SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 24, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Renwick, Freedman, Richter, JJ.

11615 Scarola Ellis LLP, Index 113781/09
Plaintiff-Respondent,

-against-

Elan Padeh,
Defendant-Appellant.

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Shapiro Arato & Isserles LLP, New York (Marc E. Isserles of counsel), for appellant.

Scarola Malone & Zubatov LLP, New York (Alexander Zubatov of counsel), for respondent.

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Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered December 27, 2012, which, upon a jury verdict, awarded plaintiff damages for breach of contract related to plaintiff's hourly representation and for unjust enrichment, unanimously modified, on the law, to vacate the award of damages on the unjust enrichment cause of action, to dismiss said cause of action, and otherwise affirmed, without costs.

On April 7, 2003, defendant Elan Padeh retained attorney George Zelma to represent him in connection with a claim against

Corcoran, a real estate company for whom Padeh previously worked as a broker. Padeh alleged that Corcoran had breached an oral agreement to pay Padeh his share of commissions earned from several real estate deals. The retainer agreement between Zelma and Padeh provided that Zelma would be paid an initial fee of $5,000 up front, plus a contingency fee of 41% of the sum recovered by lawsuit or settlement of the claim against Corcoran.

In June 2003, Zelma filed a lawsuit on Padeh's behalf against Corcoran and other entities. Corcoran asserted counterclaims against Padeh and also brought a third-party action against The Developers Group, LLC (TDG), Padeh's real estate company.[1] Because Zelma was a sole practitioner, he asked plaintiff law firm Scarola Ellis LLP (Scarola) to join the case as co-counsel. In an email dated July 2, 2004, Zelma and Scarola entered into a co-representation agreement providing that, depending on the amount of work Scarola did, Scarola would receive up to half of Zelma's 41% contingency fee (i.e., 20.5%) collected in connection with Padeh's claims against Corcoran. Both Zelma and Scarola considered this email to be an enforceable contract.

[1] Padeh hired a different law firm to represent TDG on the counterclaims.

On August 3, 2006, two years after being brought into the litigation, Scarola entered into a retainer agreement with Padeh. In that agreement, Scarola acknowledged that it had been representing, and would continue to represent, Padeh as co-counsel with Zelma in Padeh's effort to collect money from Corcoran in the pending action. Padeh and Scarola confirmed that Scarola would share in any contingency fee award in the Corcoran action on the terms previously agreed to between Zelma and Scarola in their July 2, 2004 co-representation agreement. The August 3, 2006 retainer agreement further provided that Padeh would pay, on an hourly basis, for services provided by Scarola that were outside the pursuit of Padeh's claims in the Corcoran action. A handwritten notation specified that the hourly arrangement did not include work by Scarola on issues necessary or in aid of Padeh's claims as plaintiff.

In the course of litigating the third-party claims, Corcoran alleged that Padeh and other TDG witnesses had lied during depositions. At the direction of the court, Corcoran undertook an investigation into the claimed misconduct. In May 2007, Corcoran provided the court with a report alleging that Padeh and other officers of TDG had committed perjury. Corcoran moved to strike Padeh's and TDG's pleadings, and sought monetary sanctions

in the form of attorney and expert fees incurred during its investigation. The court scheduled an evidentiary hearing on Corcoran's motion.

In October 2007, before the hearing commenced, Padeh settled the litigation and agreed to withdraw his claims against Corcoran for the sum of $200,000. As part of the settlement, Corcoran agreed to drop its counterclaims against Padeh and its third-party claims against TDG, as well as an outside arbitration against one of TDG's officers. Corcoran also agreed to withdraw its motion seeking sanctions for the alleged perjury. Scarola did not approve of the settlement, which was negotiated by Zelma. Zelma received 41% of the $200,000 settlement as per his retainer agreement with Padeh and remitted half of that amount (i.e., 20.5% of the settlement) to Scarola in accord with the co-representation agreement between the attorneys.

In September 2009, Scarola commenced this action against Padeh alleging that it had not been fully compensated for its services. Although Scarola concedes that it received 20.5% of the $200,000 settlement, it sought to recover, inter alia, 20.5% of additional noncash benefits Padeh allegedly received in settling the case, including avoiding the monetary sanctions sought by Corcoran. In its complaint, Scarola asserted causes of

action for breach of the August 3, 2006 retainer agreement, unjust enrichment and quantum meruit. The complaint also included a separate breach of contract claim alleging that Padeh had breached the retainer agreement by not paying the hourly fees for services outside the scope of the contingency fee arrangement. In his answer, Padeh asserted a counterclaim alleging that the retainer agreement was procured through duress.

The case proceeded to trial, and the jury rendered a special verdict. First, the jury found that the retainer agreement was not the product of duress. Next, the jury found that Padeh had breached the retainer agreement by failing to fully pay Scarola its hourly fees, and awarded damages in the amount of $62,290.35. The jury found, however, that Padeh did not breach the retainer agreement by failing to account for the full value of benefits he received when he settled the litigation against Corcoran. The jury also found that Scarola was not entitled to recover in quantum meruit, but concluded that Padeh was unjustly enriched as the result of services rendered by Scarola, and awarded damages in the amount of $172,113.36.

On appeal, Padeh challenges the jury's verdict awarding damages for unjust enrichment. It is well settled that a claim for unjust enrichment does not lie where it duplicates or

replaces a conventional contract claim (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). Thus, damages for unjust enrichment may not be sought "where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). On the other hand, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract" (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] [internal quotation marks omitted]).

Here, the unjust enrichment claim is precluded by the existence of the July 2, 2004 co-representation agreement between Zelma and Scarola. Although Padeh's duress claim may have called into question the validity of the August 3, 2006 retainer agreement, it is undisputed that both Zelma and Scarola considered the July 2, 2004 agreement to be an enforceable contract. Moreover, that agreement squarely covers the very subject matter of the unjust enrichment claim, i.e., the legal fees to which Scarola is entitled with respect to services

provided in the action against Corcoran. It is of no consequence that Padeh himself was not a signatory to the co-representation agreement (*see Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 AD3d 463, 464 [1st Dept 2012], *lv denied* 19 NY3d 804 [2012] ["there can be no quasi-contract claim against a third-party non-signatory to a contract that covers the subject matter of the claim"]).

Padeh fully preserved his argument that the cause of action for unjust enrichment should not have been submitted to the jury. After both sides rested, counsel for Padeh sought dismissal of this claim, arguing that the existence of the July 2, 2004 co-representation agreement precluded recovery in quasi-contract. Padeh's counsel renewed his objection when the court asked for exceptions to the verdict sheet, and specifically told the court that he did not want unjust enrichment charged. Contrary to Scarola's argument, this was sufficient to preserve the issue, and a specific objection to the form of the questions on the verdict sheet was not required.

Scarola unpersuasively argues that the jury's unjust enrichment verdict can be sustained because Padeh abandoned the Corcoran action. There is no fair view of the evidence that Padeh abandoned the lawsuit. To the contrary, he pursued his

claims and reached a settlement with Corcoran for $200,000 (*see Matter of Spellman*, 4 AD2d 215, 216 [1st Dept 1957] [action not abandoned when brought to definitive conclusion by settlement]). *Andrewes v Haas* (214 NY 255 [1915]) and *Mahan v Mahan* (213 AD2d 458 [2d Dept 1995]), relied upon by Scarola, are distinguishable. Those cases addressed situations where the client either refused to prosecute or prematurely discontinued an action, factors not present here. In any event, even if Scarola's abandonment theory had any merit, the proper measure of damages would be quantum meruit, not unjust enrichment (*see Andrewes*, 214 NY at 259; *Spellman*, 4 AD2d at 216). And here, the jury specifically denied any recovery based on quantum meruit.

No fair view of the evidence supports a conclusion that Padeh discharged Scarola before the litigation settled. Although Padeh informed Scarola that he would "not be paying two lawyers to represent [him]," when considered in its proper context, it is clear that Padeh was referring only to work on the sanctions hearing, and not on the main litigation. In any event, as with abandonment, the proper measure of damages where a contingency fee attorney is discharged is quantum meruit (*see King v Fox*, 7 NY3d 181, 192 [2006]), a claim the jury rejected.

We do not disturb the jury's verdict awarding $62,290.35

damages on the breach of contract claim related to the unpaid hourly fees. The August 3, 2006 retainer agreement unambiguously provides for hourly fees for services rendered that were outside the pursuit of Padeh's claims in the Corcoran action. The jury could have reasonably concluded that the work performed by Scarola on the perjury investigation was independent of Padeh's claims in the Corcoran action. Furthermore, Padeh paid various invoices that he received in connection with the perjury matter, evincing his understanding that it was not included in the contingency arrangement.

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

ENTERED: APRIL 24, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12056 & M-819 Maria A. Karpov, Plaintiff-Appellant, Index 307487/09

-against-

Andrei Shiryaev, Defendant-Respondent.

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Katsandonis, P.C., New York (John Katsandonis of counsel), for appellant.

Andrei Shiryaev, respondent pro se.

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Order, Supreme Court, New York County (Steven E. Liebman, Special Referee), entered October 24, 2012, which denied plaintiff's application for a judgment of divorce upon the ground of constructive abandonment, and dismissed the action, unanimously reversed, on the law, without costs, the action reinstated, and the matter remanded to the trial court for an inquest on grounds, pursuant to the parties' November 6, 2009 stipulation, and for further proceedings as may be necessary.

Plaintiff commenced this divorce action on the ground of constructive abandonment in July 2009. In a so-ordered stipulation entered into at a November 6, 2009 preliminary conference, the parties, each represented by counsel, agreed that defendant would assert a counterclaim for divorce on the ground

of constructive abandonment, and plaintiff withdrew her claim. On August 1, 2011, the outstanding financial matters were referred to a special referee to hear and determine. The parties then stipulated that the Referee would also hear and determine the issue of grounds, pursuant to the November 6, 2009 stipulation. However, at the hearing, on February 21, 2012, defendant made an application to withdraw his counterclaim, and, over plaintiff's objection, the Referee granted the application, leaving plaintiff without a cause of action for divorce. The Referee then granted plaintiff's application to reinstate her claim for divorce. Although the Referee stated that he was permitting plaintiff to proceed by inquest, instead he conducted a full trial on grounds, at which defendant was permitted to interpose opposition. The Referee denied the divorce.

The Referee exceeded his authority when he permitted defendant to withdraw his counterclaim for constructive abandonment, and conducted a fully contested trial on plaintiff's previously-withdrawn claim. The reference by the court, as thereafter expanded by the parties' stipulation, did not give the Referee authority to set aside any part of the parties' November 6, 2009 stipulation (CPLR 4311; *Kucherovsky v Excel Med. & Diagnostic, P.C.*, 93 AD3d 531 [1st Dept 2012]). By clear and

unambiguous terms, defendant waived his right to withdraw his counterclaim (*see Tutt v Tutt*, 61 AD3d 967 [2d Dept 2009]). Even if the Referee had the authority to set aside the stipulation, no legal basis whatsoever was set forth justifying setting it aside (*see Starayeva v Starayev*, 50 AD3d 354 [1st Dept 2008]).

We therefore remand this matter to the trial court to conduct an inquest on defendant's counterclaim. Should defendant violate the November 6, 2009 stipulation, we leave it to the trial court to fashion an appropriate remedy for defendant's noncompliance.

M-819 - *Karpov v Shiryaev*

Motion seeking costs denied.

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

ENTERED: APRIL 24, 2014

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Gische, Clark, JJ.

12004 The People of the State of New York, Ind. 1703/09
Respondent,

-against-

Adolphus Hamilton,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered January 13, 2012, convicting defendant, after a jury trial, of murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved 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, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The People disproved defendant's justification defense beyond a reasonable doubt (*see e.g. People v Wimberly*, 19 AD3d 518 [2d

Dept 2005], *lv denied* 5 NY3d 811 [2005]).

Although defendant asked the court to delete the concept of duty to retreat (*see* Penal Law § 35.15[2][a]) from its justification charge, he did so on a different ground from the ground he asserts on appeal, and never asserted that there was a factual issue regarding whether the homicide occurred in his dwelling. Accordingly, his present challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we conclude that there was no reasonable view of the evidence upon which to relieve defendant of the duty to retreat pursuant to Penal Law § 35.15(2)(a)(i), and no factual issue in this regard requiring submission to the jury. In any event, any error in the court's justification charge was harmless (*see People v Petty*, 7 NY3d 277, 285-286 [2006]).

We perceive no basis for reducing the sentence.

The Decision and Order of this Court entered herein on March 20, 2014 is hereby recalled and vacated.

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

ENTERED: APRIL 24, 2014

CLERK

Acosta, J.P., Renwick, Moskowitz, Freedman, Feinman, JJ.

12012 Edward Weinstock, Index 650712/11
Plaintiff-Respondent,

-against-

Merisel, Inc., etc., et al.,
Defendants-Appellants.

_____

Rivkin Radler LLP, Uniondale (Evan H. Krinick of counsel), for appellants.

DLA Piper LLP (US), New York (Timothy E. Hoeffner of counsel), for respondent.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 25, 2013, which granted plaintiff's motion for partial summary judgment on his breach of contract cause of action, unanimously affirmed, with costs.

Plaintiff sues for one year's salary plus commissions owed under an October 2006 employment contract with defendant Merisel, Inc., claiming he was wrongfully terminated on February 10, 2011 from his position as President of Merisel's Fuel Division. Plaintiff had been President of Fuel Digital, Inc. which had been sold to Merisel pursuant to an asset purchase sale in 2006. Both Fuel Digital and Merisel performed digital retouching services for clients in the fashion industry.

Plaintiff's employment contract specifically provided that

he was hired as President of the Fuel Division of Merisel for an annual base salary of $300,000, plus additional compensation, and that if he was terminated without cause, he would be owed one year's base salary plus his earned commissions as severance. It further provided that if plaintiff was terminated for cause, he would only be entitled to earned base salary and commissions. "Cause" is defined in paragraph 8(c) as (i) breach of the employment agreement, (ii) failure to perform job duties, (iii) conviction of a crime, (iv) engaging in misconduct or violence detrimental to Merisel, (v) material breach of Merisel's policies or the law, (vi) refusal to follow the reasonable directives of Merisel's board, and (vii) misconduct that materially injures the financial condition of Merisel. Plaintiff was also obligated not to compete with defendant for one year following his termination.

Plaintiff avers, and the motion court found, that after extensive discovery, defendant is unable to establish any basis for finding that the termination was for "cause" and that plaintiff is entitled to summary judgment awarding him one year's salary and earned commissions pursuant to his contract. The court found that none of the claims of disloyalty that would have been a basis to deny summary judgment were founded.

Defendants argue that plaintiff was terminated for cause

based on misconduct or an act of dishonesty "that is injurious to the Company." They maintain that plaintiff "surreptitiously" copied data for a client, Lane Bryant, and that he encouraged several Merisel employees to leave and join a competitor company, Splash, which was founded by a former Merisel employee.

The claim for copying is based solely on the affidavit of a junior level employee who averred that in January of 2011, plaintiff requested that he copy files of Lane Bryant's images for a direct mail catalog onto a silver computer disk. Lane Bryant was one of Fuel's clients and had requested such a file. The employee sent an email indicating that he told plaintiff that this was illogical because Lane Bryant already had the images, and plaintiff emailed back, "Ok, no problem. Thanks." The employee then said that plaintiff "reiterated the request verbally" and "told me to copy the files as soon as possible," which he did. Defendant originally averred that this constituted a theft of its intellectual property.

Plaintiff denies having made a verbal request for a silver disk and no disk has been produced. At her deposition, Susan Reiser, plaintiff's contact at Lane Bryant who originally requested the images, denied ever having received such a disk. Reiser testified that she had used Merisel or Fuel on an

individual project basis and had asked plaintiff to have archived images sent to Lane Bryant for possible internal retouching, but did not follow through or receive the images from Merisel. She also testified that she stopped using Merisel after plaintiff was terminated, but only after Merisel's Chief Client Officer, Michael Berman, called her and "yelled at" or "berated" her, accusing her of stealing Merisel's property which she did not have, and which, in any event, she believed belonged to Lane Bryant. Reiser used the words "vicious" and "besmirchy" to describe the call and said she told him to stop persisting with his "agenda."

Defendants also refer to an internal email sent by Reiser to Alexia Eder, Lane Bryant graphic designer, on February 3, 2011, before the call from Berman, in which she asks, "can we push April model shots to splash." The email also indicates that Lane Bryant could, on its own, upload shots from Fuel to be forwarded to Splash. The email demonstrates both that no disk was needed and that Lane Bryant already had access to its own images. Reiser indicated that all the email meant was that they had been considering Splash for a particular project, but planned to continue using Merisel's services. Nothing in the email implicates plaintiff.

While defendants now acknowledge that even if such a disk were made, there was no theft of property because the images belonged to Lane Bryant, they persist in contending that it was part of a scheme that plaintiff was involved in to transfer business to Splash. However, even if this court were to credit the employee's affidavit stating that plaintiff requested a disk, there is no evidence that such a request was either "surreptitious" or anything other than an effort to comply with a client's legitimate request. Nor, is there any evidence that it was part of a scheme to transfer business to Splash. Moreover, since plaintiff complied with his employment contract and did not compete with Merisel for at least one year after being terminated, there is no basis to conclude that he benefitted from the creation of such a disk or hard drive.

With respect to the allegation that plaintiff assisted or convinced employees to leave Merisel and join Splash, affidavits submitted by those employees belie that claim. The former employees each attest that they left Merisel because their working conditions were "getting progressively worse," they had been passed over for promotion, and their salaries were cut pursuant to a company-wide 10% reduction while, at the same time, the top Merisel executives received substantial bonuses. They

specifically deny that plaintiff had anything to do with their leaving.

On February 3, 2011, just seven days before plaintiff was terminated, defendant's Chief Executive Officer, Donald Uzzi, sent plaintiff a long email, following a conversation between them, which indicated that he appreciated plaintiff giving him a "commitment to stay with Merisel and continue to develop and protect [its] clients to advance the success of Merisel." He further stated, "I appreciate your loyalty to Merisel as well as myself." This email was sent well after other employees had left Merisel to join Splash. It is not alleged that anything specific occurred between the time Uzzi emailed plaintiff and his termination one week later and defendants are not claiming that they had any other grounds for termination. Accordingly, the trial court correctly granted plaintiff summary judgment on his cause of action for breach of contract.

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

ENTERED: APRIL 24, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12081 BLDG ABI Enterprises, LLC, Index 110703/11
Plaintiff-Respondent,

-against-

711 Second Ave Corp., et al.,
Defendants-Appellants.

_____

Michael R. Curran, Rego Park, for appellants.

Livoti Bernstein & Moraco P.C., New York (Robert F. Moraco of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered December 27, 2012, which, to the extent appealable, granted plaintiff's motion to reargue and renew defendants' motion to dismiss the complaint, and, upon renewal, denied the motion to dismiss as against defendant Ian Cheng and granted plaintiff leave to re-plead a reformation cause of action, and denied defendants' motion for renewal, unanimously affirmed, without costs.

While the court mistakenly referred to plaintiff's motion as a motion to reargue, it was essentially treated as a motion for renewal. In general, motions for renewal should be based on "newly discovered facts that could not be offered on the prior motion" (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]; CPLR

2221[e][2]). However, "courts have discretion to relax this requirement and to grant such a motion in the interest of justice" (*id.*) The motion court properly exercised its discretion when it "relaxed this requirement" and granted renewal based on plaintiff's argument that the defect in the guaranty was due to a scrivener's error (*id.*). Plaintiff submitted an affidavit by the drafter of the guaranty, by which defendant Cheng guaranteed defendant 711 Second Ave Corp.'s obligations under a lease, who explained that, through oversight, he neglected to match the date of the guaranty (the date on which both documents were prepared) to the date of lease when executed. This evidence raises issues of fact as to plaintiff's claim of a scrivener's error, which supports permitting plaintiff to assert a claim for reformation of the guaranty to correct the date (*see C.I.T. Leasing Corp. v Pitney Bowes Credit Corp.*, 221 AD2d 211, [1st Dept 1995]).

Defendants' arguments relating to service of process and the effect of plaintiff's alleged lockout action in February 2010 are largely unreviewable, since they challenge the denial of

reargument (*see D'Andrea v Hutchins*, 69 AD3d 541 [1st Dept 2010]). To the extent defendants' argument based on the advocate-witness rule addresses the denial of renewal, it is unavailing.

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12307 The People of the State of New York, Ind. 360/09
Respondent,

-against-

Fernando Ramos,
Defendant-Appellant

_____

Steven Banks, The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), rendered July 23, 2010, as amended August 4, 2010, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him to a term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and 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 determinations concerning identification and credibility. Notwithstanding any deficiencies in the identification testimony, defendant was connected to the crime by other evidence. Among other things, the victim's watch was in defendant's immediate proximity at the time of his prompt apprehension, and there was

no reasonable innocent explanation for that circumstance (*see generally People v Galbo*, 218 NY 283, 290 [1916]).

The court properly denied defendant's suppression motion. Defendant's present arguments are entirely unpreserved and we decline to review them in the interest of justice. We note that the People were never placed on notice of any need to develop the record (*see People v Martin*, 50 NY2d 1029 [1980]; *People v Tutt*, 38 NY2d 1011 [1976]) as to how, after losing sight of a person who fled from a car involved in the robbery, the pursuing officer determined that defendant was this person. As an alternative holding, we find that the hearing record, and reasonable inferences to be drawn therefrom, support the conclusion that the officer had reasonable grounds to believe that defendant was the same person he had just been chasing, and that the police conduct was lawful in all respects.

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12308 Victor Soto, Index 304704/10
Plaintiff-Respondent,

-against-

Deco Towers Associates, LLC, et al.,
Defendants-Appellants,

John Doe,
Defendant.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise Cherkis of counsel), for appellants.

Thomas K. Miller, New York, for respondent.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered February 5, 2013, which, upon reargument of defendants-appellants' (defendants) motion for summary judgment, reinstated plaintiff's common-law negligence claim, unanimously affirmed, without costs.

A court may search the record and grant relief only with respect to a claim on which summary judgment is sought (*see New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463, 467 [1st Dept 2013]). Since defendants' summary judgment motion, addressed to plaintiff's Labor Law claims, did not seek dismissal of plaintiff's common-law negligence claim, the court, upon reargument, properly reinstated the claim. Moreover, questions

of fact exist concerning whether defendants performed the construction work and, in doing so, improperly stacked the boxes that allegedly injured plaintiff. Contrary to defendants' contentions, plaintiff's testimony was neither incredible as a matter of law, nor self-contradictory (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *cf. Perez v Bronx Park S. Assoc.*, 285 AD2d 402, 404 [1st Dept 2001], *lv denied* 97 NY2d 610 [2002]). Plaintiff was not required to show that defendants supervised and controlled his work, as this case involves an allegedly dangerous condition, not the means and methods of the work (*see Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004]).

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12309-
12309A In re Brandon Michael R., and Another,

Dependent Children Under the
Age of Eighteen Years, etc.,

Wandalee R.,
Respondent-Appellant,

Little Flower Children and Family
Services of New York,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

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

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), attorney for the child Brandon Michael R.

Andrew J. Baer, New York, attorney for the child Christopher V.

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Orders of fact-finding and disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 24, 2012, which, after a fact-finding determination that respondent mother had permanently neglected the subject children, terminated her parental rights and committed the custody and guardianship of the children to petitioner agency and the Commissioner of the Department of Social Services for the purpose of adoption, unanimously modified, on the law and the facts, the

disposition as to Brandon Michael R. vacated in its entirety, the disposition as to Christopher V. vacated only with respect to his placement, the matter remanded for reopened dispositional hearings with respect to both children, and otherwise affirmed, without costs.

There was clear and convincing evidence that the agency exerted diligent efforts to reunite the mother and the children by establishing a service plan, referring her for parenting skills and anger management programs, scheduling visitation, attempting to assist her to obtain suitable housing, and referring her for mental health therapy (*see* Social Services Law § 384-b[7][a], [f]). Despite these efforts, the mother failed to complete the programs, was inconsistent with visitation, did not obtain suitable housing, and failed to demonstrate that she was in counseling (*see Matter of Racquel Olivia M.*, 37 AD3d 279, 280 [1st Dept 2007], *lv denied* 8 NY3d 812 [2007]). Accordingly, the court properly determined that the mother had permanently neglected the children.

However, the children's circumstances have changed substantially since the dispositional hearings, as they are both in new foster homes. Brandon, who is 15 years old, has been in the new foster home since November 2013, does not want to be

adopted, and requests that the agency resume diligent efforts to reunite him with the mother. Christopher has been in a pre-adoptive foster home since August 2013, wants to be adopted, and the foster parent wants to adopt him. New dispositional hearings are required to determine the fitness of the foster parents and the foster homes, and whether it is in Brandon's best interests to terminate the mother's parental rights as to him, given his refusal to consent to adoption (*see* Domestic Relations Law § 111[1]; *Matter of Kathleen Shaquana G. [Stephen G.]*, 82 AD3d 610, 611 [1st Dept 2011]; *Matter of Mentora Monique B.*, 44 AD3d 445, 447 [1st Dept 2007]).

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12310 Elhadi Elsheik Mohamed, Index 300484/12
Plaintiff-Appellant,

-against-

Larry Defrin, et al.,
Defendants-Respondents.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellant.

Axelrod, Fingerhut & Dennis, New York (Osman Dennis of counsel), for respondents.

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Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about December 17, 2012, which denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

The doctrine of collateral estoppel bars plaintiff's claims to compel the sale of certain parcels of real property or for a money judgment based on an order in a prior litigation, as the issues raised in this action have necessarily been decided in the prior litigation and plaintiff was accorded a full and fair opportunity to contest them (*see e.g. Mohamed v Defrin*, 45 AD3d 252 [1st Dept 2007], *lv dismissed* 11 NY3d 783 [2008]; *see generally Allied Chem. v Niagara Mohawk Power Corp.*, 72 NY2d 271,

276 [1988]). Plaintiff has failed to articulate any legal theory, not already considered and resolved against him, that would allow him recovery here.

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12312 REDF-Organic Recovery, LLC, Index 654492/12
Plaintiff-Respondent,

-against-

Rainbow Disposal Co., Inc.,
Defendant-Appellant.

_____

Gallion & Spielvogel LLP, New York (Steven Spielvogel of counsel), for appellant.

Wollmuth Maher & Deutsch LLP, New York (William F. Dahill of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered August 21, 2013, which denied defendant's motion to dismiss the amended complaint, unanimously affirmed, with costs.

The amended complaint alleges that defendant used plaintiff's confidential information to enter into an agreement with a third party in breach of the parties' confidentiality agreement. The amended complaint alleges a cause of action for breach of contract, and the documentary evidence submitted by defendant does not conclusively establish a defense to the asserted claims as a matter of law (*see Leon v Martinez*, 84 NY2d 83, 88 [1994]). We reject defendant's interpretation that the parties' confidentiality agreement prohibited only the disclosure, and not the use, of the confidential information.

When "read as a whole" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), the plain language of the confidentiality agreement reflects the parties' intention that plaintiff's confidential information would be provided to defendant for the "sole purpose" of determining whether defendant was interested in investing in plaintiff's proposed business transaction (*see id.* at 162-163).

The amended complaint also states a cause of action for unfair competition, since it alleges that defendant acted in bad faith in misappropriating a commercial advantage belonging to plaintiff (*cf. Ahead Realty LLC v India House, Inc.*, 92 AD3d 424, 425 [1st Dept 2012]). The amended complaint contains sufficient allegations to support the conclusion that the parties were competitors in the waste-hauling business. In any event, a court may sustain an unfair competition claim even if the parties are not "actual competitors" (*Christian Dior, S.A.R.L. v Milton*, 9 Misc 2d 425, 434 [Sup Ct, NY County 1956], *affd* 2 AD2d 878 [1st Dept 1956]). Defendant's reliance on the economic loss rule is unavailing, as it does not apply in this case (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept 2010], *affd* 18 NY3d 341 [2011]).

The amended complaint also states a cause of action for

unjust enrichment, since it alleges that plaintiff gave defendant confidential information and that defendant failed to compensate plaintiff for the value of the appropriated information (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 119-120 [1st Dept 1998]). Plaintiff may assert both breach of contract and unjust enrichment claims, as defendant has raised a bona fide dispute as to the application of the parties' confidentiality agreement (*Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438-439 [1st Dept 2012]).

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

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12313 The People of the State of New York, Ind. 496/08
Respondent,

-against-

Felix Correa,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, New York (Marianne Stracquadanio of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Megan Tallmer, J.), rendered on or about January 31, 2011,

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

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

ENTERED: APRIL 24, 2014

CLERK

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

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12316 The People of the State of New York, Ind. 736/09
Respondent,

-against-

Ishaq Davis,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Robert A. Neary, J.), rendered November 3, 2010, convicting defendant, after a jury trial, of assault in the second degree (two counts) and resisting arrest, and sentencing him to an aggregate term of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). We find no basis for disturbing the jury's credibility determinations. As to each of the injured officers, the evidence established the element of physical injury (*see* Penal Law §§ 10.00[9]). The evidence supports the conclusion that both officers' injuries were more than mere "petty slaps, shoves, kicks and the like" (*Matter of Philip A.*, 49 NY2d 198, 200 [1980]), and caused "more

than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]).

The prosecutor did not significantly exceed the bounds of the court's *Sandoval* ruling, which permitted elicitation of two prior convictions but not their underlying facts. The prosecutor asked several questions that were essentially directed at identifying defendant's criminal contempt conviction, rather than eliciting its underlying facts. The record fails to support defendant's assertion that the prosecutor's questioning induced defendant to go into the facts. Instead, the prosecutor had merely asked defendant to admit or deny the existence of the prior conviction, without calling for an explanation. When defendant responded with a factual discussion and an exculpatory explanation, the court properly determined that defendant had opened the door to questioning on the underlying facts of the crime (*see People v Fardan*, 82 NY2d 638, 646 [1993]).

Defendant's challenges to the prosecutor's summation are

unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]).

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12317- Index 601265/07
12317A Nineteen Eighty-Nine LLC,
Plaintiff-Appellant,

-against-

Carl C. Icahn, et al.,
Defendants-Respondents.

_____

Zeichner Ellman & Krause LLP, New York (Yoav M. Griver of counsel), and Jeffrey I. Ross, New York, for appellant.

Law Offices of Herbert Beigel, New York (Herbert Beigel of counsel), for respondents.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 13, 2013, which granted defendants' motion in limine, unanimously reversed, on the law and the facts, without costs and the motion denied. Order, same court and Justice, entered November 14, 2013, which denied plaintiff's motion in limine, unanimously affirmed, without costs.

Contrary to defendants' contention, the orders are appealable because they limited the scope of the issues to be tried (*Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224 [4th Dept 2003]; *see also e.g. Rondout Elec. v Dover Union Free School Dist.*, 304 AD2d 808, 810 [2d Dept 2003]).

The court properly denied plaintiff's motion in limine. Our

prior decision merely found that defendants had not proven that the Limited Liability Agreement of 1879 Hall, LLC (LLC Agreement) had been "modified by a course of conduct where business was conducted solely on a verbal basis" (96 AD3d 603, 605 [1st Dept 2012]). It did not find that defendants failed to give oral notice.

Our prior decision said nothing about whether defendants could argue that plaintiff's decisions with respect to other Federal-Mogul Corporation (FMO) bond transactions in 2003-2005 showed that it would not have participated in the 18 trades at issue.

At oral argument before the motion court, and in its appellate brief, plaintiff conceded that the jury should decide whether damages should be measured as of September 2005, January 2006, or some point in between; thus, there is no basis on which to preclude defendants from arguing that damages should be measured from any date other than January 2006.

We now turn to defendants' motion in limine. Contrary to defendants' contention, the issue of damages is governed by Delaware law, not New York law (*see* LLC Agreement § 19.8; *Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d at 604). Thus, contract damages can be governed by the highest intermediate

price rule (*see e.g. Duncan v TheraTx, Inc.*, 775 A2d 1019 [Del 2001]). If plaintiff can establish that it did not know about the 18 opportunities to purchase FMO bonds (e.g. that defendants did not give it oral notice), it may use the highest intermediate price rule, the purpose of which is "to attempt to valuate the chance that plaintiff may have profited from a rise in value in the stock at issue, had he had control over it" (*see Haft v Dart Group Corp.*, 877 F Supp 896, 902 n 2 [D Del 1995]). If plaintiff did not even know it had a chance to buy the bonds, then it had no control over them.

In light of section 7.2 of the LLC Agreement and the many references in that agreement to Carl Icahn, the consequential damages sought by plaintiff were "reasonably foreseeable at the time the contract was made" (*Pierce v International Ins. Co. of Ill.*, 671 A2d 1361, 1367 [Del 1996]). Of course, defendants are

free to present evidence that plaintiff is not entitled to consequential damages because, for example, it sometimes declined to buy FMO bonds when defendants offered it the opportunity to do so, i.e. plaintiff did not always buy when Icahn bought.

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12319 The People of the State of New York, Dkt. 45332C/09
Respondent,

-against-

Arjune Singh,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered February 15, 2012, convicting defendant, upon his plea of guilty, of disorderly conduct, and sentencing him to a conditional discharge with five days' of community service unanimously affirmed.

The information was not jurisdictionally defective. "[A]s a matter of common sense and reasonable pleading" (*People v Davis*, 13 NY3d 17, 31 [2009]), the allegation that an imitation pistol "resembled a real .9 [sic] mm semi-automatic pistol, in that it was black and silver in color," sufficiently negated both the permissible-colors exception set forth in Administrative Code of City of NY § 10-131(g)(1)(a) and the transparent/translucent materials exception set forth in section 10-131(g)(1)(b) (see

People v Dent, 112 AD3d 529 [1st Dept 2013]; *People v Delarosa*, 27 Misc 3d 1209[A], 2010 NY Slip Op 50636[U], *4-5 [Crim Ct, NY County 2010]).

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12320 Kevin Wailes, Index 654514/12
Plaintiff-Respondent,

-against-

Tel Networks USA, LLC, et al.,
Defendants-Appellants.

_____

John H. Snyder PLLC, New York (Abaigeal L. Van Deerlin of counsel), for appellants.

The Dweck Law Firm, LLP, New York (Jack S. Dweck of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered February 15, 2013, which, insofar as appealed from, denied defendants' motion to dismiss the fourth cause of action as against defendant Snyder, unanimously reversed, on the law, without costs, and the motion granted.

The allegations of Snyder's conduct in his representation of defendant Tel Networks USA, LLC during settlement discussions with plaintiff, which plaintiff characterizes as "overzealous and intimidating," do not state a cause of action under Judiciary Law § 487. The complaint alleges neither an intent to deceive nor "a chronic and extreme pattern of legal delinquency" that caused plaintiff a loss (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008] [internal quotation marks omitted], *lv denied*

12 NY3d 715 [2009]; *Nason v Fisher*, 36 AD3d 486, 487 [1st Dept 2007]). Moreover, the only allegations of wrongdoing refer to a settlement discussion had after Tel Networks commenced a legal proceeding, and that communication is absolutely privileged (*see Wiener v Weintraub*, 22 NY2d 330 [1968]; *Mosesson v Jacob D. Fuchsberg Law Firm*, 257 AD2d 381, 382 [1st Dept 1999], *lv denied* 93 NY2d 808 [1999]).

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12321 Lee I. Ascherman, M.D., et al., Index 100206/13
Petitioners-Respondents,

-against-

The American Psychoanalytic Association, Inc.,
Respondent-Appellant.

_____

Simpson Thacher & Bartlett LLP, New York (Paul C. Gluckow of counsel), for appellant.

Perlman & Perlman, LLP, New York (Tracy L. Boak of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered August 22, 2013, declaring the standards for the appointment of training analysts promulgated by respondent's executive council contrary to law and null and void, and enjoining respondent from implementing any new standards or certifying any new training analysts by any method other than that approved by respondent's board on professional standards, unless respondent's bylaws are amended expressly to provide otherwise, and dismissing respondent's counterclaims, unanimously affirmed, without costs.

The article 78 court correctly found that the bylaws of respondent not-for-profit corporation assign the duty to set the

educational and training standards for psychoanalysts to the board on professional studies, a committee of respondent, to the exclusion of the executive council, respondent's board of directors (*see Matter of LaSonde v Seabrook*, 89 AD3d 132, 137-138 [1st Dept 2011], *lv denied* 18 NY3d 911 [2012]).

We reject respondent's contention that the bylaws' exclusion of the executive council from the process of establishing the standards intrudes upon the power of the board of directors to manage the corporation, in violation of the Not-for-Profit Corporation Law, which provides that any such delegation be expressed in the certificate of incorporation (*see* N-PCL 701[a]). Respondent's certificate provides that one of respondent's purposes is to "maintain standards for the training of psychoanalysts," but it is silent on what the standards are, how they are to be established, and by whom. Hence, the bylaws' exclusive delegation to the board on professional standards of the power to set the standards that respondent must maintain does not conflict with a core purpose as articulated in the certificate. The executive council is still free to direct respondent's corporate management (see *Simoni v Civil Serv. Empls. Assn.*, 133 Misc 2d 1, 10-11 [Sup Ct, Albany County 1986] [articulating difference between corporate management vested in

board of directors, and internal management, which the bylaws may delegate]).

We note that the bylaws expressly provide that the executive council's authority to manage respondent are limited by the provisions of the bylaws (*see* N-PCL 602[f]).

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

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

ENTERED: APRIL 24, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

12323 The People of the State of New York, Ind. 494/12
Respondent,

-against-

Jimmy Davis,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ruth Pickholz, J.), rendered on or about July 31, 2012, 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: APRIL 24, 2014

CLERK