

and sanctions, and otherwise affirmed, without costs.

Causes of action for conversion, replevin, and intentional infliction of emotional distress are stated by plaintiff's allegations that defendant Pecile stole personal and revealing photographs of plaintiff taken by her husband and that she subsequently refused to return the photographs unless the nonparty husband and his company paid \$2.5 million to settle sexual harassment and retaliation claims filed with the EEOC by Pecile and her coworker, defendant Culicea.

The complaint was correctly dismissed as against Culicea, as to whom it alleges in a wholly conclusory fashion that she aided and abetted Pecile's tortious conduct. Moreover, there are no allegations that Culicea ever possessed the photographs or participated in the decision not to return them, and the attorney's letter to plaintiff's husband threatening to disseminate the photographs was written on behalf of Pecile only.

The allegations against the law firm and the individual attorney defendant also were correctly dismissed. The complaint contains, at most, wholly conclusory allegations that defendant Wigdor, the attorney for the other individual defendants, knew to be true what plaintiff's husband alleges to be true, that Pecile had stolen one of the two compact discs containing photographs of

plaintiff after improperly viewing the contents of the discs. Regardless of how implausible Pecile's claim that she retained one of the discs inadvertently may be, at most the complaint implicitly alleges that Wigdor knew that Pecile's claim was false and that she in fact had stolen them, as plaintiff's husband claims. But any such implicit allegation is wholly conclusory.

Moreover, there is no allegation that Wigdor played the slightest role in any of the actions Pecile took to obtain possession of the discs and photographs in the first place. Of course, Wigdor knew that Pecile had no right to possess the photographs and, as is undisputed, he refused the demand of plaintiff's husband that they be returned immediately. Rather, Wigdor stated that he could not return the photographs because they were evidence of the alleged unlawful conduct of plaintiff's husband, as they indeed are if, as Pecile maintains, he committed the alleged conduct. About two months after the demand was refused, Wigdor turned the photographs over to a third party; he contends that neither he nor his firm ever had possession of the compact disc.

We need not determine whether Wigdor wrongly refused the unconditional demand for the immediate return of the photographs. Even if he should have acceded to the demand, the allegations in

the complaint provide no basis for depriving him of immunity from liability "under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith" (*Purvi Enter., LLC v City of New York*, 62 AD3d 508, 509-510 [2009] [internal quotation marks & citation omitted]). To the extent the complaint alleges fraud, collusion, malice or bad faith on the part of Wigdor, the allegations are wholly conclusory. If the shield does not deflect these allegations, it is so flimsy as to be of little use.

Although we affirm the dismissal of the complaint as against the attorney defendants, we find that the imposition of costs and sanctions for the assertion of those claims is unwarranted.

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

ENTERED: MAY 24, 2011

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that the police entered the apartment and found contraband only after obtaining the voluntary consent of the apartment's tenant (see *People v Gonzalez*, 39 NY2d 122, 128-131 [1976]). The officer, who was responding to a 911 call that had been placed from the apartment but that the tenant denied making, expressly requested permission to look through the apartment to see if anyone else was present. There was no evidence of coercion, and the police acted within the scope of the consent when they then entered a bedroom and found drug paraphernalia in plain view (see *People v McClain*, 61 AD3d 416 [2009], *lv denied* 13 NY3d 747 [2009]).

Regardless of consent, we also find that the credible evidence establishes that the search which led to the discovery of the drugs was the result of proper police work necessitated by exigent circumstances. At the suppression hearing Officer Gregory Encarnacion testified that he and his partner, Officer Fillette, received a radio run of a 911 call for help coming from the subject apartment. The nature of the radio run was vague, as the caller had not said anything, but had merely called and hung up after around 20 seconds of silence. According to Encarnacion, such calls could be a harbinger of "anything," and were to be treated "very seriously."

The two officers went to the apartment, knocked, and announced themselves as police. When no one answered, the officers knocked again, but still no one answered.

Since they had not received any answer at the door, Encarnacion decided to go outside to see whether he could see into the apartment from the window. As he went outside, he saw someone running from the direction of the apartment window. Encarnacion went back to the apartment and reported to Officer Fillette what he had seen. He then knocked on the door again, this time "with a little more emphasis." A man, later identified as Paul J., defendant's uncle, opened the door and let the officers into the apartment at Encarnacion's request. Encarnacion described J. as approximately 60 years old and seeming "pretty frail" and "sick." The officers went into the living room and saw Evelyn J., Mr. J.'s sister and defendant's aunt, who was also around 60 years old and wheelchair-bound.

Encarnacion asked Ms. J. whether everyone in the apartment was all right, and she said that everything was fine. She also said that neither she nor Mr. J. had called 911. Encarnacion then radioed police dispatch, asking them to call back the number from which the 911 call had come, and the land line phone rang inside the apartment, with the dispatcher on the other end.

Encarnacion then told Ms. J. that the call had come from the apartment, and asked whether he could look through the apartment, saying, in effect, "This is the type of job I have. I have to make sure that everyone is all right in the apartment and that there isn't anybody else in the apartment." Encarnacion testified that he wanted to check the apartment because "it is not uncommon that things are going on in the apartment that people don't want us to know." According to Encarnacion, Ms. Jones consented to allow the officers to proceed through the apartment.

Encarnacion went to look through each individual room to make sure no one was there, looking inside the rooms and behind the doors. Eventually, Encarnacion reached a bedroom and noticed, on a dresser across from the door, a scale with white residue and some baking soda. Upon seeing these items, which "drew his attention," Encarnacion proceeded further into the room, and saw an open cigar box with a plate, box cutter, empty "baggies," a folded calling card, a strainer, and what he believed to be a large rock of crack cocaine.

Encarnacion also saw that the bedroom appeared to belong to a teenager, as it contained a PlayStation system, a book bag, school books, handwritten pages of homework, and a stack of

sneaker boxes. The room's window was closed, but the window guard had been opened, and there was a drop of about five or six feet to the ground. Defendant's jacket, which he later identified as his, was on the bed.

As Encarnacion was calling his supervisor, defendant entered the apartment, wearing a white t-shirt and dark jeans, with a cut on his arm. According to Encarnacion, defendant was acting "extremely nervous," and wearing only the t-shirt even though the weather was cold that day. Encarnacion asked defendant where he was coming from, and defendant replied that he was coming from the fifth floor, where he had been visiting a friend. When Encarnacion asked for his friend's name, defendant responded, "Well, we were in the staircase." Encarnacion again asked where the friend lived, and defendant repeated, "We were up on the fifth floor. We were up in the staircase."

The officers then asked Ms. J. who occupied the room where the narcotics were found, and she replied that it was her room. Encarnacion responded that in fact, it looked "like a kid's room," and asked what the baking soda and scale were for. Ms. J. replied that she had the baking soda in her room because sometimes defendant "got it and thr[ew] it around," and that she had the scale because she had to weigh her medication. According

to Encarnacion, the officers did not believe her, and told her so. Encarnacion said that he could bring Ms. J. down to the station, "possibly" raising his voice as he said so. Ms. J. then stated that the room was, in fact, defendant's. The officers then took defendant into custody.

To justify a search under the exigent circumstances or "emergency" doctrine, the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; the search must not be primarily motivated by intent to arrest and seize evidence; and there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched (*People v Dallas*, 8 NY3d 890, 891 [2007], quoting *People v Mitchell*, 39 NY2d 173, 177-78 [1976], cert denied 426 US 953 [1976]).

In this case, the police were sent to the apartment as a result of a 911 call which was traced to the apartment; yet, the two apparently feeble occupants denied making the call. The caller had hung up without leaving a message. Additionally, an individual had been observed running from the apartment, and no one had responded to the officers' initial requests to enter. In light of these five factors, which the concurrence mostly

ignores, we do not suggest by any means that exigent circumstances existed merely because Ms. J. denied that she or Mr. J. had called 911. Indeed, an emergency doctrine analysis is based on "the totality of the information available to the police" at the relevant time (see *People v Stergiou*, 279 AD2d 387, 387 [2001], *lv denied* 96 NY2d 835 [2001]). Moreover, "[t]he touchstone of the Fourth Amendment is reasonableness" (*People v Molnar*, 98 NY2d 328, 331 [2002] [citation omitted]).

In that vein, the police clearly had reasonable grounds to want to search the apartment further. As the officer testified, "anything" could be amiss. It was not beyond the realm of possibility that there were other individuals in the apartment, and that someone might even be held hostage in one of the other rooms. For a police officer not to exercise good judgment and inspect the rest of the apartment would be tantamount to dereliction of duty. If the officers had left the apartment, and it was subsequently discovered that a crime was being committed, including possibly one involving physical harm to the occupants, the officers would have been hard pressed to defend their actions.

In *People v Paez* (202 AD2d 239 [1994], *lv denied* 84 NY2d 871 [1994]), police responded to a report of a domestic dispute.

They "were told by the man who answered the door that everything was alright [sic], but then, after asking whether the 'lady of the house' was home, were invited into the apartment and pointed toward the bedroom where the only woman present was standing in the doorway." This Court determined that "despite the assurances of the man who answered the door, the police were justified in entering the bedroom to speak to this woman and determine whether she was safe" (*id.*).

Considering the factors enumerated above, the police here, like the police in *Paez*, were justified in putting little credence in the J.s' denials that they had made the call, or their representations that nothing was amiss. The police had reasonable grounds to believe that there was an emergency that might implicate the need to prevent physical injury, the search was certainly not motivated by an intent to arrest or seize evidence, and there was a justifiable reason to search the rest of the apartment.

Ultimately, and thankfully, no one's safety was at risk. Nevertheless, the knowledge gained from hindsight is not available to the officer involved in a developing situation, and cannot be used to determine whether exigent circumstances exist. Only the contemporaneous facts known at the time to the officer

can be considered in evaluating the propriety of his or her conduct.

Defendant failed to preserve his contention that the incriminating character of the paraphernalia was not immediately apparent to the officer, and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

All concur except Mazzairelli, J.P. and Manzanet-Daniels, J. who concur in part in a separate memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (concurring in part)

I agree with the majority that the court properly denied the suppression motion, given evidence that the apartment's tenant consented to the search. There is thus no reason to reach the question of whether exigent circumstances justified the search. It is a basic precept of appellate jurisprudence that we refrain from addressing issues unnecessary to the disposition of the case. To the extent the majority suggests that the mere denial of having made a 911 call constitutes exigent circumstances, I must vehemently disagree. The majority's opinion today creates unnecessary confusion and can only further muddy the waters on the issue of what constitutes exigent circumstances.

Under the exigent circumstances or "emergency" doctrine, the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property; the search must not be primarily motivated by intent to arrest and seize evidence; and there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched (*People v Dallas*, 8 NY3d 890, 891 [2007], quoting *People v Mitchell*, 39 NY2d 173, 177-78 [1976], cert denied 426 US 953 [1976]). No such emergency existed in this case. Both Paul and

Evelyn J. stated that no one had called 911, and there was nothing evidently amiss in the apartment. Indeed, the factual situation presented here differs markedly from other cases in which exigent circumstances existed. For example, in *People v McBride* (59 AD3d 151 [2009], *affd* 14 NY3d 440 [2010], *cert denied* ___ US ___, 131 S Ct 327 [2010]), detectives, who admittedly had probable cause to arrest the defendant for an armed robbery, went to his apartment, climbed the fire escape, and saw him lying face down on a bedroom floor. Other detectives at the apartment's door were then "greeted by a distraught and hyperventilating young woman who was unable to respond to their inquiries as to what was going on and whether she was all right" (*id.* at 152). This Court concluded that the warrantless entry was justified by exigent circumstances, emphasizing the violent nature of the underlying offense, the knowledge of the police that defendant was in the apartment and their reasonable belief that he was armed, and the demeanor of the woman, suggesting a "dangerous and volatile situation" (*id.*). Similarly, in *People v Paulino* (216 AD2d 238 [1995], *lv denied* 87 NY2d 849 [1995]), "police heard 'loud screams' emanating from an apartment on the floor of a building where an elderly woman on the street had indicated there

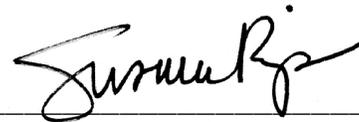
was a 'problem.'" In *People v Paez* (202 AD2d 239 [1994], *lv denied* 84 NY2d 871 [1994]), the police, who had responded to a report of a domestic dispute, were told by the man who answered the door that everything was all right, but then, after asking whether the "lady of the house" was home, were invited into the apartment and directed toward the bedroom where the only woman present was standing in the doorway (*id.*). This Court determined that "despite the assurances of the man who answered the door, the police were justified in entering the bedroom to speak to this woman and determine whether she was safe" (*id.*).

Here, by contrast, no facts presented could have given officers any concern that anyone was in danger, as there were no obvious disturbances or noises in the apartment, nor was there any report of a domestic dispute. Nor, as in *Paez*, was there any indication that anyone other than Paul and Evelyn J. was in the apartment. Once officers arrived at the apartment and questioned

the occupants, there did not appear to be any circumstance posing an imminent threat to anyone in the apartment (see *People v Christianson*, 57 AD3d 1385, 1387 [2008]).

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

ENTERED: MAY 24, 2011

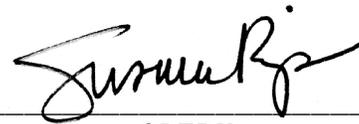
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defect in the vicinity of where plaintiff fell. Disputes as to whether the location and nature of the defect are sufficiently portrayed so as to bring the condition to the municipality's attention involve factual questions appropriately resolved at trial (see *Reyes v City of New York*, 63 AD3d 615, 615 [2009], *lv denied* 13 NY3d 710 [2009]; *Almadotter v City of New York*, 15 AD3d 426, 427 [2005]).

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Sweeny, J.P., Moskowitz, Renwick, DeGrasse, Román, JJ.

3875 Sergio Torres, etc., Index 350521/08
Plaintiff,

Nieves Torres, etc.,
Plaintiff-Respondent,

-against-

June H. Dwyer, et al.,
Defendants-Appellants.

Kaplan, Hanson, McCarthy, Adams Finder & Fishbein, Yonkers
(Jeffrey A. Domoto of counsel), for appellants.

Jaroslawicz & Jaros LLC, New York (David Tolchin of counsel), for
respondent.

Order, Supreme Court, Bronx County (Edgar G. Walker, J.),
entered April 7, 2010, which denied defendants' motion for
summary judgment dismissing the complaint of Nieves Torres
individually and on behalf of Steven Torres, unanimously
reversed, on the law, without costs, the motion granted, and that
portion of the complaint dismissed.

Defendants' submissions, including the affirmation of their
neurologist and the excerpt from the deposition transcript of
Nieves Torres, met their prima facie burden of showing that
Steven Torres did not suffer a "serious injury" under Insurance
Law § 5102(d) (see *Farrington v Go On Time Car Serv.*, 76 AD3d 818

[2010]). The evidence submitted by Nieves in opposition to the motion did not raise a triable issue of fact as to whether Steven had suffered a fracture or permanent injury. This plaintiff never made any allegation of a lost tooth, or loosened teeth, in any of the bills of particulars, and indeed made no argument relating to fracture or permanent injury below, instead focusing exclusively on a 90/180 day claim. As such, the claim that damage to Steven's teeth constituted serious injury was not cognizable by the court (*see Glover v Capres Contr. Corp.*, 61 AD3d 549 [2009]; *Marte v New York City Tr. Auth.*, 59 AD3d 398, 399 [2009]). In any event, an injury to a tooth can only meet the statutory threshold of "serious" where it requires dental treatment (*see Newman v Datta*, 72 AD3d 537 [2010]; *Sanchez v Romano*, 292 AD2d 202 [2002]). Here, the tooth knocked out of Steven's mouth was deciduous, replaced in time by an adult tooth, and there is no evidence he required or received any further treatment for that injury. Likewise, there is no evidence that the other two teeth loosened in the accident were fractured, and review of the record reveals no causal link between those teeth and the dental implants Steven later apparently received.

Nieves contends that the restrictions on Steven's participation in sports and after-school activities, and his need

for more time to do his homework due to his post-accident headaches, raise an issue of fact on his 90/180 day claim. However, attendance at school encompasses most of a school-age child's usual and customary activities (see *Lashway v Groshans*, 241 AD2d 832, 834 [1997]). Steven missed only one week of school during the relevant period, and although his ability to concentrate may have been affected, there is no evidence that his academic performance was negatively impacted (*id.*). His headaches thus did not prevent him from performing "substantially all" of his usual activities, as required by the statute (see *Jones v Norwich City School Dist.*, 283 AD2d 809, 812 [2001]).

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term of Bronx Supreme Court. After hearing that the prosecutor was offering "240.37, conditional discharge," defense counsel, after an off-the record discussion, advised the court that "we have a disposition." Defendant then allocuted as follows:

"The Court: Ms. Vickers, your attorney tells me that you wish to plead guilty to section 240.37, is that what you wish to do?

"The Defendant: Yes, sir.

"The Court: Is anyone forcing you to plead guilty?

"The Defendant: No.

"The Court: Are you pleading guilty because you are guilty?

"The Defendant: Yes.

"The Court: Plea acceptable to the People?

"Mr. Dolan: Yes, Your Honor.

"The Court: Waive prosecution by information?

"Mr. Sturman: Yes, Your Honor.

"The Court: Sentence of the Court is a conditional discharge, judgment entered as to mandatory surcharges. Advise your client of her right to appeal."

Defendant now argues that the plea should be vacated since she was never informed of any of her rights under *Boykin v Alabama* (395 US 238 [1969]). We agree.

A trial court has the constitutional duty to ensure that a defendant, before pleading guilty, "has a full understanding of

what the plea connotes and of its consequences" (*Boykin* at 244; see *People v Harris*, 61 NY2d 9, 19 [1983]). Although the court is not required to engage in any particular litany when allocuting the defendant, due process requires that the record must be clear that "the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant" (*North Carolina v Alford*, 400 US 25, 31 [1970]; see *People v Moissett*, 76 NY2d 909, 910-911 [1990]). Thus, the court should conduct an allocution that is adequate to ensure that the defendant is guilty of the crime charged and understands the constitutional rights he or she would be waiving by pleading guilty (*People v Harris*, 61 NY2d at 17; *People v Nixon*, 21 NY2d 338 [1967], cert denied 393 US 1067 [1969]). While the court need not "thoroughly advise[]" the defendant of the rights being waived (*People v Paris*, 305 AD2d 334, 334 [2003], lv denied 100 NY2d 597 [2003]), no waiver of these constitutional rights may be presumed from a silent record (*Boykin* at 242-243). Among the factors to be considered in determining whether a defendant understands the nature of his or her proffered guilty plea are the "age, experience and background of the accused" (*People v Seaberg*, 74 NY2d 1, 11 [1989]).

Here, the New York City Criminal Justice Agency Report

states that defendant was 20 years old and that this was her first arrest. The New York State Division of Criminal Justice Services report lists only the subject arrest and states that a fingerprint search shows no available prior information for defendant. The abbreviated plea allocution is utterly bereft of any indication that this inexperienced defendant was made aware of the constitutional rights she was giving up as a result of her misdemeanor guilty plea by the court or through consultation with counsel. The allocution consisted, in its entirety, of the court asking defendant whether she wanted to plead guilty, whether she was being forced to plead guilty, and whether she was guilty. Thus, the record fails to establish that defendant knowingly, intelligently and voluntarily entered her plea (*see People v Harris*, 61 NY2d at 18; *People v Aleman*, 43 AD3d 756, 757 [2007]; *People v Artusa*, 19 Misc3d 145[A], 2008 NY Slip Op 51125[u] [App Term, 2d Dept 2008]).

Moreover, it can not be determined on this record whether defendant knew exactly what she was pleading guilty to. The plea minutes mention Penal Law § 240.37, but do not describe the crime or specify whether defendant was pleading guilty under subsection (2) or (3). Further, a conviction for loitering for the purpose of engaging in a prostitution under Penal Law § 240.37(2) may be

a violation, if it is the defendant's first offense, or a class B misdemeanor, if the defendant has previously been convicted of a violation of that section or of sections 230.00 or 230.05 of the Penal Law. Although defendant was purportedly convicted of the offense as a class B misdemeanor, there is no indication that she was ever made aware of this distinction. Indeed, if this was defendant's first offense, as it appears to be from the records cited above, she may have nevertheless pleaded guilty to a class B misdemeanor even though she could not satisfy an express element of the crime (see *People v Van Buren*, 82 NY2d 878 [1993]; *People v Cooper*, 78 NY2d 476 [1991]; *People v Denise L.*, 159 Misc 2d 1080 [1994]).

Although defendant did not preserve her challenge to the voluntariness of her plea (see *People v Lopez*, 71 NY2d 662 [1988]), we nevertheless reach the issue in the interest of justice since the plea allocution was so "woefully deficient" (*People v Colon*, 42 AD3d 411, 411 [2007]; see *People v Pearson*, 55 AD3d 314 [2008]).

The particular circumstances of this case also warrant dismissal of the accusatory instrument in the interests of justice (see *People v Clayton*, 41 AD2d 204 [1973]).

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MAY 24, 2011

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Andrias, J.P., Sweeny, Catterson, Renwick, Manzanet-Daniels, JJ.

4957- In re Carlos G.,
4958 A Dependent Child Under the Age of
 Eighteen Years, etc.,

 Bernadette M.,
 Respondent-Appellant,

 Administration for
 Children's Services,
 Petitioner-Respondent,

 Episcopal Social Services,
 Non-Party Respondent.

The Bronx Defenders, Bronx (Stacy E. Charland of counsel), for
appellant.

Michael A. Cardozo, Corporation Counsel, New York (Mordecai
Newman of counsel), for Administration for Children's Services,
respondent.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of
counsel), for Episcopal Social Services, respondent.

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

Order, Family Court, Bronx County (Jennifer S. Burtt,
Referee), entered on or about July 26, 2010, which, after a
hearing, denied appellant mother's motion for immediate
visitation with the subject child and suspended visitation
pending the final determination of the termination of parental
rights (TPR) proceeding, unanimously affirmed, without costs.

In August 2007, the subject child was removed from appellant mother on an emergency basis when she left a homeless shelter and began to sleep in a park with her child so that she could spend time with her boyfriend. Immediately thereafter, petitioner the Administration for Children Services (ACS) sought a determination that appellant had neglected her child. Based on her non-appearance, appellant was found to have neglected the child, who was placed in foster care with his paternal aunt and uncle. In May 2009, ACS instituted a TPR petition against appellant. For over two years, appellant, who is reportedly illiterate and mentally retarded, has failed to visit the child, whom the foster parents plan to adopt. Additionally, the foster parents do not intend to permit post-adoption visitations by appellant. Under these circumstances, Family Court found that it would not be in the best interest of the child to grant appellant visitation rights during the pendency of the TPR proceedings, since such

rights may cease following the proceedings. We find that Family Court's determination was a provident exercise of discretion and was supported by the record (see *Matter of Gandy [Commissioner of Social Servs of City of N.Y.]*, 58 AD2d 525 [1977]).

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forecloses defendant's suppression and excessive-sentence claims. As an alternative holding, we also reject these claims on the merits.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, which are supported by the record (see *People v Prochilo*, 41 NY2d 759, 761 [1977]). We also perceive no basis for reducing the sentence.

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subject housing project (see *Matter of Bradford v New York City Hous. Auth.*, 34 AD3d 463 [2006]). The finding of chronic rent delinquency was supported by the testimony of the manager for the housing project and the record of petitioner's rent history.

Petitioner's challenge to the validity of the lease is unavailing, as she admittedly signed the lease and evinced a clear intent to be bound by it via her conduct, including the submission of affidavits of income identifying herself as the "Lessee" and the payment of rent (compare *219 Broadway Corp v Alexander's Inc.*, 46 NY2d 506 [1979]).

The penalty of termination does not shock our sense of fairness. Although petitioner's drug rehabilitation and gainful employment at the time of the administrative hearing are positive factors, her past drug-related activity and chronic delinquency in the payment of rent constitute grounds for termination of the tenancy (see *Matter of Clendon v New York City Hous. Auth.*, 33 AD3d 913 [2006]; *Harris v Hernandez*, 30 AD3d 269 [2006]).

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ENTERED: MAY 24, 2011



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Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5146- Isaiah Smith, an Infant by His Index 117109/07
5147 Mother and Natural Guardian,
 Shatisha Smith-Haywood, etc., et al.,
 Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants,

The Di Gennaro Family YPDC LLC, etc.,
Defendant-Respondent.

Jacoby & Meyers, LLP, Newburgh (Mark Hudoba of counsel), for appellants.

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Gregg Scharaga of counsel), for respondent.

Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered July 15, 2010, which denied plaintiffs' motion for leave to renew defendants-respondents' motion for summary judgment dismissing the complaint as against them, deemed to have granted renewal and adhered to the original determination, and so considered, unanimously reversed, on the law, without costs, and defendants' motion denied. Appeal from order, same court and Justice, entered March 19, 2010, unanimously dismissed, without costs, as superseded by the appeal from the July 15, 2010 order.

The infant plaintiff, then nine years old, broke his arm

when he fell off the monkey bars at a park during a summer camp outing. Deposition testimony established that plaintiff had broken his arm falling off monkey bars when he was in kindergarten, that his mother did not allow him to play on monkey bars, that campers were not allowed to be in the monkey bar area, which was unsupervised, and that plaintiff had told his counselor, who was 10 to 15 yards away supervising the basketball court, that he was going to play on the monkey bars.

In light of plaintiff's testimony both that when he was in kindergarten he knew he could get hurt playing on monkey bars and that he did not think he would get hurt, we find that it cannot be determined as a matter of law that plaintiff "fully appreciated the risks involved in the activity in which he was engaged" (see *Douglas v John Hus Moravian Church of Brooklyn, Inc.*, 8 AD3d 327, 329 [2004]). While plaintiff was not supposed to be in the monkey bar area and knew from a previous injury that he could get hurt if he fell from the monkey bars, we cannot say "that a [nine]-year-old boy 'assumed the risk' that his [counselors] would fail to supervise him" (see *Trupia v Lake George Central School District*, 14 NY3d 392, 397 [2010] [Smith, J., concurring]).

Defendants failed to demonstrate that plaintiff's accident was not proximately caused by their alleged negligent supervision of him (see *Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *Sarnes v City of New York*, 73 AD3d 1154, 1155 [2010]).

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Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5148- In re Khalil A., and Another,
5148A Dependent Children Under the Age
of Eighteen Years, etc.,

Sabree A.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of
counsel), for respondent.

Michael S. Bromberg, Sag Harbor, attorney for the children.

Orders of disposition, Family Court, New York County (Jody Adams, J.), entered on or about October 16, 2009, which, upon a fact-finding of permanent neglect, terminated respondent mother's parental rights to the subject children and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence of respondent's failure for the relevant time period to plan for the future of the children, despite petitioner's diligent efforts to encourage and strengthen the

parental relationship between respondent and the children (see Social Services Law § 384-b[7][a],[f] and § 384-b[3][g][i]). In particular, the record shows that petitioner met regularly with respondent to prepare a service plan and review her progress, arranged visitation between respondent and the children, and assisted respondent with housing, and that, these efforts notwithstanding, respondent failed to attend individual therapy or address the mental condition that led to the children's placement (see *Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]).

A preponderance of the evidence supports the determination that it is in the best interests of the children to terminate respondent's parental rights (see *Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The children have lived in the same foster home for at least five years, and the record demonstrates that the foster mother has provided loving care to the children. Under the circumstances, a suspended judgment is not warranted (see *Matter of Sean LaMonte Vonta M.*, 54 AD3d 635, 635 [2008]).

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

ENTERED: MAY 24, 2011



CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5151 Jerzy Dabrowski, et al., Index 106778/07
Plaintiffs-Respondents,

-against-

Abax Incorporated, etc., et al.,
Defendants-Appellants,

John Doe Bonding Companies 1-20,
Defendants.

Milman Labuda Law Group PLLC, Lake Success (Joseph M. Labuda of counsel), for Abax Incorporated, appellant.

Goetz Fitzpatrick, LLP, New York (Bernard Kobroff of counsel), for John Bleckman and Edward Monaco, appellants.

Virginia & Ambinder, LLP, New York (LaDonna M. Lusher of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered July 27 2010, which, to the extent appealed from, granted plaintiffs' (laborers on specified public works contracts) motion for class certification, denied defendants Abax Incorporated, John Bleckman and Edward Monaco's motion to compel discovery, and granted plaintiffs' cross motion for a protective order as to the discovery sought by defendants, unanimously affirmed, without costs.

Plaintiffs' evidence in support of class certification (see generally CPLR 901), including both the affidavits and paycheck

stubs, demonstrated merit to plaintiffs' claims that they, and other similarly-situated laborers employed by the corporate defendant (Abax), may have been subject to a practice by Abax to underpay on wages, overtime and benefits during employment on public works contracts (see generally *Kudinov v Kel-Tech Constr. Inc.*, 65 AD3d 481 [2009]). Abax's argument that there was insufficient evidence that laborers other than the named plaintiffs (and three other identified employees) had been "aggrieved" by alleged improper pay practices, thus precluding a finding of requisite numerosity, is unavailing given the affidavits proffered by six laborers who attested, inter alia, that in the relevant years 2001 through 2007, they worked with between 50 and 100 laborers, and that Abax engaged in a regular practice of not paying the prevailing wages and attendant benefits (see generally *Kudinov*, 65 AD3d at 481-482; *Pesantez v Boyle Env'tl. Servs.*, 251 AD2d 11 [1998]). The commonality of the putative class's wage/benefits claims, and their typicality (see CPLR 901), predominate over any alleged individualized claims.

The evidence indicates that Abax regularly presented the plaintiffs with paychecks that did not set forth the hours worked, the rate of pay, or the benefits accrued. It is also alleged that Abax did not post the prevailing wages, as required

by law, at any of the project sites at which plaintiffs worked. While Abax argues that too many variables existed among the putative class of laborers to group them in a single action, including their varying job titles, pay rates, and the differing project sites and contracts involved, we find that the laborers' pay claims were not complex, and that the pay scales, hours worked and other relevant contract information would typically be well-documented for the public works projects at issue (see generally *Kudinov*, 65 AD3d at 482). Abax's argument that the class, as defined, is overbroad as it would potentially include public works projects on which none of the plaintiffs worked during the years 2001 through 2007, is unavailing. The wage, overtime and benefits claims associated with public works projects, as asserted herein, should be readily identifiable, if they exist, and well-documented.

The motion court correctly determined that the plaintiffs are adequate representatives for the putative class, as they have thus far engaged in a contentious and litigious prosecution of the instant matter. Plaintiffs' counsel has demonstrated its expertise and zealous representation of the plaintiffs here, as well as in prior class action cases which have reached this court on appeal (see *Kudinov*, 65 AD3d 481; *Nawrocki v Proto Constr. &*

Dev. Corp., __ AD3d __, 2011 NY Slip Op 1895 [2011]). There is no evidence that plaintiffs lack the financial means to prosecute this case, or that the plaintiffs may have conflicts with other putative class members (see generally *Ackerman v Price Waterhouse*, 252 AD2d 179, 201-202 [1998]).

Abax's argument that it was denied due process when the court denied its motion to compel completion of discovery on pre-certification issues is unavailing. Not only had Abax engaged in a stonewalling of discovery sought by plaintiffs, its discovery requests had predominantly sought personal information from the immigrant plaintiffs for the apparent purpose to discourage prosecution of this action. In any event, Abax's hopes of gleaning information that would question plaintiffs' financial capability to prosecute this action, and/or to show that plaintiffs' interests conflicted with those of the putative class, are not a sound basis for overturning the court's discretionary decision not to compel further discovery on the class certification issue.

Finally, the proposed class action is superior to the prosecution of individualized claims in an administrative proceeding in view of the difference in litigation costs, the laborers' likely insubstantial means, and the modest damages to

be recovered by each individual laborer, if anything (see generally *Nawrocki*, __ AD3d __, 2011 NY Slip Op 1895, *2; *Pesantez*, 251 AD2d at 12).

We have considered defendants' remaining arguments and find them unpreserved and/or unavailing.

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

ENTERED: MAY 24, 2011

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CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5152- In re Joy Trezza, File 0065/09
5152A Deceased.

- - - - -

Francine K. Horowitz,
Petitioner-Appellant,

-against-

Jeffrey Oberman,
Objectant-Respondent.

Goldfarb, Abrandt, Salzman & Kutzin LLP, New York (Jeffrey G. Abrandt of counsel), for appellant.

Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered on or about March 16, 2009, which, insofar as appealed from, in this turnover proceeding brought pursuant to SCPA 2103, allowed objectant, the alleged common-law spouse of decedent, to remain in occupancy of decedent's cooperative apartment pending the determination of whether he has standing to object to the will in the probate proceeding, provided that he pay maintenance, insurance, utilities and upkeep, and order, same court and Surrogate, entered October 21, 2010, which, upon reargument, adhered to the original determination, unanimously affirmed, with costs.

The court did not abuse its discretion in ordering objectant to pay only the maintenance, insurance, utilities and upkeep of

the apartment as long as he resides there and in rejecting petitioner's request that objectant be ordered to pay market rent for his occupancy. As pointed out by Surrogate's Court, future proceedings may result in objectant having sole ownership of the apartment (*compare Johnson v Depew*, 38 AD2d 675 [1971], *appeal dismissed* 30 NY2d 565 [1972]).

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provided by a 911 caller. "The information the police relied on came from a source that was not anonymous, but rather had identifying characteristics that rendered it reliable, including a partial name and callback number" (*People v Hall*, 23 AD3d 151, 151 [2005], *lv denied* 6 NY3d 754 [2005]). There were two communications with this complainant. In the first, he called 911, and in the second the police called him back. In each communication, the caller did not merely report the presence of a person with a firearm, but also that this person had threatened to kill him. Both communications were excited utterances, which was another factor enhancing their reliability (*see People v Govantes*, 297 AD2d 551, 552 [2002], *lv denied* 99 NY2d 558 [2002]). Finally, the caller provided a detailed and generally accurate description of defendant and one of his companions, as well as their location and direction of travel.

Defendant did not preserve his remaining suppression argument and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

Defendant asserts that the officer continued his frisk after concluding that the object he felt in defendant's pocket was not a weapon. However, the hearing evidence fails to support that assertion.

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defaulted (see *IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.*, __ AD3d __, 2011 NY Slip Op 03275; *IRB-Brasil Resseguros S.A. v Eldorado Trading Corp. Ltd.*, 68 AD3d 576, 577 [2009]; *Eastbank v Phoenix Garden Rest.*, 216 AD2d 152 [1995], *lv denied* 86 NY2d 711 [1995]).

In opposition, defendants fail to raise issues of fact regarding the ownership or location of the Global Note. The record shows that defendants accepted the initial loan from IRB, paid interest on the Global Note for a number of years and, at the time of their default, negotiated new terms with IRB, implicitly admitting that IRB was the owner of the note. Moreover, defendants sued IRB - in its capacity as owner of the Global Note - in a separate action. Defendants cannot now be heard to object to the ownership which they embraced when it suited them (see *RPI Professional Alternatives, Inc. v Citigroup Global Mkts. Inc.*, 61 AD3d 618, 619 [2009]).

Equally unavailing are defendants' arguments concerning plaintiff's inability to produce the physical note where, as here, defendants have waived presentment numerous times. These waivers excuse any requirement that the instrument sued upon be presented in connection with subsequent litigation against

Portobello as issuers, or against the guarantors (see *Banco Nacional de Mexico v Ecoban Fin.*, 276 AD2d 284 [2000]).

Defendants have failed to show they discharged their debt. Defendants' primary argument is that the JP Morgan document establishes payment. This document, however, which defendants never authenticated through anyone at JP Morgan, and which is offered for the truth of the matter asserted, is impermissible hearsay and does not fall within an exception to the hearsay rule (see e.g. *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479, 480 [2007] [document not "so patently trustworthy as to be self-authenticating"]). Accordingly, it is insufficient to defeat the summary judgment motion (see *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [2010]; *Van Dina v City of New York*, 292 AD2d 267, 268 [2002]).

Defendants seek to avoid summary judgment by claiming a need for further discovery. Defendants did not demonstrate, however, that there was a likelihood that there is relevant evidence in IRB's exclusive knowledge, that further discovery might reveal the existence of such evidence, or that they made a reasonable attempt, prior to the motion, to pursue other means of

discovering the information now claimed to be necessary (see 2386 *Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 162-163 [2008], *lv denied* 11 NY3d 716 [2009]; *Voluto Ventures, LLC v Jenkins & Gilchrist Parker Chapin LLP*, 44 AD3d 557 [2007]).

The court properly denied defendants' motion for leave to amend their answers because the proposed counterclaims sounding in fraud plainly lacked merit (see *R&R Capital LLC v Merritt*, 78 AD3d 533 [2010]).

The court properly applied the statutory interest rate to plaintiff's award of post-judgment interest because, although the terms of the Global Note clearly contemplate payment of interest through satisfaction of the principal, it does not "clearly and unequivocally" specify a post-judgment rate. Accordingly, the motion court correctly "merged" the contract into the judgment and applied the statutory interest rate (*Marine Mgt. v Seco Mgt.*, 176 AD2d 252, 253 [1991], *affd* 80 NY2d 886 [1992]).

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

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processing orders, sending business-related faxes, and working on shoe designs. She also stated that for years preceding the incident she had employed two individuals who performed similar tasks; one of them worked there three times a week, while the other visited occasionally. Defendant's tax forms show that the business generated substantial revenues and that defendant listed her home address as her business address. This evidence fails to demonstrate the absence of a triable issue of fact whether defendant's real property was "used exclusively for residential purposes" (see Administrative Code § 7-210[b]; *Coogan v City of New York*, 73 AD3d 613 [2010]; see also *Matter of Town of New Castle v Kaufmann*, 72 NY2d 684, 687 [1988]). We note that issues of fact also exist whether the defect in the sidewalk was caused by defendant's negligent repair (see *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 [2002]).

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ENTERED: MAY 24, 2011



CLERK

Tom, J.P., Saxe, Moskowitz, Acosta, Abdus-Salaam, JJ.

5158- Awards.Com, LLC, Index 603105/03
5158A- Plaintiff,
5158B

Inspire Someone, LLC,
Plaintiff-Respondent,

-against-

Kinko's, Inc.,
Defendant-Appellant,

Federal Express Corp., et al.,
Defendants.

Newman Myers Kreines Gross Harris, P.C., New York (Olivia M. Gross and Howard B. Altman of counsel), for appellant.

Berg & Androphy, New York (Christopher Gadoury of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Charles E. Ramos, J.), entered February 10, 2009, which, to the extent appealed from, awarded defendant Kinko's, Inc. \$73,939 in attorney's fees and \$5,000 in costs, and bringing up for review an order, same court and Justice, entered June 23, 2008, which, to the extent appealed from as limited by the briefs, granted Kinko's motion for legal fees to the extent of referring to a special referee the determination of the amount of legal fees Kinko's incurred by interposing its breach of contract

counterclaim, and an order, same court and Justice, entered December 22, 2008, which, to the extent appealed from, directed entry of the aforesaid judgment, unanimously modified, on the law, to the extent of remanding the matter for recalculation of all the fees which Kinko's incurred in prosecuting the counterclaim, and otherwise affirmed, without costs. Appeal from the aforesaid orders unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court properly determined that, under the indemnification provision of an agreement between Kinko's and plaintiff Inspire Someone, LLC, Kinko's is entitled to recover the legal fees incurred only in prosecuting its breach of contract counterclaim. Indeed, when applying the proper standard of construction of such indemnification clauses, it is not "unmistakably clear" that the agreement's indemnification provision applies to fees incurred in defending against plaintiffs' claims (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]). However, Supreme Court awarded fees only with respect to Kinko's motion for summary judgment on its breach of

contract counterclaim. As Kinko's notes, Kinko's incurred other fees in prosecuting its counterclaim, including fees incurred in taking discovery and litigating appeals. Accordingly, we remand for recalculation of the legal fees as indicated.

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