SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 18, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Catterson, Richter, JJ.

5315 The Empire Center for New York State Policy, etc., Petitioner-Appellant, Index 105839/10

-against-

New York City Police Pension Fund, Respondent-Respondent.

Levine Sullivan Koch & Schulz, LLP, New York (David A. Schulz of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered December 30, 2010, denying the petition for an order directing respondent to comply with petitioner's Freedom of Information Law (FOIL) request for the names of all respondent's retired members, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The petition was properly denied. In *Matter of New York Veteran Police Assn. v New York City Police Dept. Art. I Pension Fund* (61 NY2d 659 [1983]), the Court of Appeals held that Public Officers Law § 89(7) exempts from disclosure both the names and addresses of retirees of the New York City Police Department

receiving pensions and annuities. Thus, respondent correctly denied petitioner's FOIL request seeking the names of its retired members. Petitioner offers no persuasive argument distinguishing its FOIL request from that in *Matter of New York Veteran Police Assn*.

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

ENTERED: OCTOBER 18, 2011

CLERK

Gonzalez, P.J., Andrias, Saxe, Sweeny, JJ.

5688 In re Carol Delgado, Index 401221/09
Petitioner-Appellant,

-against-

The New York City Housing Authority,
Respondent-Respondent.

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Carol Delgado, appellant pro se.

Sonya M. Kaloyanides, New York (Maria Termini of counsel), for respondent.

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Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered January 6, 2010, which denied the petition seeking to vacate respondent's determination terminating petitioner's tenancy on the ground of nondesirability, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The proceeding is barred by the statute of limitations since petitioner failed to file her petition within the time required by CPLR 217(1), namely, four months after respondent issued its final determination on November 20, 2008 (*see Matter of Stephens v New York City Hous. Auth.*, 293 AD2d 318 [2002], *lv denied* 98 NY2d 610 [2002]). In any event, respondent's determination was not arbitrary and capricious. Petitioner, in violation of her lease and the rules promulgated by respondent, was convicted of

possession of a weapon and possession of a controlled substance following the execution of two separate search warrants of her apartment within a three month period (*see Harris v Hernandez*, 30 AD3d 269 [2006]; *see also Matter of Diaz v Hernandez*, 66 AD3d 525 [2009]). Furthermore, while recognizing the hardship to petitioner and her children, the penalty of termination does not shock our sense of fairness (*see Matter of Satterwhite v Hernandez*, 16 AD3d 131, 132 [2005]).

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

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Andrias, Moskowitz, Richter, Abdus-Salaam, JJ.

5387 Ntia Utak, Index 101619/08
Plaintiff-Respondent,

-against-

Commerce Bank Inc.,
Defendant-Appellant,

Eric Franklin, et al.,
Defendants.

_____

White and Williams LLP, New York (Rafael Vergara of counsel), for appellant.

Trevor A. Reid, P.C., Bronx (Trevor A. Reid of counsel), for respondent.

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered February 10, 2011, which, to the extent appealed from as limited by the briefs, denied defendant Commerce Bank Inc.'s motion to dismiss the complaint as against it pursuant to CPLR 3215(c), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of Commerce dismissing the complaint.

Plaintiff, Ntia Utak, commenced this action on January 25, 2008, alleging false arrest and false imprisonment against defendant Commerce. The complaint refers to an "occurrence" involving Utak that took place on February 22, 2007 at a Commerce Bank in Manhattan. The only factual allegations describing the

occurrence are that Commerce directed its agents, servants and employees, to arrest plaintiff. The complaint does not explain why plaintiff was in the bank, or include the circumstances that led to plaintiff's alleged arrest and false imprisonment. Nor does the record include an affidavit by plaintiff attesting to the information contained in the complaint. Commerce did not file an answer in this action.

On July 26, 2010, approximately 30 months after commencing this action, plaintiff submitted a Request for Judicial Intervention (RJI) seeking a preliminary conference. The record does not indicate, nor does plaintiff contend, that he took any steps to prosecute his case prior to submitting the RJI. On August 20, 2010, Commerce moved to dismiss the action pursuant to CPLR 3215(c) for failure to enter a default judgment within one year. Commerce noted that more than two years had passed since it had allegedly been served with the summons and complaint, and that plaintiff had not sought entry of a default judgment against it during that time[1].

Under CPLR 3215(c), if a plaintiff fails to seek entry of a judgment within one year after default the court "shall dismiss

[1] The crux of Commerce's argument below was that it was never served with the summons and complaint. However, the motion court found that Commerce had indeed been served, and on appeal Commerce has abandoned this argument.

the complaint as abandoned...unless sufficient cause is shown why [it] should not be dismissed." Here, plaintiff failed to show sufficient cause to defeat the dismissal motion because he neither set forth a viable excuse for the delay, nor demonstrated a meritorious cause of action (*Hoppenfeld v Hoppenfeld*, 220 AD2d 302, 303 [1995]; *Gavalas v Podelson*, 297 AD2d 535 [2002]). Plaintiff did not even address the fact that he never sought entry of a default judgment against Commerce, or that he waited over two years after commencing his action before making an RJI.

Further, plaintiff did not demonstrate that he has a meritorious cause of action (*Hoppenfeld*, 220 AD2d 302, 303). The complaint is bereft of any facts or circumstances surrounding the alleged false arrest and false imprisonment. Plaintiff does not explain why he was in the bank, nor does he shed any light on the facts underlying his false imprisonment claim. Notably, the complaint is verified by plaintiff's attorney, which makes it hearsay and devoid of evidentiary value (*Beltre v Babu*, 32 AD3d 722, 723 [2006]). This complaint cannot be considered as proof of the facts constituting plaintiff's claims for the purpose of a default judgment (*Ritzer v 6 E. 43rd St. Corp.*, 47 AD3d 464, 464 [2008]). Nor has plaintiff provided an affidavit of merit,

thereby warranting dismissal under CPLR 3215(c) (*Pack v Saldana*, 178 AD2d 123, 124 [1991]).

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

ENTERED: OCTOBER 18, 2011

CLERK

Andrias, J.P., Friedman, Renwick, DeGrasse, Abdus-Salaam JJ.

5455 Sound Communications, Inc., Index 107817/08
Plaintiff-Respondent,

-against-

Rack and Roll, Inc., et al.,
Defendants-Appellants.

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Napoli Bern Ripka, LLP, New York (Denise A. Rubin of counsel), for appellants.

Law Office of Steven E. Rosenfeld, P.C., New York (Isaiah Juste of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered June 7, 2010, which denied the motion by defendants Lance Wolfson, Marla Wolfson and Premier Container Corp. pursuant to CPLR 3211(a)(7) and 3212 for an order dismissing the complaint, unanimously reversed, on the law, without costs, those defendants' motion granted and the complaint dismissed as against them.

Plaintiff sues to recover fees due under an oral agreement for services rendered in the advertisement of a product known as the "Rack and Roll Paper Towel Storage Holder." All of plaintiff's underlying invoices, which are annexed to the complaint, are addressed to defendant Rack and Roll, LLC only. Therefore, the complaint fails to state an account stated cause of action against the moving defendants (*see e.g. Roth Law Firm,*

PLLC v Sands, 82 AD3d 675, 676 [2011]).

Plaintiff also failed to state a fraud cause of action against the moving defendants. Plaintiff essentially alleges that defendants never intended to honor a promise to pay plaintiff's fees. "It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract" (*Gordon v Dino De Laurentis Corp.*, 141 AD2d 435, 436 [1988] [citation omitted]). Plaintiff's negligent misrepresentation cause of action should have been similarly dismissed because this claim also relates to an alleged contract and there is no allegation of a special relationship between plaintiff and the moving defendants (*see Morris v Putnam Berkley, Inc.*, 259 AD2d 425, 426 [1999]). Defendants have also made a prima facie showing that the Wolfsons did not contract with plaintiff as individuals or on behalf of Premier. The moving defendants were therefore entitled to judgment as a matter of law and plaintiffs conclusory assertions were insufficient to defeat summary judgment with respect to the contract and unjust enrichment claims (*see Spaulding v Benenati*, 57 NY2d 418, 425 [1982]).

Plaintiff's argument that defendants' original answer, which was verified by counsel, contains admissions is also unavailing. The assertions in the pleading were made "upon information and

belief" and do not constitute formal or informal judicial admissions (*see Scolite Intl. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 421 [1979]).

The court should also have rejected plaintiff's attempt to pierce Rack and Roll's corporate veil. "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 142 [1993]). The complaint merely alleges that Rack and Roll functioned as the moving defendants' alter ego. It is not sufficiently alleged that Rack and Roll's status as a limited liability company was used to commit a fraud against plaintiff (*see e.g. Albstein v Elany Contr. Corp.*, 30 AD3d 210 [2006], *lv denied* 7 NY3d 712 [2006]).

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

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Sweeny, Freedman, Manzanet-Daniels, Román, JJ.

5474 Philip Medina, Index 301465/08
Plaintiff-Appellant,

-against-

Patrick Phillips, et al.,
Defendants.

First Cardinal Corporation, LLC,
Nonparty-Respondent.

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Law Office of Andrew Laufer, PLLC, New York (Andrew C. Laufer and Stephen D. Chakwin, Jr. of counsel), for appellant.

Stewart, Greenblatt, Manning & Baez, Syosset (Lisa Levine of counsel), for respondent.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered April 29, 2010, which denied plaintiff's motion for nunc pro tunc approval of settlement of the underlying personal injury action pursuant to Workers' Compensation Law § 29(5), unanimously reversed, on the law and facts, without costs, and the motion granted.

On October 10, 2007, plaintiff Philip Medina was injured in a motor vehicle accident during the course of his employment as an ambulance driver with Shiva Ambulette Service, when the vehicle he was operating was struck by a vehicle operated and owned by defendants. Plaintiff commenced a personal injury action against defendants, alleging, inter alia, that as a result

of the accident, he suffered a "serious injury," as defined by Insurance Law § 5102(d). On or about October 3, 2008, plaintiff entered into a settlement of the underlying action with defendants in the amount of $20,000. Until that date, he had been receiving workers' compensation benefits from his workers' compensation carrier, nonparty respondent First Cardinal Corporation, LLC.

The court erroneously denied plaintiff's request for a nunc pro tunc order granting him a right-to-settle letter from First Cardinal. "A judicial order may be obtained nunc pro tunc approving a previously agreed-upon settlement, even in cases where the approval is sought more than three months after the date of the settlement, provided that the petitioner can establish that (1) the amount of the settlement is reasonable, (2) the delay in applying for a judicial order of approval was not caused by the petitioner's fault or neglect, and (3) the carrier was not prejudiced by the delay (*Matter of Stiffen v CNA Ins. Cos.*, 282 AD2d 991 [2001], *lv denied* 97 NY2d 612 [2002]).

The record does not show that the delay in obtaining approval was attributable to the fault or neglect of plaintiff; indeed, the record supports the conclusion that First Cardinal "unwittingly lulled [plaintiff] into believing that it was willing to waive [plaintiff's] failure to obtain timely consent

or court approval of the settlement" (*Stiffen*, 282 AD2d at 993). The record indicates that plaintiff brought the application shortly after the August 26, 2009 denial of benefits, and that First Cardinal was aware of the facts and circumstances surrounding the settlement and plaintiff's medical condition. The record further indicates that in October 2008, plaintiff attempted to obtain a consent-to-settle letter from First Cardinal, but that said letter never arrived although duly requested. Upon plaintiff's further request, in February 2009, the carrier assured plaintiff that a letter would be issued upon receipt of the necessary information. Although on February 2 and February 9, 2009, plaintiff's attorney furnished the carrier with plaintiff's medical records and information concerning the automobile liability coverage and insurance claim, no letter was ever issued. Notwithstanding its communication with plaintiff concerning the information necessary to issue the consent-to-settle letter, First Cardinal had already, by application dated January 25, 2009, sought to terminate plaintiff's workers' compensation benefits due to plaintiff's failure to seek approval of the settlement of the underlying action.

Moreover, First Cardinal suffered no demonstrable prejudice as a result of the delay. Workers' Compensation Law § 29(1) authorizes an employee who is "injured or killed by the

negligence or wrong of another not in the same employ" to "pursue his remedy against such other" while also accepting workers' compensation and medical benefits. In such a case, the insurance carrier liable for the payment of such compensation "shall have a lien on the proceeds of any recovery from such other" (*id*.). The carrier, however, "shall not have a lien on the proceeds of any recovery for compensation and/or medical benefits paid which were in lieu of first party benefits which another insurer would have otherwise been obligated to pay under [the No-Fault Law]" (Workers Compensation Law § 29[1-a]). First-party benefits are defined as payments of up to $50,000 for "basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, including lost earnings and medical expenses (*see* Insurance Law § 5102[a],[b]). To date, only $19,034.77 has been disbursed by First Cardinal to plaintiff, leaving more than $30,000 in available benefits remaining before the insurer would be entitled to assert a lien against the proceeds recovered by plaintiff in the underlying action.

Section 29(5) of the Workers' Compensation Law does not distinguish between those instances in which an employer or carrier has both an existing lien and prospective offset rights at the time of settlement and a case, like this one, where the carrier possesses only future offset rights (*see Matter of*

Brisson v County of Onondaga, 6 NY3d 273 [2006]). Nevertheless, it is difficult for First Cardinal to assert prejudice resulting from nunc pro tunc issuance of a consent-to-settle order where the actual denial of workers' compensation benefits occurred on August 29, 2009, the benefits paid on plaintiff's behalf are substantially below the statutory $50,000 cap, and the record indicates that due to the nature of plaintiff's injuries, benefits are unlikely ever to exceed the cap. Indeed, the carrier's own chiropractic examiner assessed plaintiff as having only resolved strains and sprains, and, on April 14, 2008, pronounced plaintiff ready to return to work without restriction and with no need for further treatment.

Finally, although the issue was not raised by First Cardinal in opposition to plaintiff's motion, we find that the amount of the settlement is fair and reasonable in light of plaintiff's injuries.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5723 The People of the State of New York, Respondent, Ind. 6399/07

-against-

Christopher Clark, Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Risa Gerson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered May 13, 2008, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations, including its evaluation of inconsistencies in

testimony. We do not find the police account of the incident to be implausible.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5724 In re William Kolmel Index 114665/09
Petitioner-Appellant,

-against-

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

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Wolin & Wolin, Jericho (Alan E. Wolin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Edward F. X. Hart of counsel), for respondents.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered June 10, 2010, which, insofar as appealed from as limited by the briefs, denied the petition seeking, inter alia, to annul the determination of respondent Department of Education (DOE) denying petitioner certification of completion of probation and terminating his employment as a probationary teacher, and denying his appeal of an unsatisfactory rating (U-rating) for the 2008-09 school year, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted to the extent of annulling the U-rating and the matter remanded to DOE for proper completion of the final review and recommendation.

The record shows that following three years of probationary

service as a high school social studies teacher, petitioner had received satisfactory reviews and year-end reports. However, petitioner was informed he would not be recommended for tenure that year and agreed to enter into an agreement extending his probation through the 2008-09 school year. During this fourth year, petitioner received two satisfactory and two unsatisfactory classroom reports, two letters to the file for unbecoming conduct, and his principal gave him an unsatisfactory rating in each category on the year-end report (except voice and appearance, which were left blank) and an overall U-rating. As a result, it was recommended that petitioner be denied certification of completion of probation, which required termination of his service and precluded him from being hired by any other high school in the City.

"[A]...probationary employee may be discharged for any or no reason at all in the absence of a showing that his or her dismissal was in bad faith, for a constitutionally impermissible purpose or in violation of law" (*Matter of Brown v City of New York*, 280 AD2d 368, 370 [2001]; *see Matter of Frasier Board of Educ. of City School Dist. of City of N.Y.*, 71 NY2d 763, 765 [1988]). "Evidence in the record supporting the conclusion that performance was unsatisfactory establishes that the discharge was made in good faith" (*Matter of Johnson v Katz*, 68 NY2d 649, 650

[1986]); the same standard applies when a teacher challenges a "U" rating (*see Batyreva v New York City Dept. of Educ.*, 50 AD3d 283 [2008]).

Here, the two negative classroom observations cited in the year-end report, which criticized petitioner's manner of asking questions, and the file letters, could rationally support a finding that petitioner had not developed into a proficient high school social studies teacher, following three years of suggestions and assistance (*see e.g. Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [2011]).

However, petitioner submitted evidence that the principal who made the determination to award the 2008-09 U-rating did not observe petitioner's teaching during either of his final two years at the school. This was in violation of DOE's rules concerning teacher rankings, which require at least one observation by the principal and pre-observation meetings with probationary teachers in danger of U-ratings. Furthermore, the year-end report, on its face, was completed by the principal in an arbitrary manner, including unsatisfactory rankings in every category, even where unsupported by any evidence or contradicted by evidence in the report itself. Petitioner's assertion that the principal stated at the administrative hearing that she did not rely on the file letters in making her tenure recommendation

is not disputed by respondents. Petitioner also submitted a statement by a current DOE employee who formerly worked at the high school, that the principal pressured assistant principals to give negative U-ratings without observing the teachers. These deficiencies in the review process leading to the recommendation to deny tenure and terminate petitioner's employment are not merely technical, but undermined the integrity and fairness of the process (*see Matter of Blaize v Klein*, 68 AD3d 759 [2009]; *Matter of Lehman v Board of Educ. of City School Dist. of City of N.Y.*, 82 AD2d 832, 834 [1981]; *compare Matter of Davids v City of New York*, 72 AD3d 557, 558 [2010] [technical failure to follow rules not bad faith where delays were undertaken in attempt to allow petitioner to bring his performance up to standards]).

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5725 In re Aliyah Careema D., etc.,

A Dependent Child Under
Eighteen Years of Age, etc.,

Sophia Seku D.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

_____

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

Rosin Steinhagen Mendel, The Children's Aid Society, New York (Douglas H. Reiniger of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Ilana Grubel, J.), entered on or about September 8, 2010, which revoked a suspended judgment entered on a finding of abandonment, terminated respondent mother's parental rights to the subject child, and committed the custody and guardianship of the child to petitioner and the Commissioner of Social Services for the purposes of adoption, unanimously affirmed, without costs.

The finding that respondent violated the terms of the suspended judgment is supported by a preponderance of the evidence (*see e.g. Matter of Kendra C.R. [Charles R.]*, 68 AD3d 467 [2009], *lv dismissed in part, denied in part* 14 NY3d 870

[2010]). Respondent was required, inter alia, to submit to random drug testing and remain free of illicit substances, maintain regular and consistent supervised visitation, and obtain and maintain a source of income and suitable housing for herself and the child. Shortly after the suspended judgment was granted, respondent was convicted of criminal sale of a controlled substance in the third degree, and sentenced to 2½ years' incarceration. Moreover, respondent failed to maintain contact with the child for four months after she was incarcerated, which failure is not excused by her incarceration (*see Matter of Anthony M.*, 195 AD2d 315, 316 [1993]).

The finding that termination of respondent's parental rights is in the child's best interests is supported by a preponderance of the evidence showing that respondent would remain incarcerated until after the period of the suspended judgment had expired, and that the child's kinship foster mother has been providing quality care for the child, wants to adopt her, and has been trained to

handle her special needs (*see e.g. Matter of David J.*, 260 AD2d 279 [1999]).

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5726 The People of the State of New York, Respondent, Ind. 5533/08 77/09

-against-

Michael Rosario, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about April 10, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 18, 2011

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.
Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5727 The People of the State of New York, Ind. 6220N/08
Respondent,

-against-

Duane Jones,
Defendant-Appellant

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew T. Murphy of counsel), for respondent.

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Judgment, Supreme Court, New York County (Robert H. Straus, J.H.O. at *Darden* hearing; Michael R. Sonberg, J. at suppression hearing; Patricia M. Nunez, J. at plea and sentencing), rendered on June 17, 2010, as amended August 12, 2010, convicting defendant of criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 3½ years, with an aggregate term of 5 years' postrelease supervision, unanimously affirmed.

The court properly denied defendant's suppression motion. This Court has conducted an in camera review of the minutes of the hearing conducted pursuant to *People v Darden* (34 NY2d 177 [1974]) and considered all of the arguments raised by defendant on appeal. We find that the search warrant was based on probable

cause, and that there is no ground for suppression of any evidence.

We perceive no basis for reducing the postrelease supervision portion of defendant's sentence.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse JJ.

5728 Peter V. Pace, Jr., et al., Index 301955/09
Plaintiffs-Respondents,

-against-

Brandon Robinson,
Defendant-Appellant.

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Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for appellant.

Sgarlato & Sgarlato PLLC, Staten Island (Brooke Tiffany Skolnik of counsel), for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 25, 2010, which, in an action for personal injuries, granted plaintiffs' motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiffs established their entitlement to judgment as a matter of law on the issue of liability, and in opposition, defendant failed to raise a triable issue of fact. Defendant's own uncontroverted testimony, stating that he approached a stop sign and then failed to yield the right of way to plaintiff Peter Pace as he was riding his motorcycle, established defendant's negligence as a matter of law based on his violation of Vehicle and Traffic Law § 1142(a) (*see Murchison v Incognoli*, 5 AD3d 271 [2004]). Defendant's argument that Pace was comparatively negligent is unavailing. "[I]t is not plaintiff's burden to

establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case of negligence" (*Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [2010]). In any event, on this record, there is a lack of evidence of comparative fault on the part of Pace.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5729 In re Reynaldo M.,
Petitioner-Appellant,

-against-

Violet F.,
Respondent-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

Karen P. Simmons, The Children's Law Center, Brooklyn (Janet Neustaetter of counsel), attorney for the child.

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Appeal from order, Family Court, Bronx County (Annette Louise Guarino, Referee), entered on or about April 15, 2010, which, upon petitioner father's petition for visitation, granted the father contact with the subject child in the form of mail, letters and gifts, and provided that the child was free to initiate telephone contact with the father if she wished, unanimously dismissed, without costs.

The record reflects that the father's attorney consented to the order, and "no appeal lies from an order entered on the consent of the appealing party" (*Matter of Lah De W. [Takisha W.]*, 78 AD3d 523, 523 [2010]). The attorney was familiar with the matter, had represented the father on numerous prior occasions in the case, and had obtained an adjournment to

ascertain the father's position on a proposed resolution of the application for visitation (see CPLR 2104*; Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

Were we to consider the father's appeal, we would find that a fact-finding hearing on the petition was not required because the court had sufficient information to make an informed determination regarding the best interests of the child (see *Skidelsky v Skidelsky*, 279 AD2d 356 [2001]). The recommendation of the expert and the child's expressed desire not to visit with the father due to her fear of him were sufficient to warrant denial of the request for visitation.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5730 The People of the State of New York, Ind. 6516/07
Respondent,

-against-

Kevin Combs,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (James A. Yates, J.), rendered on or about July 29, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 18, 2011

CLERK

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

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5731 The People of the State of New York, Respondent, Ind. 3010/08

-against-

Luis Pauletta, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered April 15, 2009, convicting defendant, after a jury trial, of attempted murder in the second degree, attempted assault in the first degree and endangering the welfare of a child, and sentencing him to an aggregate term of 7 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence warrants the inference that when defendant attacked the victim with a knife, he did so with homicidal intent.

The court properly exercised its discretion in determining that defendant's cross-examination opened the door to previously precluded evidence of an uncharged crime (*see People v Massie*, 2

NY3d 179, 183-185 [2004]; *People v Melendez*, 55 NY2d 445, 451-452 [1982]). The prior incident at issue was revealed in a prosecution witness's responsive answer to a question from defense counsel, and the court properly permitted the People to explore the incident more fully on redirect. In any event, the evidence of the prior incident was not unduly prejudicial, and any prejudice was minimized by the court's careful limiting instructions.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5732 Harlem Suites, LLC, Index. 603179/08
Plaintiff-Respondent,

-against-

231 Norman Ave., LLC, et al.,
Defendants-Appellants.

_____

Law Offices of Annette G. Hasapidis, South Salem (Annette G. Hasapidis of counsel), for appellants.

Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Jed M. Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 16, 2010, which, insofar as appealed from as limited by the briefs, granted plaintiff's cross motion for summary judgment, unanimously modified, on the law, to deny summary judgment as against defendant DCI USA, Inc. (DCIU), and otherwise affirmed, without costs.

All defendants except DCIU guaranteed that plaintiff would be repaid $1,750,000 plus interest no later than March 4, 2009. Their argument that two agreements entered into in September 2007 (the Refinancing Agreements) constituted a novation of the 2005 operating agreement, construction agreement, and guaranty (the Original Agreements) is without merit (*see Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 290 [1995], *lv denied* 88 NY2d 809 [1996]). Far from expressing an intent to supersede the Original

Agreements, one of the Refinancing Agreements states, "[A]ll of the obligations and guarantees currently existing between the parties undersigned shall continue after the refinance with North Fork Bank per the terms of the operative agreements. . . Specifically, the guarantee of [plaintiff's] equity investment and the indemnifications for the loans remain in place per the Construction Agreement and the Personal Guarantees."

Defendants' argument that there was an oral agreement to relieve them of their guarantees is also unavailing. The supposed partial performance was not "unequivocally referable to the modification" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 341 [1977]), and the conduct relied upon to establish estoppel was compatible with the Original Agreements (*id.* at 344).

Defendants' reliance on the original complaint is misplaced, since the amended complaint superseded the original complaint (*see Thompson v Cooper*, 24 AD3d 203, 205 [2005]). In any event, the original complaint said nothing about extinguishing defendants' guarantees.

Since there is no evidence in the record that DCIU gave a guarantee, and since plaintiff neither requested summary judgment

against it nor explained why it was liable, we deny summary judgment as against DCIU.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5733 The People of the State of New York, Respondent, Ind. 2123/08

-against-

William Matos, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel, for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about November 6, 2008, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5734 The People of the State of New York, Respondent, Ind. 4468/08

-against-

Angelo Rivera, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Renee A. White, J. at speedy trial motion; Daniel P. FitzGerald, J. at jury trial and sentencing), rendered December 11, 2009, convicting defendant of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of 7 years, unanimously affirmed.

The court properly denied defendant's speedy trial motion. Defendant did not preserve his claim that the adjournment following the court's decision to order a hearing on defendant's suppression motion should have been charged to the People (*see People v Beasley*, 16 NY3d 289, 292 [2011]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits (*see* CPL 30.30[4][a]; *People v Davis*, 80 AD3d 494 [2011]; *People v Green*, 90 AD2d 705 [1982], *lv*

denied 58 NY2d 784 [1982]). This determination renders the excludability of the remaining challenged period academic. In any event, the other challenged period was properly excluded due to the unavailability of a principal prosecution witness for medical reasons (CPL 30.30[4][g]; *People v Alcequier*, 15 AD3d 162, 163 [2005], *lv denied* 4 NY3d 851 [2005]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5736 The People of the State of New York, Respondent, Ind. 1020/07

-against-

Gabriel Tiribio, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (William B. Carney of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered July 16, 2008, convicting defendant, after a jury trial, of burglary in the first degree (two counts), burglary in the second degree, and robbery in the first and second degrees, and sentencing him, as a second felony offender, to an aggregate term of 18 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's principal argument is that the police action was a full scale arrest requiring probable cause, rather than an investigative detention only requiring reasonable suspicion. However, the officers' display of their weapons, use of force to bring defendant to the ground, and application of handcuffs were precautionary measures that were justified by the circumstances and did not elevate the detention to an arrest (*see People v*

Allen, 73 NY2d 378, 379-80] [1989]; *People v Chestnut*, 51 NY2d 14, 21 [1980]. The police entered a confusing, rapidly unfolding situation and were reasonably concerned for their safety. The hearing record fully supports the court's finding that the police had been informed that the fleeing suspects were armed, as well as its finding that defendant and his accomplice did not comply with the officers' initial command that they not move. To the extent that defendant is also arguing that the police did not even have reasonable suspicion, that argument is without merit.

Defendant did not preserve his claim that the verdict was based on legally insufficient evidence, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-49 [2007]). There is no basis for disturbing the jury's credibility determinations.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5737 The People of the State of New York, Respondent, Ind. 5063/08

-against-

Vladamir Pashanau, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellant Litigation, New York (Jan Hoth of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about May 28, 2009, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5738 New York City Campaign Finance Board, Index 401380/09
Plaintiff-Respondent,

-against-

Robby Mahadeo, et al.,
Defendants,

Ray L. Trotman, etc.,
Defendant-Appellant.

_____

Ray L. Trotman, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Judith J. Gische, J.), entered November 9, 2010, which granted plaintiff New York City Campaign Finance Board's (Board) motion for summary judgment and for dismissal of all counterclaims, and denied defendants' motion to vacate a Board determination imposing penalties on defendants and to compel payment of certain matching funds, deemed to be an appeal from judgment, same court and Justice, entered November 23, 2010, in favor of plaintiff and against defendants, in the total sum of $24,828.70, and as so considered, unanimously affirmed, without costs.

In this action to recover civil penalties from defendants (*see* Campaign Finance Act of 1965, as codified at Administrative

Code of City of NY § 3-701 *et seq.*), defendant Trotman's argument, that the Board lacked jurisdiction to impose statutory penalties on the defendants because the defendants never received any public matching funds from the Board and because the Board determined, before penalties were imposed, that defendants were not qualified to receive public matching funds, is unpreserved as it is raised for the first time on appeal. Were we to reach this argument, we would find it unavailing. Trotman's argument constitutes a collateral attack on the Board determination that imposed the challenged penalties. That determination may not be reached, as the time for bringing an article 78 proceeding to challenge it expired more than a year prior to defendants' assertion of a counterclaim to the Board's instant action to recover the penalties imposed, and defendants' order to show cause seeking declaratory relief (*see generally* CPLR 217 [1]; *Matter of Lewis Tree Serv. v Fire Dept. of City of N.Y.*, 66 NY2d 667 [1985]). Even assuming, arguendo, Trotman's appellate argument was not precluded, and was properly preserved for appellate consideration, it is unavailing. Trotman, as the principal treasurer for defendant-candidate, was subject to joint and several liability under the public matching fund program, and he was obligated to ensure the campaign's compliance with all public matching fund requirements, as set forth in Administrative

Code § 3-701 *et seq.*, even if the campaign ultimately failed to qualify for, or accept, public funds under the program (*see* Administrative Code §§ 3-703 [11], 3-711; *Matter of Espada 2001 v New York City Campaign Fin. Bd.*, 59 AD3d 57, 63 [2008]).

To the extent Trotman argues that the Board's determination was "arbitrary and capricious" as it was made without a hearing, and without regard to the facts, such argument again constitutes an impermissible collateral attack upon the Board's determination. In any event, the record reflects that the defendants failed to request a hearing and, further, that the Board properly based its determination regarding penalties upon defendants' disclosures and the applicable statutory scheme (*see* Administrative Code § 3-701 *et seq*.).

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

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5739 The People of the State of New York, Respondent, Ind. 4039/06

-against-

Bryan Wingfield, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Denise Fabiano of counsel), and Mayer Brown LLP, New York (Christopher J. Houpt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John B. F. Martin of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles J. Tejada, J. at suppression hearing; Bruce Allen, J. at jury trial and sentencing), rendered January 4, 2008, convicting defendant of criminal possession of a weapon in the second and third degrees, and sentencing him, as a second violent felony offender, to an aggregate term of 7 years, unanimously affirmed.

The court properly denied defendant's suppression motion. When the police heard shots and immediately saw defendant running from the location where the gunfire originated, the police acted reasonably under the totality of circumstances when they pursued defendant. Defendant's pattern of behavior provided reasonable suspicion that the reason for his flight was his involvement in the shooting (*see People v Johnson*, 51 AD3d 508, 509 [2008], *lv*

denied 11 NY3d 738 [2008]). Accordingly, the recovery of a pistol that defendant dropped was not the product of an unlawful seizure.

The court's adverse inference charge concerning the prosecution's loss or destruction of certain recordings of an officer's radio transmission correctly stated the law, and it was sufficient to prevent any prejudice (*see People v Martinez*, 71 NY2d 937, 940 [1988]). The court was not obligated to include additional language requested by defendant (*see People v Alvarez*, 54 AD3d 612, 613 [2008], *lv denied* 11 NY3d 853 [2008]).

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5740 Todd Pleeter, et al., Index 111415/07
Plaintiffs-Appellants,

-against-

William Cole, M.D., et al.,
Defendants-Respondents,

New York University Medical Center, et al.,
Defendants.

_____

Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellants.

Gordon & Silber, P.C., New York (Laura E. Rodgers of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered March 17, 2010, dismissing the complaint after jury trial, and bringing up for review an order, same court and Justice, entered January 12, 2010, which denied plaintiffs' post-trial motion to set aside the verdict, unanimously affirmed, without costs.

On June 24, 2006, Todd Pleeter suffered a blood clot to his eye, for which he was treated at New York University Medical Center. As reported to Dr. William Cole in the hospital, plaintiff's medical history included an episode of atrial fibrillation in 2002, after which he underwent mitral valve prolapse repair, with no subsequent episodes of atrial

fibrillation or palpitations. The hospital records also contain an entry from Dr. Cole stating that plaintiff reported having not taken aspirin until June 26. Based upon the foregoing and the results of tests performed at the hospital, Dr. Cole determined that plaintiff had suffered from a platelet embolus or clot to the eye and prescribed him an antiplatelet medication upon discharge.

We perceive no basis to disturb the jury's crediting of the testimony of Dr. Cole and his expert cardiologist over that of plaintiffs' experts with regard to the propriety of Dr. Cole's failure to prescribe Coumadin, an anticoagulant (*see Torricelli v Pisacano*, 9 AD3d 291 [2004], *lv denied* 3 NY3d 612 [2004]).

The trial court did not commit reversible error in allowing into evidence the medical records of Dr. Kenneth Hymes, a hematologist, whose response to a subpoena duces tecum was accompanied by an unsworn letter bearing his signature and purporting to be a certification of the records. The admission of these records, which post-dated the alleged act of malpractice, was not prejudicial to plaintiffs, was cumulative and was at most harmless error.

We have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5741 The People of the State of New York, Respondent, Ind. 1352/04

-against-

Melvin Williams, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Davis Polk & Wardwell LLP, New York (William Pollak of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Ronald A. Zweibel, J.), entered on or about May 6, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously reversed, on the law and as a matter of discretion in the interest of justice, the motion granted, the order replaced by an order specifying and informing defendant of a proposed sentence of 2 years plus 1½ years' postrelease supervision, and the matter remanded for further proceedings.

The court denied resentencing both on the ground of ineligibility and on the merits. Defendant is eligible for resentencing (*see People v Santiago*, 17 NY3d 246 [2011]), and we

conclude that substantial justice dictates resentencing as indicated (*see e.g. People v Milton*, 86 AD3d 478 [2011]).

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5742-
5743 The People of the State of New York, Respondent,

-against-

Anthony Gillespie,
Defendant-Appellant.

Ind. 1255/99

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered November 4, 2009, resentencing defendant to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing the mandatory minimum term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d

621 [2011]). We have no authority to revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Renwick, DeGrasse, JJ.

5744N Josephina Santos Santana, et al., Index 300859/10
Plaintiffs-Respondents,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

Wallace D. Gossett, Brooklyn (Jane Shufer of counsel), for appellants.

Ronemus & Vilensky, LLP, New York (Robert Vilensky of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 30, 2010, which, in an action for personal injuries sustained by plaintiff Josephina Santos Santana when she slipped and fell while descending a staircase in a subway station owned and operated by defendants, granted plaintiffs' motion for leave to amend the notice of claim and file a late notice of claim, unanimously reversed, on the law and the facts, without costs, and the motion denied.

The court should not have granted plaintiffs' motion for leave to amend the notice of claim pursuant to General Municipal Law § 50-e(6). Plaintiffs did not merely seek to supplement the original claim, but rather, impermissibly sought to change the theory of liability from a fall on the stairs due to snow, ice or slush to a fall due to a loose metal tread (*see Torres v New York*

City Hous. Auth., 261 AD2d 273, 275 [1999], *lv denied* 93 NY2d 816 [1999]). Moreover, defendant would be prejudiced by the amendment since the original notice of claim was insufficient to allow them to effectively conduct a meaningful investigation of plaintiffs' amended claim (*see id.* at 274-275).

In view of the foregoing, we need not reach the merits of plaintiffs' motion for leave to file a late notice of claim.

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

ENTERED: OCTOBER 18, 2011

CLERK

Mazzarelli, J.P., Moskowitz, Acosta, Degrasse, JJ.

5745 In re Keith A'Gard Ind. 4234/09
[M-3943] Petitioner,

-against-

Honorable Renee Allyn White, et al.,
Respondents.

_____

Keith A'Gard, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Honorable Renee A. White and Daniela Conti-Maiorana, respondents.

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

_____

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.

ENTERED: OCTOBER 18, 2011

CLERK

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

5746 The People of the State of New York, Ind. 906/05
Respondent,

-against-

Elio Cruz,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Katheryne M. Martone of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered December 13, 2005, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 18 years to life, unanimously affirmed.

Defendant's ineffective assistance claims primarily involve matters outside the record concerning counsel's strategic choices and defendant's input into those choices (*see People v Love*, 57 NY2d 998 [1982]). Although defendant raised these claims in an unsuccessful CPL 440.10 motion, defendant's motion for leave to appeal to this Court was denied (*see* CPL 450.15 [1]; 460.15). Accordingly, while defendant's claims are cognizable on direct appeal, our review is limited to the trial record (*see People v Evans,* 16 NY3d 571, 575 [2011]). To the extent the trial record permits review, we conclude that defendant received effective

assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

Defendant has not shown "the absence of strategic or other legitimate explanations" for the various aspects of counsel's conduct challenged on appeal (*People v Rivera*, 71 NY2d 705, 709 [1988]). On the contrary, the trial record, including a detailed statement by counsel that defendant expressly ratified, shows that counsel had a legitimate explanation for declining to pursue any defense that would have led to a manslaughter conviction, including extreme emotional disturbance or lack of homicidal intent. Defendant maintained his complete innocence, and his counsel appropriately respected his client's desire to pursue an all-or-nothing strategy (*see People v Petrovich*, 87 NY2d 961 [1966]; *People v Jacotin*, 304 AD2d 447 [2003], *lv denied* 100 NY2d 595 [2003]).

To the extent that there is any merit in defendant's other claims that counsel's performance was deficient, defendant cannot demonstrate that he was prejudiced, in light of his acknowledgment on appeal that his trial testimony was patently incredible and that his all-or-nothing defense had virtually no hope of success. Defendant's chosen defense was so implausible that it would have failed no matter how well his counsel

investigated and tried the case.

Counsel also made a reasonable strategic choice when, rather than requesting a mistrial, he successfully moved for the replacement of two jurors who disparaged counsel during the trial. To the extent that, aside from the issue of ineffective assistance, defendant directly challenges the court's resolution of the incident of the two jurors, his arguments are unpreserved, waived and procedurally defective (*see People v Garcia*, 298 AD2d 107 [2002], *lv denied* 99 NY2d 558 [2002]), and we decline to review them in the interest of justice.

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5748 Shan Palakawong,
Plaintiff,

Index 300883/08
84021/09
304038/08

-against-

Marie Lalli, etc., et al.,
Defendants.

– – – – –

Marie Lalli, et al.,
Third-Party Plaintiffs-Appellants,

-against-

Edwin Perez,
Third-Party Defendant-Respondent.

– – – – –

Edwin Perez,
Plaintiff-Respondent,

-against-

A.J. Lalli, et al.,
Defendants-Appellants,

Shan Palakawong,
Defendant.

_____

O'Connor, McGuinness, Conte, Doyle & Oleson, White Plains (Elizabeth Holmes of counsel), for appellants.

Goldman & Grossman, New York (Eleanor R. Goldman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered on or about June 25, 2010, which, in related personal injury actions arising from a motor vehicle accident, denied the

Lallis' motion to dismiss Perez's action and any of Perez's claims and defenses in the third-party action or to issue other sanctions for Perez's spoliation of his motorcycle, unanimously modified, on the law and the facts, to grant the motion to the extent of precluding Perez from presenting evidence at trial as to the condition of his motorcycle after the accident, without prejudice to seeking an adverse inference change at trial, and otherwise affirmed, without costs.

The Lallis may rely on evidence other than Perez's motorcycle to prove that they did not cause the motor vehicle accident, including the police accident report and their insurer's inspections of other vehicles involved in the accident. Thus, Supreme Court providently exercised its discretion in denying that part of the Lallis' motion seeking to dismiss Perez's action (*see Tommy Hilfiger, USA v Commonwealth Trucking*, 300 AD2d 58, 60 [2002]). However, a lesser sanction is warranted

given Perez's intentional alteration of his motorcycle (*see Kugel v City of New York*, 60 AD3d 403 [2009]; *Rodriguez v 551 Realty LLC*, 35 AD3d 221, 221 [2006]).

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5752 The People of the State of New York, Ind. 6800/03
Respondent,

against-

Mike Joseph,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Renee A. White, J.), rendered April 27, 2010, resentencing defendant to a term of 6 years, with 2 years' postrelease supervision, unanimously affirmed.

There is no basis for further reducing the sentence pursuant to CPL 440.46, and we perceive no basis for reducing defendant's term of postrelease supervision to one and one-half years.

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5754 The People of the State of New York, Respondent, Ind. 6005/02

-against-

Cesar Bernacet, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Laura Lieberman Cohen of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

_____

Judgment of resentence, Supreme Court, New York County (Rena K. Uviller, J.), rendered August 4, 2009, resentencing defendant to a term of 7 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]). Defendant

may not challenge the voluntariness of his underlying guilty plea on this appeal (*see People v Jordan*, 16 NY3d 845 [2011]).

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5755 The People of the State of New York, Ind. 270/99
Respondent,

-against-

Joseph Horlback,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Carol Berkman, J.), rendered April 29, 2009, resentencing defendant to a term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]), and we do not find that term to be excessive. We have no authority to

revisit defendant's prison sentence on this appeal (*see id.* at 635).

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5757 The People of the State of New York, Ind. 6194/08
Respondent,

-against-

Kenneth Powell,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner J.), rendered on or about November 17, 2009,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 18, 2011

CLERK

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

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

5758 The People of the State of New York, Respondent, Ind. 783/09

-against-

Allen Rice, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Nicholas A. Duston of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered on or about February 3, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: OCTOBER 18, 2011

CLERK

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

5761 The People of the State of New York, Ind. 4519/08
Respondent,

-against-

Ryan Grays,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee A. White J.), rendered on or about March 17, 2009

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTERED: OCTOBER 18, 2011

CLERK

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

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

5762 The People of the State of New York, Ind. 3263/07
Respondent,

-against-

Jasiri Walloe,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Ropes & Gray, LLP, New York (Irina Vasilchenko of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on May 30, 2008, convicting defendant, after a jury trial, of sexual abuse in the first degree (six counts) and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 14 years, unanimously affirmed.

The People did not violate their disclosure obligations under *Brady v Maryland* (373 US 83 [1963]), and defendant is not entitled to reversal on the ground that the prosecution failed to acquire an allegedly exculpatory surveillance tape possessed by a private party. The tape was in the exclusive possession of a bar, and it was never in the People's possession or control. Therefore, whether exculpatory or not, it did not constitute

Brady material (*see People v Brock*, 246 AD2d 406 [1998], *lv denied*, 91 NY2d 940 [1998]). Although a police officer viewed the tape and requested a copy, he did not thereby constructively possess the tape, which was erased by the bar. Temporary access is not necessarily the equivalent of possession for *Brady* purposes (*see People v Hayes*, 17 NY3d 46, 50-52 [2011] [no *Brady* violation where police failed to interview witnesses after overhearing them make potentially exculpatory statements]). Furthermore, the officer testified as to his recollection of the contents of the tape, and there is no reason to believe it contained anything exculpatory. At most, it depicted defendant and the victim at a time and place not likely to have a bearing on the victim's intoxication at the time of the crime. We have considered and rejected defendant's remaining *Brady*-related arguments.

The court properly denied defendant's request for a missing witness instruction. The People established that the witness was unavailable despite reasonably diligent efforts to locate him (*see e.g. People v Skaar*, 225 AD2d 824, 824-825 [1996], *lv denied* 88 NY2d 854 [1996]). Furthermore, the witness was not under the People's control for purposes of a missing witness instruction.

We do not find the sentence to be excessive.

Defendant's remaining claim is unpreserved and we decline to review it in the interest of justice.

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5763 The People of the State of New York, Dkt. 26230C-08
Respondent,

-against-

Jose Batista,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne Hale of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered May 19, 2009, convicting defendant, after a nonjury trial, of harassment in the second degree, and sentencing him to a term of 15 days, unanimously affirmed.

Defendant did not preserve his challenge to the legal sufficiency of the evidence, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence supports the inference

that defendant acted with the requisite intent for second-degree harassment (*see* Penal Law § 240.26[1]; *People v Bartkow*, 96 NY2d 770 [2001]), particularly since defendant swung at the victim while making threats of violence.

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5764 Mark Richard Pines, Index 100112/06
Plaintiff-Respondent,

-against-

Ricardo A. Lopez,
Defendant-Appellant.

_____

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellant.

Richard J. Katz, LLP, New York (Jonathan A. Rapport of counsel), for respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered September 28, 2010, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing plaintiff's claims for the permanent consequential limitation and significant limitation categories of serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint in its entirety.

Defendant established prima facie entitlement to judgment as a matter of law on plaintiff's claims of permanent and significant limitations. Defendants submitted, inter alia, the affirmed reports of an expert orthopedist, who, after reviewing plaintiff's medical records and examining him, found no

limitations in the range of motion of plaintiff's knees and opined that plaintiff's injuries were the result of severe degenerative arthritis in both knees.

In opposition, plaintiff did not raise a triable issue of fact. He failed to present admissible evidence of contemporaneous range of motion limitations following the accident (*see Batts v Medical Express Ambulance Corp.*, 49 AD3d 294 [2008]). The medical records of plaintiff's orthopedic surgeon also documented that plaintiff previously had been diagnosed with degenerative arthritis in his knees and that the eventual need for a total knee replacement had been anticipated for several years prior to the subject accident. Furthermore, plaintiff's medical expert failed to address two prior accidents in which plaintiff had injured his knees, or to "address how plaintiff's current medical problems, in light of [his] past medical history, are causally related to the subject accident"

(*Style v Joseph*, 32 AD3d 212, 214 [2006]; *see Zhijian Yang v Alston*, 73 AD3d 562, 563 [2010]).

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5765 The People of the State of New York, Respondent, Ind. 302/08

-against-

Terrence Johnson, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Nicholas A. Duston of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about March 26, 2010, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant'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: OCTOBER 18, 2011

CLERK

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

5766N Patricia Forbes, Index 101558/06
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

_____

Steven S. Efron, New York (Renée L. Cyr, of counsel), for appellants.

Roth & Roth, LLP, New York (David A. Roth of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered May 5, 2010, which, in an action for personal injuries, denied defendants' motion to vacate an order granting plaintiff's motion to strike their answer for failure to comply with discovery orders, unanimously affirmed, without costs.

Denial of the motion was proper inasmuch as defendants' proffered excuse of "law office failure" was not credible (*see Gonzalez v Praise the Lord Dental*, 79 AD3d 550 [2010]). Defendants' pattern of noncompliance with court-ordered disclosure over a period of several years gives rise to an inference of willful and contumacious conduct that warranted the striking of the answer (*see Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [2010]). Furthermore, the discovery responses that defense

counsel claims would have demonstrated compliance with the discovery orders post-dated the return date of the motion (*see Gonzalez* at 550).

Defendants also failed to demonstrate a meritorious defense to the action. The evidence offered solely on reply is entitled to no consideration by a court (*see Guzman v Mike's Pipe Yard*, 35 AD3d 266 [2006]; *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1995]).

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

ENTERED: OCTOBER 18, 2011

CLERK

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

5767 In re Ingrid Baumann, Ind. 4234/09
[M-3963] formerly known as Ingrid Diamond,
Petitioner,

-against-

Honorable Matthew Cooper
Respondent.

_____

Ingrid Baumann, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Anthony J. Tomari of counsel), for respondent.

_____

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.

ENTERED: OCTOBER 18, 2011

CLERK