating two residential apartment buildings and a shopping center in the Bronx. On October 15, 2015, two of the partners issued a notice purporting to withdraw from and dissolve the

partnerships, pursuant to New York Partnership Law § 62(1)(b), "which," the notice said, "provides that a partnership is terminable at will on notice."

In response to the notice of dissolution, plaintiffs brought this action seeking, among other things, a judgment declaring that defendants "wrongfully purported, unilaterally, to effect a non-judicial dissolution of the subject Partnerships."

The motion court determined that no dissolution had been effected. It reasoned that, because the partnership agreements provide that the partnerships shall continue "until terminated by mutual agreement," defendants' notice to dissolve was a "nullity" that was ineffective to dissolve the partnerships. We agree.

"New York's Partnership Law creates default provisions that fill gaps in partnership agreements, but where the agreement clearly states the means by which a partnership will dissolve, or other aspects of partnership dissolution, it is the agreement that governs the change in relations between partners and the future of the business" (*Congel v Malfitano*, 31 NY3d 272, 279 [2018]). Where, as here, a partnership agreement contains provisions governing the dissolution of the partnership by the will of the partners, ordinary contract principles apply (*see e.g. In re Century/ML Cable Venture*, 294 BR 9, 25 [Bankr SD NY 2003]), and a notice by a partner or partners to dissolve a

partnership in contravention of the partnership agreement's dissolution provisions is a legal nullity and does not effect a dissolution of the partnership. We note that, unlike *Congel*, the defendants here assert that their notice of dissolution was a legal nullity.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7112 The People of the State of New York, Respondent, Ind. 2852/12

-against-

Pablo Minier,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered November 3, 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: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7113 In re Kaniya D.,

A Child Under Eighteen Years of Age, etc.,

Queleen D.,
Respondent-Appellant,

New Alternatives for Children,
Petitioner-Respondent.

_____

Bruce A. Young, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about June 21, 2017, which revoked a March 2, 2016 order suspending judgment for twelve months and terminated respondent mother's parental rights to the subject child, unanimously affirmed, without costs.

The finding that the mother violated the terms of the suspended judgment is supported by a preponderance of the evidence (*see Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467, 467-468 [1st Dept 2009], *lv dismissed, lv denied* 14 NY3d 870 [2010]). The record showed that she failed to: attend therapy, maintaining that she did not need therapy; submit to drug screens, notwithstanding that her schedule permitted her to do so

and maintained that such screens were unrelated to the child; attend all of the child's medical appointments, notwithstanding the child's severe special needs; and visit regularly, often appearing late for visits, which remained supervised (*see Matter of Aliyah Careema D. [Sophia Seku D.]*, 88 AD3d 529 [1st Dept 2011]).

A preponderance of the evidence supports the determination that the child's best interests would be served by terminating the mother's parental rights (*Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). Notwithstanding the mother's arguments, since the last court date, she had supervised visitation on four occasions and did not show that she attended those visits on time or that she understood that her failure to visit regularly had a negative effect on the child (*see Matter of Latasha W.*, 268 AD2d 340 [1st Dept 2000]).

Moreover, although the mother testified to the many services that the child was receiving, there was no indication that she appreciated or understood the extent of the child's severe special needs or how they affected the child's functioning, nor why the child needs to learn to sign and needs physical therapy for her legs and arms, or how her motor skills are affected, which requires therapy. The mother testified that the child is doing well in school, but she did not explain what the child's

limitations are or why the child requires a one-to-one caretaker in a school setting.

On this record, despite the suspended judgment period, the mother failed to put the child's needs above her own, thereby allowing the child to remain in foster care for several years (*see Matter of Imani J.*, 29 AD3d 467 [1st Dept 2006], *lv denied* 7 NY3d 842 [2006], *cert denied* 549 US 1228 [2007]). Nor did the mother demonstrate having taken any steps toward being able to care for the child.

Moreover, the mother failed to demonstrate that exceptional circumstances exist that would warrant the court's extension of the suspended judgment in the child's best interests (*see Matter of Lourdes O.*, 52 AD3d 203, 204 [1st Dept 2008]).

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7114 MacArthur Properties, LLC, Index 116303/09
Plaintiff-Appellant,

-against-

Metropolitan Transportation Authority, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

_____

The Tzanides Law Firm, PLLC, New York (Kirk P. Tzanides of counsel), for appellant.

Hoguet Newman Regal & Kenney, LLP, New York (Ira J. Lipton of counsel), for Metropolitan Transportation Authority and MTA Capital Construction Company, respondents.

Gallet Dryer & Berkey, LLP, New York (Randy J. Heller of counsel), for S3 Tunnel Constructors, Skanska USA Civil Northeast Inc., JF Shea Construction, Inc., and Schiavone Construction Company, respondents.

_____

Appeal from order, Supreme Court, New York County (Martin Shulman, J.), entered June 6, 2017, which, inter alia, denied plaintiff's motion for summary judgment on the issue of liability and granted defendants-respondents' motions for summary judgment dismissing the complaint, deemed an appeal from the judgment, same court and Justice, entered July 20, 2017, dismissing the complaint (CPLR 5501[c]), and so considered, the judgment

unanimously affirmed, without costs, for the reasons stated by Shulman, J.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7115- Ind. 1679/15
7115A The People of the State of New York, 1102/16
Respondent,

-against-

Manuel Davila,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (John W. Carter, J. at motion; Ralph Fabrizio, J. at pleas and sentencing), rendered June 23, 2017, convicting defendant, upon his pleas of guilty, of assault in the second degree and attempted robbery in the first degree, and sentencing him to consecutive terms of two years and four years, respectively, unanimously affirmed.

The record establishes that defendant made a knowing, intelligent and voluntary waiver of his right to appeal, which forecloses review of his suppression and excessive sentence claims. The court's oral colloquy with defendant concerning the waiver, which was conducted through an interpreter, avoided conflating the right to appeal with the rights normally forfeited upon a guilty plea, and it was sufficient to establish a valid

waiver (*see People v Bryant*, 28 NY3d 1094 [2016]).

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the motion court properly concluded that defendant was not entitled to a *Wade* hearing given the facts presented, and we perceive no basis for reducing defendant's sentence.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7116 Hector Polanco, Index 303568/11
Plaintiff-Respondent,

-against-

Bronx 360 Realty LLC, et al.,
Defendants-Appellants,

Uplift Elevator Corp.,
Defendant-Respondent,

PRC Management LLC,
Defendant.

_____

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

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for Hector Polanco, respondent.

Gottlieb Siegel & Schwartz, LLP, New York (Jaime Hyman of counsel), for Uplift Elevator Corp, respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered on or about December 18, 2017, which granted defendant Uplift Elevator Corp.'s motion to reargue its opposition to defendants Bronx 360 Realty LLC and T.U.C. Management Company, Inc.'s motion for summary judgment dismissing the complaint as against them, and, upon reargument, denied Bronx 360 and T.U.C.'s motion, unanimously affirmed, without costs.

The record demonstrates that building owner Bronx 360 and manager T.U.C. were aware that the building's elevator was

malfunctioning on the day of plaintiff's accident. That day was the third consecutive day on which Uplift was performing repairs to the elevator, pursuant to its maintenance agreement with Bronx 360. Issues of fact exist whether Bronx 360 and T.U.C. breached their duty to warn of a dangerous condition on the premises (*see Piluso v Bell Atl. Corp.*, 305 AD2d 68, 70 [1st Dept 2003]; *Hall v Scheidelman, Inc.*, 65 AD2d 928, 928 [4th Dept 1978]). The testimony by Bronx 360's superintendent, Uplift's elevator repair technician, Uplift's president, and plaintiff, differs as to whether signs had been posted warning that the elevator was out of order and ought not to be used and whether any such signs were in place when plaintiff entered the premises.

In view of the issues of fact as to their own negligence, Bronx 360 and T.U.C. are not entitled to summary judgment on their cross claim against Uplift for indemnification.

We have considered Bronx 360 and T.U.C.'s remaining arguments and find them unavailing.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7117 The People of the State of New York, Respondent, Ind. 2123/16

-against-

Jessica Washington, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (Larry Stephen, J.), rendered July 11, 2016, 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: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7118-
7119 A. Anonymous,
Plaintiff-Appellant,

-against-

Mount Sinai Hospital,
Defendant-Respondent,

Housing Works,
Defendant.

Index 22499/12E

_____

Antollino PLLC, New York (Gregory Antollino of counsel), for appellant.

Akerman LLP, New York (Rory J. McEvoy of counsel), for respondent.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered March 27, 2017, which granted defendant Mount Sinai Hospital's motion for summary judgment dismissing the employment discrimination claim, and order, same court and Justice, entered May 26, 2017, which denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

Supreme Court correctly dismissed the claim under the New York City Human Rights Law (City HRL) (Administrative Code of City of NY § 8-107[1]) that defendant terminated plaintiff's employment on the basis of his disability. Defendant established prima facie that it terminated plaintiff's employment because of his excessive absences, and plaintiff failed to raise an issue of

fact whether the proffered reason was pretextual (*see Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 [1st Dept 2012]). Plaintiff failed to submit evidence that defendant was aware that he had any disability (*see Pimentel v Citibank, N.A.*, 29 AD3d 141, 145 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]).

Plaintiff submitted no evidence that defendant knew he had HIV. He admitted that he did not tell anyone at defendant hospital about his HIV status. Rather, plaintiff cites a doctor's letter, printed on the letterhead of Housing Works, that states that he suffered from unspecified "symptoms" and needed to be excused from work for three days. The mere fact that the letterhead includes a caption that refers to housing for homeless people with AIDS and HIV does not, standing alone, suffice to create a triable issue whether defendant knew that plaintiff had HIV. There is no evidence that Housing Works treats only individuals with AIDS and HIV, that defendant believed that that was the case, or that the two individuals who made the decision to terminate plaintiff's employment saw the doctor's letter. Both of those individuals denied any knowledge that plaintiff had HIV, and both averred that the sole basis for his termination was plaintiff's excessive absences from work during his initial probationary period of employment.

Nor can defendant be held liable for failure to provide a

reasonable accommodation for an employee who never alerted it to his disability (*see Pimentel*, 29 AD3d at 148).

Plaintiff also claims osteopenia, a bone condition, which purportedly resulted in additional days' absence from work, as a disability. However, he admitted at his deposition, and acknowledges on appeal, that he did not tell anyone at the hospital that he suffered from osteopenia. Rather, he argues that defendant was at least aware that he had a vague and unspecified "amalgam of bone conditions." This argument does not create a triable issue as to discrimination, including failure to accommodate, on account of osteopenia or any other disability. To the extent plaintiff relies on a soft-tissue injury near his knees, the injury does not rise to the level of a cognizable disability under the City HRL (*see* Administrative Code of City of NY § 8-102[16]). The doctor from whom he sought treatment for the injury asked that plaintiff be excused from work for 10 days, after which he could return with "no restrictions."

The court correctly denied plaintiff's cross motion for summary judgment, since the disparate impact claim on which he moved was not pleaded in the complaint and was asserted for the first time in conclusory fashion in the motion (*Boureima v New York City Human Resources Admin.*, 128 AD3d 532, 533 [1st Dept 2015]).

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: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7120 The People of the State of New York, SCI 958/16
Respondent,

-against-

Luis Urena,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (James J. Wen 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 (Marc J. Whiten, J.), rendered June 21, 2016,

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: SEPTEMBER 25, 2018

CLERK

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

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7121 The People of the State of New York Ind. 810/94
Respondent,

-against-

Niki Shaljamin,
Defendant-Appellant.

_____

Law Office of Bernard V. Kleinman, PLLC, Somers (Bernard V. Kleinman of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Stephen M. Antignani, J.), entered on or about October 13, 2017, which denied defendant's Correction Law § 168-o(2) petition to modify his sex offender classification or terminate sex offender registration, unanimously affirmed, without costs.

We conclude that the order is appealable under the general principles relating to civil appeals contained in CPLR 5701(a), and that nothing in the Correction Law is to the contrary (*see People v Charles*, 162 AD3d 125, 133-140 [2d Dept 2018]).

However, we find that the court providently exercised its discretion in denying a modification of defendant's level two classification. Defendant failed to establish by clear and convincing evidence a basis for a modification (*see People v Lashway*, 25 NY3d 478 [2015]; *People v Lopez*, 154 AD3d 531 [1st

Dept 2017]). The mitigating factors cited by defendant, such as his law abiding life extending over a long period of time, do not outweigh the seriousness of the underlying crimes, and the letters of recommendation submitted on his behalf indicate that the writers were unfamiliar with these crimes and their seriousness. Furthermore, defendant did not submit any documentation showing that he had completed sex offender treatment, or any type of safety planning while he worked as a superintendent of a building, a position similar to the one he held at the time of the offenses.

We have considered and rejected defendant's procedural arguments concerning the manner in which the court made its determination. Defendant received an ample opportunity to be heard, and the matter was capable of being determined on the parties' submissions.

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7122-
7123 The People of the State of New York, Ind. 1133/12
Respondent, 1185/12

-against-

Derrick Gordon,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, Bronx County (Alvin Yearwod, J.), rendered July 27, 2016,

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

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

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

ENTERED: SEPTEMBER 25, 2018

CLERK

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

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7124 The People of the State of New York, Respondent, Ind. 3949/15

-against-

Mario Barrera, Defendant-Appellant.

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

_____

Judgment, Supreme Court, New York County (James Burke, J.), rendered March 16, 2016, 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: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7125 172 Van Duzer Realty Corp., Index 113137/09
Plaintiff-Appellant,

-against-

Globe Alumni Student Assistance Association, Inc., et al.,
Defendants,

- - - - -

878 Education, LLC,
Nonparty Respondent.

_____

Cox Padmore Skolnik & Shakarchy LLP, New York (Noah Potter of counsel), for appellant.

Martin Oliner, Lawrence, for respondent.

_____

Appeal from order, Supreme Court, New York County (Carol Edmead, J.), entered on or about April 6, 2017, which declined to sign an order to show cause, unanimously dismissed, without costs, as taken from a nonappealable paper.

"No appeal lies from an order declining to sign an order to show cause" (*Nova v Jerome Cluster 3, LLC*, 46 AD3d 292, 293 [1st Dept 2007]; *see also Naval v American Arbitration Assn.*, 83 AD3d

423 [1st Dept 2011]; *Heath v Wojtowicz*, 48 AD3d 214 [1st Dept 2008], *lv denied* 10 NY3d 708 [2008]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Kahn, Oing, JJ.

7126N 172 Van Duzer Realty Corp., Index 653767/13
Plaintiff-Appellant,

-against-

878 Education, LLC,
Defendant-Respondent,

Globe Institute of Technology, Inc., et al.,
Defendants.

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Cox Padmore Skolink & Shakarchy LLP, New York (Noah Potter of counsel), for appellant.

Martin Oliner, Lawrence, for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered October 6, 2017, which denied plaintiff's motion to consolidate three actions, unanimously affirmed, without costs.

It was a provident exercise of discretion for the court to deny the motion to consolidate, as there are insufficient common questions of law and fact presented (*see J. Henry Schroder Bank & Trust Co. v South Ferry Bldg. Co.*, 88 AD2d 570, 571 [1st Dept 1982] [citing CPLR 602]). The 2007 action, brought by a non-party to the other two actions, arises out of a loan default, with third-party contract claims between current and prior asset holders of the allegedly defaulting party. The 2009 action is a landlord-tenant action (*172 Van Duzer Realty Corp. v Globe Alumni Student Assistance Assn., Inc.*, 102 AD3d 543 [1st Dept 2013], *mod*

24 NY3d 528 [2014]), and in the 2013 action the landlord seeks to rescind the asset transfer agreement in furtherance of attempting to satisfy any judgment it may enter in the 2009 action (*172 Van Duzer Realty Corp. v 878 Educ., LLC*, 142 AD3d 814 [1st Dept 2016]). While the three actions share some common facts, individual issues predominate, making consolidation inappropriate (*see Bender v Underwood*, 93 AD2d 747 [1st Dept 1983]).

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

ENTERED: SEPTEMBER 25, 2018

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, P.J.
Sallie Manzanet-Daniels
Peter Tom
Angela M. Mazzarelli
Peter H. Moulton, JJ.

6867-6868
Index 101532/17
101651/17

Ind. 3160/17
SCID 30207/17
30222/17

_____x

In re The People of The State of New York
ex rel. Ronald P. Fischetti, etc.,
Petitioner-Appellant,

-against-

Cynthia Brann, etc.,
Respondent-Respondent,

Anyone Having Custody of Petitioner,
Respondent.

- - - - -

In re The People of The State of New York
ex rel. Ronald P. Fischetti, etc.,
Petitioner-Appellant,

-against-

Cynthia Brann, etc.,
Respondent-Respondent,

Anyone Having Custody of Petitioner,
Respondent.

_____x

Petitioner appeals from the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), entered on or about November 3, 2017, denying a writ of habeas corpus and dismissing the petition, and from the judgment of the same court (A. Kirke Bartley, Jr., J.), entered November 27, 2017, denying a subsequent application for a writ of habeas corpus and dismissing the petition.

Law Offices of Eric Franz, PLLC, New York (Eric Franz of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joel J. Seidemann and Armand Durastanti of counsel), for respondent.

TOM, J.

This appeal, concerning the denial of petitioner's two petitions for writs of habeas corpus, is the latest chapter in what began as a bitter custody battle that culminated in Family Court finding that petitioner Pamela Buchbinder, the defendant in this criminal matter, "masterminded a plot to murder [Dr. Michael Weiss] in order to gain control of the proceeds of [his] $1,500,000 life insurance policy, for which she was named the irrevocable trustee" and possibly custody of their child (*Matter of Michael Evan W. v Pamela Lyn B.*, 152 AD3d 414, 415 [1st Dept 2017], *lv denied* 30 NY3d 910 [2018]) Family Court granted the child's father - Weiss - custody of the parties' son, issued an order of protection against Buchbinder in favor of the child, and denied her supervised visitation with the child.

Buchbinder and Weiss, both psychiatrists by profession, and who were never married, had their only child in 2008. Weiss operated his medical practice out of his office-apartment in the Upper West Side of Manhattan. After the child was born, they continued to reside together until July 2009, at which point Buchbinder and the child moved to another apartment. Buchbinder closed her medical office after the attempted murder plot on Weiss.

In 2011, the parties commenced proceedings to determine

custody and visitation. On July 18, 2012, the parties entered into a so-ordered custody and visitation agreement. Pursuant to the 2012 custody agreement, the parties shared joint legal custody, with Buchbinder retaining residential custody, and Weiss having regular parenting time including one overnight each week and time every other weekend. The parties contemporaneously entered into a so-ordered stipulation regarding child support, which, inter alia, required the father to maintain a $1,500,000 life insurance policy naming the child as irrevocable beneficiary and Buchbinder as irrevocable trustee. The policy was subsequently purchased.

According to Weiss's testimony in Family Court, and at a later criminal trial (*see People v Nolan*, 159 AD3d 455 [1st Dept 2018]), on November 12, 2012, following his overnight visitation with the child, he dropped the child off at daycare and returned to his home office for a therapy session with a patient. Shortly after the appointment began, Jacob Nolan - Buchbinder's 20-year-old cousin - barged in unannounced carrying a duffel bag, and Weiss escorted him out.

After his appointment ended, Weiss spoke with Nolan, who was loitering in the stairwell. Nolan told him that he had come to pick up a hard copy of the child's financial aid documents for preschool. Once in the apartment, Nolan asked to use the

bathroom. Weiss asked Nolan to leave the duffel bag in the hallway because he was concerned that Nolan may have had equipment in the bag that he might use to "bug" the apartment at Buchbinder's request, as she had already made many recordings of their phone conversations.

While Weiss was retrieving the requested documents, Nolan emerged wielding a 10-pound sledgehammer, and struck Weiss in the shoulder as Weiss screamed for help. Nolan then dropped the sledgehammer, pulled out a knife and stabbed Weiss seven or eight times. Weiss was stabbed in the arms, legs, back, chest and abdomen. Weiss managed to wrestle the knife away and stabbed Nolan above the collarbone. He recognized that the knife was the same as one he purchased for Buchbinder when they were living together.

Nolan fled into the building's hallway while Weiss continued to call for help. Weiss, injured and bleeding, managed to crawl into the hallway where building staff, accompanied by responding police officers, discovered him. Nolan was also found in the hallway using his phone and "urgently" trying to get in touch with someone. As a result of the attack, Weiss suffered permanent scars on his arms, legs, back, and abdomen, which he showed to the jury at Nolan's criminal trial.

Nolan was arrested at the scene, and police recovered the

knife, sledgehammer and duffel bag, which contained cigarettes, plastic zip ties, a white plastic bag with a Home Depot logo on it, two pillows, and a map of Weiss's building with its two different entrances noted, with lines drawn to show how to get from one side of the lobby to the other, and the location of Weiss's apartment.

Surveillance video from the West 23rd Street Home Depot showed Nolan and Buchbinder inside the store on the night of November 11, 2012, purchasing the zip ties and sledgehammer, for which Buchbinder paid cash. An officer involved in the investigation testified that upon a search of Buchbinder's apartment, the knife recovered appeared to be missing from a set of similar knives. A handwriting expert also concluded that Buchbinder drew the map recovered from Nolan. Cell phone records showed that Buchbinder and Nolan exchanged calls on the day of the attack.

In the Family Court proceeding, the court found that Weiss had proved by a preponderance of the evidence that Buchbinder had conspired to kill him, that she therefore committed various family offenses against Weiss, and that such aggravating circumstances involved warranted a five year order of protection against Buchbinder in favor of Weiss and his son. Family Court also denied Buchbinder any visitation with the child, based on

the foregoing evidence and in light of Buchbinder's decision to invoke her Fifth Amendment right not to testify, from which the court took the strongest negative inference. This Court affirmed the Family Court's order (*see Michael Evan W.*, 152 AD3d at 414).

Following Nolan's criminal trial, a jury convicted him of attempted murder in the second degree, two counts of burglary in the first degree, and attempted assault in the first and second degrees, and he was sentenced to an aggregate prison term of nine and one-half years to be followed by five years of post-release supervision. This Court affirmed the judgment of conviction (159 AD3d at 455).

On September 19, 2017, Buchbinder was charged with attempted murder in the second degree, burglary in the first degree (two counts), and attempted assault in the second degree, based on the same incident. She was arrested in Fayetteville, New York, a suburb of Syracuse, on October 19, 2017.

On October 20, 2017, Buchbinder pleaded not guilty before Justice Thomas Farber, who had presided over Nolan's trial and sentencing. The People argued that no bail could guarantee petitioner's return to court. The People asserted that Buchbinder had resided at several Manhattan addresses over the years, but those were determined not to be current. While she had been a psychiatrist practicing in Manhattan, she had closed

her practice.

The People conceded that there were offers by counsel to surrender Buchbinder. However, the People noted that in attempting to locate her for the last three weeks, her phone was used in various locations in Massachusetts and Fayetteville, New York. The People added that when she was arrested, her passport, effective until November 2017, was found on her person, and she also possessed her child's recently expired passport.

The People contended that Buchbinder had a clear motive to kill Dr. Weiss, since she "hated" him "because of their relationship," and his death would give her exclusive control of the proceeds of the $1.5 million in life insurance.

The People submitted the hand-drawn map showing how to enter Weiss's building, which, as noted, was found in Nolan's bag. The People argued that Nolan was able to obtain access to the building by asking for "Bright Kids New York City," a commercial establishment located in the building which was also written on the map. The People remarked that if only Nolan had been competent at wielding a knife while swinging the 10-pound hammer he had purchased with Buchbinder, Buchbinder would have been charged with murder. The People also asserted that Nolan had no motive to harm Dr. Weiss, other than to satisfy Buchbinder.

Moreover, the People argued that Buchbinder's "character" as

the person posting bail was a relevant factor. In addition to the alleged attempted murder, the People relied on this Court's other findings in the Family Court case that "testimony demonstrated that [petitioner] sought to alienate the child from the father, falsely claiming that the father was trying to put her in jail, and pressing the child for personal details about the father's life" (*see Michael Evan W.*, 152 AD3d at 415).

Buchbinder's counsel argued that he had met with four ADAs and said he would produce his client to the police. Counsel stated that there was not even a "gesture" at accepting this offer; instead, the police, using phone records, found out that she was staying with friends and arrested her in the Syracuse area. Counsel also noted that petitioner had offered a $1 million bond, to be secured by her mother's home in Florida, which had $1.6 million in equity.

Counsel also argued that petitioner's passport did not establish a flight risk, since she had not traveled out of the country in the past five years and made no attempts to flee after the incident. Regarding Buchbinder's character as the person posting bail, counsel noted that she had no prior convictions, had never missed a court date, and had never violated the order of protection requiring her to stay away from her child or otherwise been held in contempt of court.

In addition, counsel remarked that no efforts were made to revoke her license as a psychiatrist, allowing her to prescribe "narcotics." Instead, she was compelled to close her practice because of negative publicity arising from Nolan's trial.

Counsel further argued that it would be unfair to remand her based on evidence from Nolan's trial and the Family Court proceeding, since she had no opportunity to tell her story in Nolan's trial, and pleaded the Fifth in Family Court on the advice of counsel.

The bail court denied petitioner's bail application, holding that any bail in this case would be inappropriate. The court stated:

> "I did try ... the case of [Jacob] Nolan. So, I am intimately familiar with the factors alleged by the People. I also realize, as [Buchbinder's counsel] said, that in the case that was tried against Mr. Nolan, not to any fault of the People's, Mr. Nolan's lawyers took the position that he had been manipulated by [petitioner].
>
> "So, ... I have not heard [petitioner]'s side of the story. I'm not obviously commenting on the presumption of innocence. Of course, she's presumed innocent.
>
> "This is in essence a murder case. It is only ... by dumb luck in this case that Mr. Weiss survived. He was stabbed within an inch of his life, brutally attacked with a sledge hammer. There may well be an explanation for this, but [petitioner] is on video ... buying ... the sledge hammer."

On or about October 30, 2017, Buchbinder sought a writ of

habeas corpus, arguing, among other things, that her offers to turn herself in to the police had been ignored or rebuffed. She argued that her residences outside Manhattan did not set her apart from many other ordinary New Yorkers; and that she had possessed her child's expired passport, which would not have assisted her flight, merely for the sentimental value of her child's photo after losing custody. She stressed that she was a medical doctor in New York with no criminal record.

The People responded that, in addition to the foregoing allegations, Detective Kevin Buehler had visited some of Buchbinder's addresses obtained through a computer check, including 450 West 17th Street, 500 West 30th Street, 177 Prince Street, and 26 West 9th Street, and determined that she did not reside at any of them. Buchbinder was subsequently believed to live in Cambridge, Massachusetts.

When Buchbinder was arrested, she told Detective Buehler that she lived at 26 West 9th Street in Manhattan, but when Buehler said he had found otherwise upon visiting that address, she said that she lived at 41 West 19th Street.

The habeas court denied the application on or about November 3, 2017. The court noted that Justice Farber was very familiar with the *Nolan* case, having presided over the trial recently in 2016. The court noted that the People established their case

beyond a reasonable doubt by presenting detailed evidence including the video, the sledgehammer, the map, and the motive. As to Buchbinder's character, the court cited this Court's findings in the Family Court case.

In addition, the habeas court stated that Buchbinder was not working since her psychiatric practice had closed, yet she was able to post $1 million secured by $1.6 million of real estate since she was from a wealthy family and her mother was willing to offer her Florida home as security. The habeas court noted that Buchbinder's multiple addresses were not current, and she was arrested in a suburb of Syracuse. As to the likelihood that Buchbinder would flee, the court noted that she possessed a valid passport and her child's expired passport.

The court also pointed out that the bail court "was aware she had no priors, and even though it may not have been totally accurate, ... was told ... that she had never missed a date in the Family Court proceeding."

The habeas court concluded that Judge Farber based on the evidence presented did not abuse his discretion in deciding that no amount of bail would secure the presence of petitioner for trial.

Thereafter, by letter dated November 13, 2017, petitioner sought to reargue bail by offering new conditions, namely a $1.5

million bond and electronic monitoring with real-time GPS tracking of all [her] movements.

At a November 14, 2017 conference, Justice Farber stated:

> "Quite frankly, at this point I'm not going to reconsider bail. I may at a future date after I read the Grand Jury minutes, after I consider everything else, but at this stage, I just made my ruling on the application. Nothing in this letter, including an increased bail package and the additional monitoring[,] changes my view of it. My view of it, at this point, is that this is, in essence, a homicide case and that there's really no amount of bail that would be sufficient to prevent somebody in Ms. Buchbinder's situation from fleeing."

Counsel advised the court of a note by Nolan, handwritten within 24 hours after the incident, stating that Buchbinder had "nothing to do with this," but the court responded that there were other statements from him that implicated her. The court explained:

> "Look, I tried the first case, and I don't want to say anything that's going to let anybody think that I've prejudged the case, but I'm very familiar with the evidence in the case. Things have a way of changing over the course of a case. If I view the case differently at some later point, I will reconsider bail and let you know. ... But at this stage, that does not make any difference to me."

The People then noted, as to the flight risk, that Buchbinder had not only her passport but also her birth certificate on her when she was arrested in Fayetteville, which is about a two-hour drive from Canada. The People also clarified that Buchbinder had failed to appear in court five times in a

child support proceeding.

On or about November 21, 2017, counsel filed a second petition for a writ of habeas corpus, arguing that Justice Farber improperly declined to reconsider the request for bail on November 14, even after Buchbinder proposed more stringent conditions including electronic ankle-bracelet monitoring with real-time GPS tracking of all her movements, at her own expense, as well as a $1.5 million bond fully secured by her mother's Florida home, in contrast with her previous offer of a $1 bond with no electronic monitoring.

The habeas court denied the second habeas application on November 27, 2017. In this regard, the court stated that Judge Farber's ruling on November 14th was not a de novo bail determination but rather, a denial of petitioner's application to reargue a bail application. Further, the court found that petitioner's offer of a larger bail package with Nolan's note did not constitute an actual change in circumstance and concluded that Judge Farber did not abuse his discretion to not revisit bail.

Finally, the court said:

> "Judge Farber[']s] ... discussion of flight on November 14th was with respect to the discrete issue of whether there was evidence that the petitioner had been attempting to or was planning to flee. He stated ... that his

> prior remand determination was not based on allegations of actual flight but rather, the other factors as referenced in CPL 510.30."

On appeal, Buchbinder contends that her two habeas applications should have been granted, since the bail court abused its discretion in denying her applications for bail. We find that the habeas court in each proceeding properly found that the bail court did not abuse its discretion in denying bail pending trial.

It is well established that "[t]he action of the bail-fixing court is nonappealable, but may be reviewed in a habeas corpus proceeding if it appears that the constitutional or statutory standards inhibiting excessive bail or the arbitrary refusal of bail are violated" (*People ex rel. Rosenthal v Wolfson*, 48 NY2d 230, 232 [1979] [internal quotation marks omitted]). Further, "the function of the habeas corpus court is one of collateral review of the determination of the nisi prius court; it is a second stage re-examination. The habeas corpus court is not to examine the bail question afresh or to make a de novo determination of bail" (*id.* [internal quotation marks omitted]).

Thus, "the habeas court['s review] must of necessity be limited to consideration of the propriety of [the bail court's] determination in the light of the record on which it was made" (*id.* at 232-233). In other words, "[t]he scope of inquiry is

whether or not the bail court abused its discretion by denying bail without reason or for reasons insufficient in law" (*People ex rel. Kuby v Merritt*, 96 AD3d 607, 608 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012]; see *People ex rel. Hunt v Warden of Rikers Is. Correctional Facility*, 161 AD2d 475 [1990], *lv denied* 76 NY2d 703 [1990]). And, where the record shows that the bail court considered the factors enumerated in CPL 510.30(2)(a) and the "denial is supported by the record, it is an exercise of discretion resting on a rational basis and thus beyond correction in habeas corpus" (*People ex rel. Parker v Hasenauer*, 62 NY2d 777, 778-779 [1984]).

In fixing bail, "the court must consider the kind and degree of control or restriction that is necessary to secure [the defendant's] court attendance when required" (CPL 510.30[2][a]). That determination should be "informed by," among other things, the "defendant's character and reputation, employment and financial resources, family ties and length of residence in the community, prior criminal record[,] attendance record in prior proceedings" (*Matter of Restaino*, 10 NY3d 577, 583 n 3 [2008]), likelihood of conviction (*see* CPL 510.30[2][a][viii]), and potential sentencing exposure (*see* CPL 510.30[2][a][ix]).

Applying those principles, we find that the habeas court in the first proceeding correctly found that Justice Farber did not

abuse his discretion in denying petitioner's initial bail application. The denial of bail was amply supported by the seriousness of the charges including attempted murder, the potential sentence of at least 5 years and up to 25 years in prison for the class B violent felonies of attempted murder in the second degree or first-degree burglary (*see* Penal Law §§70.02[1][a], [3][a], 110.10, 125.25, 140.30), as well as the strength of the evidence. Notably, Justice Farber had just presided over Nolan's trial for carrying out the plot allegedly orchestrated by petitioner (*see People ex rel. Kirshbaum v Schriro*, 100 AD3d 571, 571 [1st Dept 2012] [bail court providently exercised its discretion in denying bail pending second trial, having presided over first trial, "at which defendant was convicted of serious charges"]).

To the extent Buchbinder argues that the court improperly focused on the seriousness of the charges and the sentencing exposure to the exclusion of other factors, the court's failure to explicitly address each statutory factor or every specific argument raised by the parties on the record does not establish that the court abused its discretion. The court implicitly based its ruling on all of the parties' arguments (*see id.*).

In addition, the bail court's ruling was supported by circumstances demonstrating a serious flight risk. In

particular, Buchbinder no longer had any significant ties to New York City and had closed her psychiatric practice here. She had apparently been living in various places in Massachusetts and New York, and was arrested in Fayetteville, a suburb of Syracuse about a two-hour drive away from the Canadian border. It was reasonable to conclude that offering to secure her bond with her mother's home in Florida would not prevent Buchbinder, who is now 48 years old, from fleeing the country while facing charges that could lead to a 25-year prison sentence, potentially resulting in her incarceration well into her 70s.

Buchbinder argues that she had not fled the country in the years between the offense and her arrest, which was close to the expiration of the five-year statute of limitations for attempted murder (*see* CPL 30.10[2][b]), and that her counsel offered to arrange for petitioner to turn herself in to the police. Counsel argued to the bail court that the authorities irrationally wasted taxpayers' money by continuing to surveil her after her attorney had made this offer. However, the authorities presumably had good reason to be skeptical of whether Buchbinder, who had allegedly tried to kill her child's father, would actually cooperate or would flee as soon as she received word that the authorities had accepted her offer and planned to arrest her soon.

Buchbinder asserts that the denial of bail contradicted Justice Farber's own finding that she did not pose a flight risk. However, this is based on a misreading of the record. Justice Farber's statement that he had not "seen compelling evidence [petitioner] was actually intending to flee," which "was not part of [his] decision," did indicate that he was not entirely convinced of the People's argument that petitioner was carrying a passport in the Syracuse area because she planned an imminent flight to Canada. But, Justice Farber's conclusion that no bail would be "sufficient to prevent somebody in Ms. Buchbinder's situation from fleeing" demonstrates that Justice Farber had more broadly found a high risk of flight in light of all the circumstances discussed above.

Buchbinder attempts to downplay the seriousness of the crime by noting that the victim stayed overnight in a hospital for only one night, and argues that this shows that there was no intent to kill. However, we find this argument unavailing. Buchbinder also contends that Nolan was convicted based on direct evidence of his attack against Dr. Weiss, which does not show that there is strong evidence of petitioner's guilt. However, this ignores the circumstantial evidence that Nolan carried out the attack at the behest of Buchbinder, who had a strong motive based on Weiss's life insurance policy and her desire for custody of their

child. This evidence includes, as this Court found prior to any of the decisions at issue here, surveillance footage of Buchbinder and Nolan buying the sledgehammer Nolan used to attack Weiss, that the knife wielded by Nolan came from Buchbinder's apartment, that she and Nolan spoke on the day of the incident, and that the hand-drawn map found in Nolan's bag was found to be in Buchbinder's handwriting (*see Michael Evan W.*, 152 AD3d at 415).

Buchbinder separately notes that Nolan was convicted based on his confession, which implicated her but which could not be admitted against her without violating her confrontation rights (*see Bruton v United States*, 391 US 123 [1968]). However, Justice Farber emphasized that Buchbinder was presumed innocent, and that he had not yet heard her case. Thus, the bail court did not improperly hold Nolan's guilt against Buchbinder without regard to the potential for different evidence to be presented at or precluded from her trial.

We also find that the habeas court in the second proceeding properly found that Justice Farber did not abuse his discretion in denying the application to reargue bail on new conditions. The habeas court properly found that insofar as Justice Farber denied the renewed bail application on the merits rather than as procedurally barred by the prior denial of bail, Justice Farber

properly exercised his discretion.

Contrary to Buchbinder's contention, she was not entitled to have the court accept her renewed bail offer simply because she agreed to enhanced security measures and to put up more money. In *People ex. rel. Kuby v Merritt (*96 AD3d 607 [1st Dept 2012], *lv denied* 19 NY3d 813 [2012], supra), we found that the habeas court properly found the bail court did not abuse its discretion when it denied a renewed bail application which proposed a significant cash bond and electronic monitoring.

Specifically, in *Kuby* the defendant Gigi Jordan was charged with second-degree murder based on her suicide note stating that she had killed her eight-year-old son in order to protect the child from his abusive father. After Jordan's initial offer of a $5 million bond was denied, she proposed an enhanced security package in which the bond would be fully secured by her New York City properties. In addition, her approximately $40 million in assets would be frozen, "she would be confined to her Manhattan brownstone and monitored round the clock by on-premises armed security guards and an electronic G.P.S. system, at her own expense," and she would be required to continue psychiatric treatment (*id.* at 608). In affirming the denial of Jordan's habeas application challenging the denial of her renewed bail offer, this Court noted that while petitioner was an

"accomplished" and wealthy person, she had, as in this case, "moved around repeatedly" (*id.* at 610). As is relevant here, this Court also held:

> "Petitioner's position, if accepted, would mandate that bail be granted in every case in which the accused has the financial resources to offer private security and monitoring, thereby depriving the court of its discretion to grant or deny bail on consideration of the factors enumerated in CPL 510.30(2)(a). While petitioner claims that her security package is foolproof and trumps all other factors, the fact remains that no ad hoc arrangement based on keeping a defendant in her private home under the watch of a security firm that she hired could be as secure as remand" (*id.* at 610).

As in *Kuby*, the bail court here providently exercised its discretion in adhering to its remand decision notwithstanding the offer of ankle bracelet monitoring and additional money. Indeed, here the record supports the bail court's rational finding that the seriousness of the charges, the likelihood of conviction and lengthy sentence, and the risk of flight, as well as financial resources that could be used to facilitate flight, militated against setting bail, and outweigh the security package offered by Buchbinder.

In sum, both denials of bail were based on a proper consideration of the statutory factors relevant to determining "the kind and degree of control or restriction ... necessary to

secure [petitioner's] court attendance when required" (CPL 510.30[2][a]), and there was no abuse of discretion by the bail court.

Accordingly, the judgment of the Supreme Court, New York County (Roger S. Hayes, J.), entered on or about November 3, 2017, denying a writ of habeas corpus and dismissing the petition, and the judgment of the same court (A. Kirke Bartley, Jr., J.), entered November 27, 2017, denying a subsequent application for a writ of habeas corpus and dismissing the petition, should be affirmed, without costs.

All concur.

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), entered on or about November 3, 2017, and judgment, same court (A. Kirke Bartley, Jr., J.), entered November 27, 2017, affirmed, without costs.

Opinion by Tom, J. All concur.

Acosta, P.J., Manzanet-Daniels, Tom, Mazzarelli, Moulton, JJ.

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

ENTERED: SEPTEMBER 25, 2018

CLERK