SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 6, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Sweeny, Richter, Manzanet-Daniels, Clark, JJ.

11709 Nitzia Johnson, Index 305640/10
Plaintiff-Appellant,

-against-

KS Transportation Inc., et al.,
Defendants-Respondents.

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Seligson, Rothman & Rothman, New York (Martin S. Rothman), of counsel for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 16, 2013, which granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion denied as to plaintiff's claim of significant limitation to her left knee, and otherwise affirmed, without costs.

Plaintiff alleges she suffered serious injuries to her spine and left knee when she was struck by a car while crossing the

street. About four months after the accident, plaintiff underwent surgery on her left knee to repair meniscal tears and patellofemoral traumatic arthropathy.

Defendants KS Transportation Inc. and Anderson R. Rivas established their entitlement to judgment as a matter of law by showing that plaintiff did not suffer a serious injury to her spine and left knee. Defendants submitted an orthopedic surgeon's affirmation concluding that there is "no basis to causally relate" plaintiff's alleged injuries to her spine to the accident, and stating that plaintiff had "subjective complaints of back pain which is a common complaint that occurs in the absence of any trauma." After examining an MRI of plaintiff's knee taken prior to her surgery, the orthopedic surgeon further determined that the medial and lateral meniscal tears in plaintiff's knee are the result of a degenerative condition and are "not unusual in an arthritic knee." Defendants' radiologist, who evaluated the MRI of plaintiff's knee, concluded that plaintiff's condition is "indicative of pre-existing degenerative disease." The radiologist also noted that the ligamentous, tendinous and meniscal structures showed "[n]o acute post-traumatic changes."

In response, plaintiff raised an issue of fact as to whether

she sustained a significant limitation to her left knee by submitting two disability certificates completed by Dr. Ronald Krinick, the orthopedist who performed her knee surgery. On the certificates, completed shortly after plaintiff's knee surgery, Dr. Krinick indicated that plaintiff is "totally incapacitated." Dr. Krinick also wrote on one of the certificates that plaintiff "remains totally disabled." Although unaffirmed, the disability certificates are properly taken into consideration as they are not the sole basis of plaintiff's opposition (*see Pietropinto v Benjamin*, 104 AD3d 617, 618 [1st Dept 2013]). In an affirmed report, plaintiff's radiologist found evidence of diffuse trabecular bone injury in the context of trauma. Plaintiff also submitted an operative report by Dr. Krinick finding that plaintiff sustained medial and lateral meniscal tears and concluding that such injuries are "consistent with the [plaintiff's] mechanism of injury" caused by the accident (*see Bonilla v Abdullah*, 90 AD3d 466, 467 [1st Dept 2011], *lv dismissed* 19 NY3d 885 [2012]). Dr. Krinick's report is unaffirmed, but can be considered as it was reviewed by defendants' expert orthopedic surgeon in preparing his report (*see Ayala v Douglas*, 57 AD3d 266, 267 [1st Dept 2008]).

Serious injuries to plaintiff's left knee having been

established, we need not address whether the other injuries claimed by plaintiff were sufficient to meet the no-fault threshold (*see Abreu v NYLL Mgt. Ltd.*, 107 AD3d 512, 513 [1st Dept 2013]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549 [1st Dept 2010]).

Plaintiff, however, did not raise an issue of fact as to her 90/180-day claim. The fact that plaintiff missed more than 90 days of work is not determinative (*Bailey v Islam,* 99 AD3d 633, 634 [1st Dept 2012]). Further, her testimony that she can no longer "dance like [she] used to" or go grocery shopping alone is insufficient to establish that she was "restricted from performing substantially all of the material acts that constituted [her] usual and customary daily activities for 90 days during the 180 days following the accident" (*Bailey*, 99 AD3d at 634; *see Nelson v Distant*, 308 AD2d 338, 340 [1st Dept 2003]).

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

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

ENTERED: MARCH 6, 2014

CLERK

Friedman, J.P., Renwick, Freedman, Feinman, JJ.

11191 In re Carmen Applewhite, Index 113474/11
Petitioner-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, et al.,
Respondents-Respondents.

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Richard E. Casagrande, New York (Lori M. Smith of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Fay Ng of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Joan B. Lobis, J.), entered on or about August 10, 2012, which, to the extent appealed from, granted respondents' cross motion to deny the petition to annul petitioner teacher's unsatisfactory annual performance rating (U-rating) for the 2007-2008 school year, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the cross motion denied, the petition granted, and the unsatisfactory rating annulled.

Respondents' determination to sustain petitioner's unsatisfactory performance rating was not rationally based on administrative findings that petitioner acted in an insubordinate

manner and refused to adhere to the directives of the principal during the 2007-2008 school year (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioner established that respondents violated their own rules, procedures and guidelines contained in their human resources handbook "Rating Pedagogical Staff Members" by placing certain disciplinary letters in petitioner's personnel file which neither contained her signature acknowledging receipt of the letters nor a witness' statement attesting to her refusal to sign (*see Matter of Kolmel v City of New York*, 88 AD3d 527 [1st Dept 2011]; *and see Matter of Friedman v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 109 AD3d 413 [1st Dept 2013]; *compare Matter of Cohn v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 102 AD3d 586, 587 [1st Dept 2013]). We note that neither the principal who made the allegations nor any other witness testified at the hearing.

Under the circumstances presented here, remittitur to Supreme Court for service of an answer is not warranted, as the facts have been fully presented in the parties' papers and no

factual dispute remains (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. Of Nassau County*, 63 NY2d 100, 102 [1984]; *Matter of Camacho v Kelly*, 57 AD3d 297, 298-299 [1st Dept 2008]).

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

ENTERED: MARCH 6, 2014

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11260 Lee Pokoik, etc., Index 115224/10
Plaintiff-Respondent-Appellant,

-against-

Gary Pokoik,
Defendant-Appellant-Respondent,

Jonathan Pokoik,
Defendant-Respondent.

J. Pokoik Realty, LLC,
Defendant.

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Rosenberg & Estis, PC, New York (Norman Flitt of counsel), for appellant-respondent and respondent.

The Law Firm of Gary N. Weintraub, LLP, Huntington (Gary N. Weintraub of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 25, 2013, which, insofar as appealed from, granted defendants' motion for summary judgment dismissing the complaint as against defendant Jonathan Pokoik and denied the motion as against defendant Gary Pokoik, and denied plaintiff's cross motion for summary judgment on his first cause of action alleging breach of fiduciary duty and for dismissal of defendants' affirmative defenses, unanimously modified, on the law, to grant defendants' motion as to the fifth cause of action alleging breach of contract as against Gary, and to grant the

cross motion to the extent of dismissing all of defendants' affirmative defenses and granting plaintiff summary judgment on his first cause of action as against Gary, and otherwise affirmed, without costs.

As the proponent of the motion for summary judgment, Gary is required to demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial (*Kosson v Algaze*, 84 NY2d 1019 [1995]).

Gary contends that, based on Limited Liability Company Law 409, he is entitled to summary judgment on the portion of the first cause of action that alleged breach of fiduciary duty with respect to the properties located at 77th Street and 82nd Street (the ones owned by the LLCs) because he reduced plaintiff's capital accounts in good faith, relying on the advice of nonparty accounting firm Eisner & Lubin. As to the remaining portion of the first cause of action alleging breach of fiduciary duty with respect to the 83rd Street property, which is owned by tenants-in-common, he claims entitlement to summary judgment based on the

business judgment rule.

As the managing member of the LLCs, Gary owed plaintiff – a nonmanaging member – a fiduciary duty (*see Salm v Feldstein*, 20 AD3d 469, 470 [2d Dept 2005]; *see also Tzolis v Wolff*, 39 AD3d 138, 146 [1st Dept 2007], *affd* 10 NY3d 100 [2008]). "[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (*Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989] [internal quotation marks and citations omitted]).

Reliance on outside professionals under Limited Liability Company Law § 409(b)(2) must be in good faith (*see* Limited Liability Company Law § 409[a]; *Stephens v National Distillers & Chem. Corp.*, 1996 WL 271789, *6, 1996 US Dist LEXIS 6915, *19 [SD NY 1996]). As described here, Gary does not meet his initial burden of showing that he acted in good faith and undivided loyalty to plaintiff so as to rely on Limited Liability Company Law § 409 or the business judgment rule.

To establish a breach of fiduciary duty, the movant must

prove the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct (*see Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). In 2006, to settle a dispute, Gary and plaintiff, both represented by counsel, agreed in writing that upon plaintiff's payment of more than $2.2 million and attorney's fees to four properties in which he and Gary, along with others, had a financial interest, any "discrepancy" between payments recorded in the properties' books and their bank statements would be "written off by the [four properties]." The parties knew that the amounts to be paid by plaintiff were less than the full amounts originally at issue. Plaintiff timely made all payments. However Gary, the managing member, contends the accountant informed him that under the tax law, the properties would have to account for the "written-off funds," amounting to about $750,000. Gary followed the accountant's instructions to place the entire burden on plaintiff, reasoning that the "discrepancy" had likely been due to plaintiff's previous actions.

Neither the LLCs' operating agreements nor the 2006 settlement agreement provide any authority to unilaterally reduce plaintiff's accounts. Further, Gary makes no showing that he informed plaintiff of the accountant's recommendation or notified

him that his capital accounts, and no one else's, were depleted in order to address the tax situation.

At a later date, and without notice, Gary discontinued making distributions to plaintiff. Gary contends that plaintiff was not singled out for harmful treatment because the operating agreements for the LLCs require distributions to be made in proportion to a member's capital account, and all members' distributions were made that way. However, as the motion court noted, plaintiff was the only member who had his capital account written down.

Gary had an interest in reducing plaintiff's capital accounts, as opposed to charging certain amounts to the LLCs, because the latter course of action would ultimately have had a negative financial impact on Gary. These failures to make truthful and complete disclosures (Limited Liability Company Law § 409), and Gary's conflict in choosing to burden only plaintiff and not all the LLCs members, including himself, does not show "undivided and undiluted loyalty" (*Birnbaum v Birnbaum*, 73 NY2d at 466; *see also* Limited Liability Company Law § 409).

Gary also fails to show that he is entitled to summary judgment dismissing so much of the first cause of action alleging breach of fiduciary duty with respect to the 83rd Street

property, which is owned by tenants-in-common, based on the business judgment rule. He cites no cases applying that rule to a tenancy-in-common. Even if, arguendo, the business judgment rule could be applied to a tenancy-in-common, it "does not protect . . . corporate fiduciaries when they make decisions affected by inherent conflict of interest" (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]). In addition, "[t]he business judgment rule . . . permits review of improper decisions, as when the challenger demonstrates that the board's action * * * deliberately singles out individuals for harmful treatment" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002] [internal quotation marks omitted]). In sum, Gary's motion was properly denied as to the first cause of action.

However, Gary should have been granted summary judgment dismissing the fifth cause of action, which alleged breach of contract with respect to the 83rd Street property, because plaintiff failed to prove that there was a contract for that property (*see Allied Sheet Metal Works v Kerby Saunders, Inc.*, 206 AD2d 166, 172-173 [1st Dept 1994]). We note that plaintiff can still seek his distributions for the 83rd Street property under the first cause of action.

Turning to plaintiff's cross motion, the motion court should

have granted summary judgment dismissing the seven affirmative defenses. The first defense relies on the provision in the LLC operating agreements governing distributions. However, plaintiff establishes that he continued to receive distributions for about three years after his accounts were emptied. Gary's lack of good faith is revealed when he does not explain why the terms of the operating agreement were disregarded for three years and then suddenly enforced. Additionally, the first defense has no application to the tenancy-in-common.

The second defense should be dismissed because the evidence submitted on plaintiff's cross motion refuted defendants' allegations that the 2006 settlement agreement required a general reconciliation of the books and records relating to the properties at issue on appeal, that Eisner & Lubin performed such a reconciliation, that Eisner & Lubin discovered that plaintiff had fraudulently entered expenses, and that, as a result, his capital accounts were reduced.

The third defense of the business judgment rule is dismissed for the reasons stated above; plaintiff establishes prima facie that Gary's actions toward him were not carried out in good faith, and Gary fails to raise a triable question of fact. The business judgment rule is not applicable in the absence of good

faith which includes "deliberately singl[ing] out an individual for harmful treatment" (*Owen v Hamilton*, 44 AD3d 452, 456 [1st Dept 2007], *lv dismissed* 10 NY3d 757 [2008]).

Plaintiff should also have been granted summary judgment dismissing the fourth defense. The basis for defendants' allegation that plaintiff has unclean hands is his pre-April 2006 disbursements from the properties, which defendants characterize as misappropriation. However, Gary released those claims in the July 2006 settlement agreement.

The fifth defense of waiver is based on plaintiff's annual receipt of K-1s from the LLCs which, beginning for the tax year 2006, show that his accounts were running a negative balance, therefore, according to Gary, providing plaintiff with notice several years before he instituted this action. However, plaintiff was never alerted by his accountant (the same firm as undertook the forensic review providing the basis for the 2006 settlement), of the change to his account. There was no contemplation in the 2006 settlement that plaintiff's accounts would ever be invaded. In any event, the tax forms did not alert plaintiff that his accounts were treated differently from those of the other members. In addition, this defense is inapplicable to the tenancy-in-common.

Plaintiff should have been granted summary judgment dismissing the sixth defense, as the release in the 2006 settlement agreement does not bar his claims. Plaintiff should also have been granted summary judgment dismissing the seventh defense, failure to join indispensable and necessary parties, namely, the LLCs. The breach of fiduciary duty claim can proceed against Gary in the absence of the LLCs.

Plaintiff was also entitled to summary judgment in his favor on his first cause of action for breach of fiduciary duty as against Gary. As already discussed, all of the affirmative defenses should have been dismissed (*see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010] ["[s]ummary judgment must be granted if the proponent makes a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and the opponent fails to rebut that showing"] [internal quotation marks omitted]). Although judicial inquiry into the actions of corporate directors is normally prohibited, plaintiff has made a showing of self-dealing and misconduct on Gary's part, and we are thus permitted to examine the management of the LLCs' finances, as well as those of the tenancy-in-common (*see Jones v Surrey Coop. Apts.*, 263 AD2d 33, 36 [1st Dept 1999]). While it

may be that Gary relied on his accountant's opinion when he drained plaintiff's capital account, his and the accountant's failure to inform plaintiff of this decision or of the subsequent elimination of distributions, clearly establishes plaintiff's claim that Gary was not acting in his best interest and that Gary breached his fiduciary duty of care (*compare Schultz v 400 Coop. Corp.*, 292 AD2d 16, 22 [1st Dept 2002]).

We have considered the parties' remaining arguments, including Gary's argument that plaintiff is estopped from complaining about distributions, and plaintiff's argument that Jonathan's motion should have been denied, and find them unavailing.

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

ENTERED: MARCH 6, 2014

CLERK

Sweeny, J.P., Acosta, Saxe, Moskowitz, Clark, JJ.

11446N-
11447N Sean R., etc.,
Plaintiff-Appellant,

-against-

BMW of North America, LLC, et al.,
Defendants-Respondents.

Index 100725/08

Phillips & Paolicelli LLP, New York (Steven J. Phillips of counsel), for appellant.

Biedermann Hoenig Semprevivo, New York (Philip C. Semprevivo of counsel), for BMW of North America, LLC, BMW of North America, Inc. and BMW(US) Holding Corp., respondents.

Brill & Associates, P.C., New York (Corey M. Reichardt of counsel), for Hassel Motors, Inc., respondent.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Leslie McHugh of counsel), for Martin Motor Sales, Inc., respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered May 15, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to reargue a prior order, entered December 21, 2012, granting defendants' motion to preclude the testimony of two of plaintiff's expert witnesses, deemed to have granted reargument, and, upon reargument, to have adhered to the prior order, and, so considered, said order unanimously affirmed, without costs. Appeal from the order entered December 21, 2012, unanimously

dismissed, without costs, as subsumed in the appeal from the order entered May 15, 2013.

As a threshold matter, the May 15th order effectively granted reargument, and, upon reargument, adhered to the court's original decision. Accordingly, it is appealable (*Centennial Restorations Co. v Wyatt*, 248 AD2d 193, 197-198 [1st Dept 1998]).

Plaintiff's experts' testimony was properly precluded. The motion court properly determined that the medical and scientific literature submitted by plaintiffs' experts does not support the proffered theory that exposure to gasoline fumes caused plaintiff's birth defects. Rather, the literature shows that some of the constituent chemicals contained in gasoline, and presumably those chemicals' vapors, can cause birth defects. However, plaintiff failed to show how exposure to those constituent chemicals, constituted as unleaded gasoline vapors,

could have caused his injuries (*see Parker v Mobil Oil Corp.*, 7 NY3d 434, 449-450 [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: MARCH 6, 2014

CLERK

Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11725 Gordon Group Investments, LLC, Index 650795/09
Plaintiff-Appellant-Respondent,

-against-

Michael "Jack" Kugler, et al.,
Defendants,

Alexander Vik, et al.,
Defendants-Respondents,

Star Asset Management Limited, et al.,
Defendants-Respondents-Appellants.

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Kennedy Berg LLP, New York (James W. Kennedy and Andrew A. Smith of counsel), for appellant-respondent.

Hutner Klarish LLP, New York (Eric S. Hutner of counsel), for respondents-appellants.

Becker, Glynn, Muffly, Chassin & Hosinski LLP, New York (Robin L. Alperstein of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 27, 2012, which, insofar as appealed from as limited by the briefs, granted defendants' motions to dismiss plaintiff's claims for breach of contract, fraud, conspiracy to defraud, and aiding and abetting fraud as time barred, unanimously modified, on the law, the breach of contract claim reinstated, and otherwise affirmed, without costs.

In December 2009, plaintiff, Gordon Group Investments, LLC

(GGI), commenced this action for, inter alia, breach of contract and fraud (solely against defendant Michael Kugler), conspiracy to defraud (against all defendants), and aiding and abetting fraud (against all defendants except Kugler) alleging that it entered into an agreement with Kugler, who promised to invest its money in highly rated, highly liquid, and highly secure bonds, such as government-issued or government-backed securities. However, Kugler and the other defendants allegedly engaged in a concerted effort to swindle GGI out of a substantial amount of money through a "pump and dump" scheme involving the stock of a thinly-traded (and now bankrupt) German public company known as BKN International A.G. (BKN). Defendants allegedly artificially inflated BKN's stock price by causing GGI to purchase significant numbers of shares of the stock without GGI's knowledge or consent, and then selling off their own shares at the artificially inflated price, earning a substantial profit and leaving GGI with shares of worthless BKN stock.

Contrary to the motion court's determination, the breach of contract claim is not time-barred. Connecticut's six-year statute of limitations (*see* CPLR 202; Conn Gen Stat § 52-576[a]), as opposed to the three-year statute (*see* Conn Gen Stat § 52-581[a]) governs, since the claim is based on the written

"Resolution to Obtain Credit With or Without Security and to Contract for Services" (Resolution) authorizing Kugler to trade on GGI's investment account. The Resolution, which governs Kugler's investment services to GGI, refers to a "Clearing Agreement," that contains a provision limiting the trading activity to only government-issued or government-backed securities. Further, while the initial breach occurred in June 2003, when Kugler first purchased the BKN stocks on GGI's behalf without GGI's knowledge, he still had a continuous duty to invest the money under the agreement. Thus, the statute of limitations did not bar claims relating to investments made within the six year period.

The fraud claims, however, are time-barred. GGI does not dispute that fraud claims are governed by a three-year statute of limitations in Connecticut (*see* Conn Gen Stat § 52-577). Nor does it dispute that the fraud claim accrued at the latest on August 2005. Rather, it contends that under the equitable tolling doctrine, the statute of limitations did not begin to run until September 2008, when it became aware of the pump and dump scheme. Although GGI did not raise the equitable tolling argument before the motion court this Court may still consider the argument on appeal, as GGI "does not allege new facts but,

rather, raises a legal argument which appeared upon the face of the record and which could not have been avoided . . . if brought to [defendants'] attention at the proper juncture" (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009] [internal quotation marks and citation omitted]; *see also Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1996], *lv denied* 88 NY2d 811 [1996]). Nevertheless, the doctrine of equitable tolling does not save the fraud claims from being time-barred. The complaint alleges that the fraud claim accrued in June 2003 when Kugler first purchased BKN stocks with GGI's money. It further alleges that Kugler affirmatively and intentionally concealed the fraudulent conduct until August 2005, when he admitted to the unauthorized trades. Thus, the statute of limitations was tolled until August 2005.

GGI's argument that post-August-2005 concealment further tolled the running of the statute of limitations to September 2008 is unpersuasive. In Connecticut, fraudulent concealment does not toll the statute of limitations where the plaintiff has learned of information that would lead to the discovery of a

cause of action through due diligence (*Mountaindale Condominium Assoc. v Zappone*, 59 Conn App 311, 322, 757 A2d 608 [2000], *cert denied* 254 Conn 947, 762 A2d 903 [2000]; *see also World Wrestling Entertainment, Inc. v THQ, Inc.*, 2008 WL 4307568, *11-12, 2008 Conn Super LEXIS 2256, *34-36 [2008] [citing Connecticut cases]; *Chien v Skystar Bio Pharm. Co.*, 623 F Supp 2d 255, 265-266 [D Conn 2009], *affd* 378 Fed Appx 109 [2d Cir 2010], *cert denied* 131 S Ct 2455 [2011]). Thus, when Kugler admitted to GGI in August 2005 that he made unauthorized trades, due diligence by GGI at that point would have revealed the fraudulent scheme.

In light of the forgoing, we need not consider the arguments raised on the cross appeal.

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11875 In re Lillie Leon, Index 108822/11
Petitioner-Appellant,

-against-

The Department of Education of the City of New York, et al,
Respondents-Respondents.

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

Michael A. Cardozo, Corporation Counsel, New York (Kristin M. Helmers of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 17, 2012, denying the petition to vacate an arbitration award, dated July 14, 2011, which terminated petitioner's employment as a tenured public school teacher, and granting the cross motion to dismiss the proceeding brought pursuant to Education Law § 3020-a and CPLR article 75, unanimously affirmed, without costs.

Upon review of the record, we find that the Hearing Officer's determination that petitioner, without reasonable or legitimate justification, continually refused teaching assignments during the 2010-2011 school year, and that such conduct constituted insubordination and the dereliction of

duties, is supported by adequate evidence in the record (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). There exists no basis upon which to disturb the credibility determinations of the Hearing Officer (*id.* at 568). Although the arbitration award was not issued in a timely manner, petitioner was not prejudiced by the delay (*see Scollar v Cece*, 28 AD3d 317 [1st Dept 2006]).

The penalty of termination does not shock our sense of fairness in light of the extensive nature of petitioner's insubordinate conduct throughout the school year, which required the school to hire a substitute teacher to cover her class, and her refusal to admit to any wrongdoing, which indicated a likelihood of recurrence (*see e.g. Matter of Winters v Board of Educ. of Lakeland Cent. School Dist.*, 99 NY2d 549 [2002]; *Cipollaro v New York City Dept. of Educ.*, 83 AD3d 543 [1st Dept 2011]).

We have considered petitioner's remaining contentions, including that reversal is required because Supreme Court applied

an improper standard on the cross motion to dismiss, and find them unavailing.

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11876 In re Grand Imperial, LLC, Index 103032/12
Petitioner,

-against-

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

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Cohen, Hochman & Allen, New York (Lindsay Garroway of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Determination of respondent Environmental Control Board (ECB), dated February 16, 2012, which, inter alia, found that petitioner violated Administrative Code of City of NY § 28-118.3.2 and New York City Zoning Resolution (ZR) § 22-00, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered on or about March 19, 2013), dismissed, without costs.

The proceeding was properly transferred to this Court as it raised an issue of substantial evidence and respondents raised no objections in point of law requiring disposition by the Supreme

Court (*see* CPLR 7803[4] and 7804[g]; *see also Matter of Al Turi Landfill v New York State Dept. of Envtl. Conservation*, 98 NY2d 758, 760 [2002]; *Matter of O'Donnell v Rozzi*, 99 AD2d 494 [2d Dept 1984]).

Respondent's determination that petitioner's premises were being used primarily as a transient hotel is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]), including the inspector's unrefuted testimony that he entered 90% of the rooms, spoke to guests concerning the length of their stays, and observed that at least 60% of the premises was being used as a transient hotel. This conclusion was supported by, inter alia, the existence of rooms with three piece bathrooms with sealed toilet seats, towels placed on towel racks, coffee makers, mini-bars, the provision of housekeeping service, and a notice warning guests that staying past check-out time would cause them to be charged for an extra day (*compare Terrilee 97th St., LLC v New York City Envtl. Control Bd.*, 102 AD3d 637 [1st Dept 2013]).

Petitioner failed to establish that its use as a transient hotel was a prior, lawful non-conforming use which existed at the

time of the enactment of the relevant statutory provisions and continued thereafter, uninterrupted except for a period of up to two years (*see* Administrative Code § 27-111; ZR §§ 52-11, 52-61).

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11877-
11878 Index 95659/92

In re The State of New York
Office Of Mental Health,
Petitioner-Appellant,

-against-

Jared C. (Anonymous),
Respondent-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Jason Harrow of counsel), and Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Maura Martin Klugman of counsel), for respondent.

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Orders, Supreme Court, New York County (Arthur F. Engoron, J.), entered on or about August 30, 2013, which denied the petition for a subsequent retention order for confinement in a secure facility and directed petitioner to transfer respondent from a secure facility to a nonsecure facility, unanimously reversed, on the law, without costs, and the petition granted.

The court's findings that respondent does not currently suffer from a dangerous mental disorder and that his transfer to a nonsecure facility is consistent with the public safety and welfare of the community and of respondent (CPL 330.20[1][c], [11]) are unsupported by any fair interpretation of the evidence

(*see Matter of Consilvio v Alan L.*, 7 AD3d 252 [1st Dept 2004]). A preponderance of the evidence establishes that respondent suffers from a dangerous mental disorder and that because of his condition he currently constitutes a physical danger to himself or others (CPL 330.20[1][c]). The unrebutted expert testimony offered by petitioner demonstrates that respondent currently suffers from schizophrenia and other mental illnesses and lacks insight into his condition, and that he engaged in violent and sexually assaultive conduct as recently as April 2012 and June 2013. This evidence raises concerns about respondent's commitment to and compliance with his medication regimen, as does respondent's testimony that he was "programmed" to say that he would continue taking medication in a nonsecure facility if told to do so.

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11879 The People of the State of New York, Ind. 2281/11
Respondent,

-against-

Aubyn Collins,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 20, 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: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11880 Maureen Kendig, Index 305843/09
Plaintiff-Appellant,

-against-

Alanna Kendig,
Defendant-Respondent.

_____

Spiegel & Barbato, LLP, Bronx (Stephen A. Iannacone of counsel), for appellant.

Hurwitz & Fine, P.C., Melville (Elizabeth A. Fitzpatrick of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered October 5, 2012, which granted defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to demonstrate that she suffered a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Plaintiff claims to have suffered cervical and lumbar spine disc injuries and bilateral carpal tunnel syndrome, as a result of an accident in which she was a passenger in a car driven by her daughter.

Defendant made a prima facie showing that plaintiff, who was 61 years old at the time of the accident, did not suffer a serious injury as a result of the motor vehicle accident. Defendant's orthopedic expert found no deficits in range of

motion of the claimed injured body parts, and opined that the conditions shown in the MRI reports of the lumbar and cervical spine were preexisting degenerative conditions unrelated to trauma. Defendant's radiologist opined that the MRI films of plaintiff's cervical spine showed only chronic and degenerative conditions predating the accident (*see Nova v Fontanez*, 112 AD3d 435 [1st Dept 2013]; *Mitrotti v Elia*, 91 AD3d 449 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact. She submitted a favorable disability decision by an Attorney Advisor for the Social Security Administration who confirmed that plaintiff suffered from degenerative disc disease of the cervical and lumbar spine. Her treating neurologist's report failed to address defendant's prima facie showing that her cervical and lumbar spine conditions were degenerative, preexisting and arthritic (*see Nova*, 112 AD3d at 436). The report noted clinical findings consistent with an "exacerbation of multilevel cervical and lumbar disc bulges and protrusion" but provided no basis for determining the extent of any such exacerbation (*see Brand v Evangelista*, 103 AD3d 539, 540 [1st Dept 2013]; *Nova*, 112 AD3d at 436).

Plaintiff failed to produce objective medical evidence of

her claimed wrist injuries in admissible form. In any event, her medical submissions showed only "mild" neuropathy in the period following the accident, and did not provide objective evidence of the extent and duration of any alleged resulting physical limitations (*see Jacobs v Slaght*, 47 AD3d 679, 680 [2d Dept 2008]). Later medical records submitted by plaintiff demonstrated that she exhibited full strength and sensation in both wrists at various times after the accident, and her neurologist failed to address the inconsistencies of these findings (*see Dorrian v Cantalicio*, 101 AD3d 578 [1st Dept 2012]).

In view of defendant's showing as to causation, we need not address plaintiff's arguments in support of her 90/180-day claim.

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11882 The People of the State of New York Ind. 4982/08
Respondent,

-against-

Brian Payne,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Amy Donner 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 (Daniel P. FitzGerald, J.), rendered February 8, 2010, as amended February 11, 2010, convicting defendant, after a jury trial, of robbery in the first degree and assault in the first degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 20 years to life, 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]). The element of serious physical injury was established by evidence that defendant inflicted a puncture wound that penetrated the victim's cheek and sinus, resulting in permanent nerve damage. At the time of trial, long after the attack, the victim continued to experience significant

numbness and abnormal sensations in her mouth and face that went well beyond mere discomfort. Accordingly, the injuries qualified as "protracted impairment of health" (Penal Law § 10.00[10]; *see People v Askerneese*, 256 AD2d 34 [1st Dept 1998], *affd* 93 NY2d 884 [1999]).

Defendant's right of confrontation was not violated by testimony by the People's expert DNA analyst that referred to data gathered by nontestifying technicians (*see People v Brown*, 13 NY3d 332 [2009]; *People v Vargas*, 99 AD3d 481 [1st Dept 2012], *lv denied* 21 NY3d 1011 [2013]; *see also Williams v Illinois*, 567 US __, 132 S Ct 2221, 2242-2244 [2012]). In any event, any error in receiving this evidence was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11883 In re R.B., etc., et al., Index 100738/13
Petitioners-Appellants,

-against-

The Department of Education of the City of New York, etc., et al.,
Respondents-Respondents.

_____

Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered August 7, 2013, which denied the petition seeking, inter alia, a declaration that respondents' methodology for selection to the Gifted and Talented Program was arbitrary and capricious, and mandating a particular methodology and removal of respondents' sibling priority policy, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Dismissal of the proceeding is warranted because petitioners did not exhaust their administrative remedies provided in Education Law § 310(7), and they failed to demonstrate either the futility of pursuing such remedy or any other exception to the

exhaustion doctrine (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 88 AD3d 72, 80-81 [1st Dept 2011]). "[A]ny dispute concerning the proper placement of a child in a particular educational program can best be resolved by seeking review of such professional educational judgment through the administrative processes provided by statute" (*Hoffman v Board of Educ. of City of N.Y.*, 49 NY2d 121, 127 [1979]).

In any event, respondents' admission processes relating to the subject program has a rational basis. Regarding the sibling priority policy, that policy's purpose was to relieve the financial and logistical burdens of families with two or more children who might otherwise have to attend different schools in different parts of the City. As to the percentile-ranking methodology, respondents reasonably explained that this methodology was fairer and gives more students who are gifted a chance to be in the lottery to obtain a spot in the program.

The sibling priority policy does not violate the Equal Protection Clause of the New York State Constitution. Respondents demonstrated that the policy "rationally furthers some legitimate, articulated state purpose" (*Archbishop Walsh High School v Section VI of N.Y. State Pub. High School Athletic*

Assn., 88 NY2d 131, 136 [1996] [internal quotation marks omitted]).

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

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11884 In re Charisma D., and Another,

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

Sandra R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Tennile M. Tatum-Evans, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondent.

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child Charisma D.

Geanine Towers, P.C., Brooklyn (Geanine Towers of counsel), attorney for the child Jason T.

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 20, 2012, which, insofar as appealed from as limited by the briefs, brings up for review a fact-finding determination that the mother neglected her children, Charisma D. and Jason T., by leaving them without any advance notice or provisions for their care with their maternal grandmother, who was an inappropriate caretaker, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's

finding of neglect due to inadequate supervision, as the mother left the subject children, at the time aged eight and three, with her own mother, who she knew, or reasonably should have known, to be an inappropriate caregiver (*see Matter of Lashina P.*, 52 AD3d 293, 294 [1st Dept 2008]). Among other things, the mother conceded in prior proceedings that she knew the maternal grandmother had used illegal drugs and kept them in her home (*see* 67 AD3d 404, 405 [1st Dept 2009]). Further, the mother knew that the maternal grandmother was attending a methadone treatment program each day from the morning until the afternoon, yet made no provision for the children's care during those extended periods (*see Matter of Annalize P. [Angie D.]*, 78 AD3d 413, 414 [1st Dept 2010]; *Matter of Serenity P. [Shameka P.]*, 74 AD3d 1855, 1856 [4th Dept 2010]). The mother also failed to make provision for the children to have adequate food and health care while they were with the maternal grandmother (*see Matter of Clarissa S.P. [Jaris S.]*, 91 AD3d 785, 785 [2d Dept 2012]; *Matter of Joseph DD.*, 214 AD2d 794, 795-796 [3d Dept 1995]). Additionally, after the mother learned that the maternal grandmother had left the children with their respective paternal grandmothers, she failed to provide them with her contact information, and failed to communicate with the children for a

substantial period of time (*see Matter of Victor V.*, 261 AD2d 479, 480 [Dept 1999], *lv denied* 93 NY2d 819 [1999]).

There is no basis to disturb the Family Court's credibility determinations (*see Matter of Deivi R. [Marcos R.]*, 68 AD3d 498, 499 [1st Dept 2009]).

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11885 The People of the State of New York, SCI 2742/12
Respondent,

-against-

Pedro Sola,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard M. Weinberg, J.), rendered on or about September 20, 2012,

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: MARCH 6, 2014

CLERK

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

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11888 The People of the State of New York, Ind. 6052/08
Respondent,

-against-

Tony Simmons,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 1, 2011, convicting defendant, after a jury trial, of two counts of criminal sexual act in the third degree, five counts of sexual abuse in the second degree and five counts of sexual abuse in the third degree, and sentencing him to an aggregate term of four years, unanimously affirmed.

Defendant asserts that, as to certain counts, the verdict was against the weight of the evidence with respect to the element of the victims' inability to consent, where such inability depended on their being in the custody of a local correctional facility at the time of the crimes. This Court "is constrained to weigh the evidence in light of the elements of the

crime as charged without objection by defendant" (*People v Noble*, 86 NY2d 814, 815 [1995]). Under the court's charge, to which defendant did not object, the evidence supported the conclusion that the victims were in court detention pens that qualified as local correctional facilities (*see* Correction Law § 40[a]). To the extent defendant is making a legal sufficiency claim, it is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we similarly reject it (*see People v Sala*, 95 NY2d 254, 260 [2000]).

Defendant also challenges the admission of evidence that he characterizes as evidence of criminal propensity, notwithstanding that it did not involve a prior illegal or immoral act. To the extent there was any error in receiving this evidence, we find the error to be harmless (*see People v Cortez*, __ NY3d __, 2014 NY Slip Op 00293, *10, *17 [2014]).

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11890 In re James Mascarella, Index 101324/11
Petitioner-Respondent,

-against-

Robert D. LiMandri, etc.,
Respondent-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Karen Griffin of counsel), for appellant.

La Reddola, Lester & Associates, LLP, Garden City (Robert J. La Reddola of counsel), for respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered August 21, 2012, which granted the petition to the extent of annulling respondent's determination dated January 5, 2011, to revoke petitioner's hoist machine operator license and remanding the proceeding for a new final determination by an impartial decision maker, unanimously reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78, dismissed.

Petitioner presented no evidence that respondent commissioner had any personal involvement in the disciplinary process, other than the initiation of charges in his name, or that respondent made public statements regarding the charges against petitioner, and no specific bias against him by the

commissioner was alleged. Signing charges, without more, does not mandate recusal by the public official (*see Kluglein v Shaw*, 149 AD2d 511 [2d Dept 1989], *lv denied* 74 NY2d 613 [1989]; *Agugliaro v Commissioner of Dept. of Transp. Of State of N.Y.*, 135 AD2d 711 [2d Dept 1987], *lv denied* 72 NY2d 801 [1988]).

The penalty of revocation is not so disproportionate to the offense as to shock the conscience (*see Featherstone v Franco,* 95 NY2d 550, 554 [2000]). The record reflects that respondent considered the factors set forth in Correction Law § 753 in determining the appropriate penalty to impose on petitioner, who pleaded guilty to conspiracy to commit extortion, a felony, and admitted that he obtained jobs in the construction industry through preferential treatment.

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11891-
11892N Bhavya Shah,
Plaintiff-Appellant,

-against-

RBC Capital Markets LLC,
Defendant-Respondent.

- - - - -

Bhavya Shah,
Plaintiff-Appellant,

-against-

RBC Capital Markets LLC, et al.,
Defendants-Respondents.

Index 151482/13
107113/11

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Law Office of Michael G. O'Neill, New York (Michael G. O'Neill of counsel), for appellant.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (Margaret L. Watson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 9, 2013, which, to the extent appealed from, denied plaintiff's motion to compel defendant to respond to certain discovery requests, and order, same court (Joan M. Kenney, J.), entered June 17, 2013, which granted defendant's motion to dismiss the complaint pursuant to CPLR 3211, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in

denying plaintiff's motion to compel in the 2011 action. For one and a half years after the commencement of that action plaintiff failed to raise the issue of interrogatories or document demands, despite a number of chances to do so at compliance conferences, and despite the IAS court's rules requiring all outstanding discovery matters to be raised at compliance conferences (*see Macias v City of Yonkers*, 65 AD3d 1298 [2nd Dept 2009]; *see also* 22 NYCRR 9.1). Plaintiff also failed to raise this issue at the final compliance conference in November 2012, which took place one month before plaintiff was to file the note of issue.

Plaintiff misplaces reliance on inapposite cases in which local rules denied litigants a right to make a motion and were held to be invalid (*see e.g. Barrett v Toroyan*, 35 AD3d 278 [1st Dept 2006]).

Supreme Court properly exercised its discretion in dismissing the 2013 action. The court has broad discretion to dismiss an action on the ground that another action is pending between the same parties arising out of the same subject matter or series of alleged wrongs, and it is inconsequential that different legal theories or claims were set forth in the two

actions (*Whitney v Whitney*, 57 NY2d 731 [1982]; *see also Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). Nor was there good reason for the two actions to proceed separately.

Moreover, we note that plaintiff commenced the 2013 action in an apparent attempt to overcome her failure to amend her complaint in the 2011 action as directed in a September 11, 2012 order in that action. Supreme Court appropriately dismissed the 2013 action on this ground as well (*see Velez v Union Sanitorium Assn.*, 106 AD2d 280, 281 [1st Dept 1984], *affd* 64 NY2d 1119 [1985]).

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

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

ENTERED: MARCH 6, 2014

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Freedman, Gische, JJ.

11893N In re Marc Kadish, Index 652824/13
Petitioner-Appellant,

-against-

First Midwest Securities, Inc.,
Respondent-Respondent.

_____

Fitapelli Kurta, New York (Marc Fitapelli of counsel), for appellant.

Winget, Spadafora & Schwartzberg, LLP, New York (Steven E. Mellen of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered September 16, 2013, which denied petitioner's application pursuant to article 75 of the CPLR for an attachment to secure an eventual arbitration award, unanimously affirmed, without costs.

CPLR 7502(c) provides, in pertinent part, that the court may "entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration . . . but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 [attachment] and 63 [injunction] of this chapter shall apply to the application, including those relating to undertakings and to the

time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the *sole* ground for the granting of the remedy shall be as stated above" (emphasis added).

Respondent FMSI disputes this standard, citing to multiple cases which involve injunctions under CPLR 7502(c), and clarify that, in addition to the usual three-prong test for preliminary injunctions under article 63 of the CPLR, a petitioner must demonstrate that a potential arbitral award could be rendered ineffectual (*see Interoil LNG Holdings, Inc. v Merrill Lynch PNG LNG Corp.*, 60 AD3d 403, 404 [1st Dept 2009]; *Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351 [1st Dept 2007]; *Erber v Catalyst Trading*, 303 AD2d 165 [1st Dept 2003]; *Matter of Cullman Ventures [Conk]*, 252 AD2d 222, 230 [1st Dept 1998]; *Koob v IDS Fin. Servs.*, 213 AD2d 26 [1st Dept 1995]; *see also SG Cowen Sec. Corp. v Messih*, 224 F3d 79, 81-84 [2d Cir 2000] [detailed analysis of interplay between CPLR 7502 and CPLR article 63]).

Recent cases of this Court, however, continue to apply the "rendered ineffectual" standard with regard to a CPLR 7502(c) attachment in aid of arbitration (*Matter of Sojitz Corp. v Prithvi Info. Solutions Ltd.*, 82 AD3d 89, 96 [1st Dept 2011]

[citing *Matter of H.I.G. Capital Mgt. v Ligator*, 233 AD2d 270, 271 [1st Dept 1996]; *Sullivan & Worcester LLP v Takieddine*, 73 AD3d 442, 442 [1st Dept 2010]), and we agree with this interpretation.

In any event, under either standard, petitioner's evidentiary showing was insufficient, as FMSI submitted evidence that a certified public accounting firm had issued a clean audit "with no exceptions and no qualifications to its ability to continue operation as a going concern," nor did petitioner offer any competent evidence to rebut the likelihood that insurance will cover any hypothetical arbitration award against FMSI.

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11894 The People of the State of New York, Ind. 2086/06
Respondent,

-against-

Moses Ervine,
Defendant-Appellant.

_____

David R. Kliegman, Kew Gardens, for appellant.

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

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Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 10, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second violent felony offender, to a term of 24 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 credibility determinations.

At a *Sirois* hearing (*Matter of Holtzman v Hellenbrand*, 92 AD2d 405 [1983]), the People established, by clear and convincing evidence, that defendant caused a witness's unavailability by making express and implied threats, either personally, or through

unidentified persons where the circumstances warranted an inference of defendant's involvement. Accordingly, defendant forfeited his right to confront this witness, and his grand jury testimony was properly received in evidence (*see People v Cotto*, 92 NY2d 68 [1998]; *People v Geraci*, 85 NY2d 359 [1995]). Although, despite the pattern of threats, the witness managed to testify in the secrecy of the grand jury proceeding, it can be readily inferred that the witness's failure to testify at trial was caused by the threats, rather than by other factors in the witness's background.

Defendant has not shown that he was prejudiced by any violation of the People's disclosure obligations under *Brady v Maryland* (373 US 83 [1963]), or under state law. The People disclosed an anonymous phone call and a call log immediately after their potential relevance became apparent. Defendant's claim that earlier disclosure of this information might have

affected the verdict is purely speculative (*see e.g. People v Strawder*, 44 AD3d 406 [1st Dept 2007], *lv denied* 9 NY3d 1010 [2007]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11895- Index 300694/08
11895A Albert Garcia,
Plaintiff-Appellant,

-against-

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

Sgt. Robert Dello Iacono, etc.,
et al.,
Defendants.

_____

Koehler & Isaacs LLP, New York (Raymond J. Aab of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Suzanne K. Colt of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered November 29, 2012, which granted the motion of defendants City of New York, Police Officer John Florio and Detective Joseph Dietrich for summary judgment dismissing the complaint in its entirety, and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about September 19, 2008, denying plaintiff's motion to extend his time to serve Sergeant Dello Iacono, Captain Raddy and Detective DeSimone, unanimously dismissed, without costs, as

untimely.

Plaintiff failed to rebut the presumption of probable cause raised by the grand jury indictment (*see Lawson v City of New York*, 83 AD3d 609 [1st Dept 2011], *lv dismissed* 19 NY3d 952 [2012]; *Jenkins v City of New York*, 2 AD3d 291, 292 [1st Dept 2003]). The existence of probable cause constitutes a "complete defense" to plaintiff's claims of false arrest, false imprisonment, and malicious prosecution under state law *(Lawson* at 609) and his claim under 42 USC § 1983 (*see Brown v City of New York*, 289 AD2d 95 [1st Dept 2001]; *Weyant v Okst*, 101 F3d 845, 852 [2d Cir 1996]). Plaintiff failed to raise any triable issue of fact that the written and videotaped confessions which constituted the key evidence supporting the indictment were coerced (*see* CPL 60.45[2][a], 60.45[2][b]; *People v Hernandez*, 25 AD3d 377, 378-379 [1st Dept 2006], *lv denied* 6 NY3d 834 [2006]; *People v Lang*, 226 AD2d 245 [1st Dept 1996], *lv denied* 88 NY2d 967 [1996]).

The motion court also correctly held that plaintiff failed to establish a claim for municipal liability under 42 USC § 1983 (*see Monell v Department of Social Servs. of City of N.Y.*, 436 US 658 [1978]). Plaintiff failed to establish any municipal pattern and practice sufficient to support such a claim, and failed to

show that supervisory police officials were grossly negligent or otherwise acted with "deliberate indifference" to plaintiff's rights (*see Prowisor v Bon-Ton, Inc.*, 426 F Supp 2d 165, 174 [SD NY 2006], *affd* 232 Fed Appx 26 [2d Cir 2007]; *Pendleton v City of New York*, 44 AD3d 733 [2d Dept 2007]).

The motion court did not err in dismissing the complaint against defendants Dello Iacono, Raddy and DeSimone for failure to timely serve process (*see* CPLR 306-b), and against defendant Peters who had defaulted, on account of plaintiff's failure to timely move for a default judgment (*see* CPLR 3215[c]). Plaintiff's appeal from the September 19, 2008 order denying his motion for an extension of time to effect service on those officers was not timely taken and is not properly before the Court.

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

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11896 The People of the State of New York, Ind. 437N/12
Respondent,

-against-

Jamel Monroe,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered June 18, 2012, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to a term of four years, unanimously affirmed.

Although we do not find that defendant made a valid waiver

of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11898 Ciprian Pena Diaz, et al., Index 302435/11
Plaintiffs-Appellants,

-against-

Ernesto A. Guzman, et al.,
Defendants-Respondents,

Charlotte E. Hardy,
Defendant.

_____

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Nicole M. Maciejunes of counsel), for appellants.

Marjorie E. Bornes , Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about December 6, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint on the threshold issue of serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, to deny the motions as to plaintiff Diaz's claim of permanent consequential or significant limitation of use to his cervical spine, and plaintiff Gomez's claim of permanent consequential or significant limitation of use of her right knee, and otherwise affirmed, without costs.

Defendants made a prima facie showing that neither plaintiff

suffered a serious injury by submitting the affirmed reports of a physician who found normal ranges of motion in all allegedly injured body parts of both plaintiffs and opined that the spinal injuries were not caused by the accident, and a radiologist who opined that there was no trauma in Gomez's right knee (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]).

In opposition, Diaz raised a triable issue of fact as to his claimed cervical spine injury by submitting affirmed reports of a physician who examined him shortly after the accident, and of another physician who examined him more recently, both of whom found range-of-motion deficits (*see Aviles v Villapando*, 112 AD3d 534 [1st Dept 2013]). Further, Diaz's physician opined, following examination and review of the medical records, that there was a direct causal relationship between his current condition and the subject accident (*see Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]). However, Diaz failed to present any evidence of recent or permanent range of motion deficits with respect to the claimed injuries to his lumbar spine and right forearm, sufficient to support a finding of significant or permanent consequential limitations in use (*id.*).

Gomez raised triable issues of fact as to whether she suffered a serious injury to her right knee, including a torn

medial meniscus, by the affirmed reports of her surgeon, who, after performing arthroscopic surgery, opined that she suffered a permanent injury causally related to the subject accident, and of a physician who measured limitations in range of motion before and after the surgery (*see Ortiz v Salahuddin*, 102 AD3d 617 [1st Dept 2013]). However, Gomez failed to present medical evidence of any range-of-motion deficits continuing for a significant time or of a permanent nature with respect to her other claimed injuries (*see Kone*, 107 AD3d at 538).

Nevertheless, if Diaz or Guzman prevails at trial on his or her serious injury claim, he or she will be entitled to recover also for the non-serious injuries caused by the accident (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549–550 [1st Dept 2010]).

Defendants demonstrated that neither Diaz nor Guzman satisfied the 90/180–day category of serious injury, by relying on their testimony that they were confined to home for "about a

month," and neither plaintiff presented evidence sufficient to raise an issue of fact as to that category (*see Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11899 Resat Keles, Index 116143/09
Plaintiff-Appellant, 116468/09
116752/09

-against-

Zvi Galil, et al.,
Defendants-Respondents.

- - - - -

Resat Keles,
Plaintiff-Appellant,

-against -

Alan Brinkley, et al.,
Defendants-Respondents.

- - - - -

Resat Keles,
Plaintiff-Appellant,

-against-

Lee Bollinger, et al.,
Defendants-Respondents.

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Resat Keles, appellant pro se.

Friedman Kaplan Seiler & Adelman LLP, New York (Robert D. Kaplan of counsel), for respondents.

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Order, Supreme Court, New York County (Marcy Friedman, J.), entered January 13, 2012, which granted defendants' motions to dismiss the three actions with prejudice, unanimously affirmed, without costs.

Because these three actions assert claims that arise from

the same transactions involved in plaintiff's 2008 action against some of these same defendants (*see* 74 AD3d 435 [1st Dept 2010], *lv denied* 16 NY3d 890 [2011], *cert denied* __ US __ , 132 S Ct 225 [2011]), the prior dismissal of that action acts as a bar to the instant claims under the doctrine of res judicata (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-474 [1st Dept 2011] [doctrine of res judicata extends to parties and their privies]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Clark, JJ.

11900 In re Paula D., an Infant over the Age of Fourteen by her Mother and Natural Guardian, Sandra T., et al.,
Plaintiffs-Respondents-Appellants,

-against-

The City of New York,,
Defendant-Respondent,

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

Steers Construction Corp.,
Defendant-Appellant-Respondent,

M.A. Angeliades, Inc., et al.,
Defendants.

- - - - -

New York City Transit Authority,
Third-Party Plaintiff-respondent-appellant,

-against-

Seaboard Surety Company,
Third-Party Defendant-Respondent.

- - - - -

Seaboard Surety Company,
Second Third-Party Plaintiff-Respondent,

-against-

Steers Construction Corp.,
Second Third-Party Defendant-Appellant-Respondent.

[And Another Action]

Index 14593/01
8870/06

Leahy & Johnson, P.C., New York (Peter James Johnson, Jr. of counsel), for appellant-respondent.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for Paula D. and Sandra T., respondents-appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Joel M. Simon of counsel), for Metropolitan Transportation Authority and New York City Transit Authority, respondents-appellants.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. DeStefano of counsel), for L.A. Wenger Contracting Company, Inc. and Matrix Construction Corp., respondents-appellants.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for municipal respondent.

Wolff & Samson PC, New York (Adam P. Friedman of counsel), for Seaboard Surety Company, respondent.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered May 17, 2012, which, to the extent appealed from as limited by the briefs, denied the respective motions and cross motions of defendants L.A. Wenger Contracting Inc./Matrix Construction Corp. (Wenger), Steers Construction Corp. (Steers), and Metropolitan Transportation Authority and New York City Transit Authority (collectively NYCTA) for summary judgment dismissing the complaint and cross claims as against them, granted the motion of defendant City of New York for summary judgment dismissing the complaint as against it, and granted the motion of third-party defendant Seaboard Surety Company

(Seaboard) for summary judgment dismissing the third-party complaint, unanimously modified, on the law, to the extent of dismissing all contractual claims of NYCTA as against Steers, and otherwise affirmed, without costs.

There is an issue of fact as to whether the infant plaintiff's failure to observe the vehicle that struck her was a foreseeable consequence of a construction enclosure arguably blocking her view at the subject intersection.

The record also presents triable issues as to whether Wenger, responsible for designing and creating the construction enclosure, unleashed a force of harm, such that it was not entitled to rely upon municipally approved plans (*see Davies v Ferentini*, 79 AD3d 528, 529-530 [1st Dept 2010]), or its status as an independent contractor (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Steers's argument that, although it took over for Wenger as general contractor, it had no duty or authority with respect to the enclosure, is contradicted by the record, since Steers's principal testified that his company moved the enclosure after the accident. Questions of fact also exist as to whether the enclosure followed the approved plans, and whether it should have been recognized it as unsafe.

Dismissal of the complaint as against the City was proper.

There is no evidence that the City owed a special duty to plaintiff (*see McLean v City of New York*, 12 NY3d 194, 201-204 [2009]), and its nondelegable duty as owner was not triggered since the defect was in the construction structure, not the roadway or sidewalk (*compare Blake v City of Albany*, 48 NY2d 875 [1979]).

Seaboard was properly granted summary judgment since it had no control over the construction site and did not contract to assume Wenger's duties under its contract with NYCTA until after the accident.

However, all contractual claims interposed against Steers should have been dismissed. The record is devoid of any contract wherein Steers agreed to indemnify NYCTA.

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11901 The People of the State of New York, Ind. 3185/08
Respondent,

-against-

Kareem Washington,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), and Weil Gotshal & Manges LLP, New York (Kami Lizarraga of counsel),for appellant.

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered August 11, 2011, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 22 years to life, 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 determinations concerning identification and credibility, including its evaluation of prior identification testimony received pursuant to CPL 60.25. In addition to identification testimony, there was circumstantial evidence that strongly linked defendant to the crime, and

defendant's attacks on this evidence are unavailing.

Defendant was not deprived of his right to effective, conflict-free representation by his attorney's brief statement in response to defendant's post-trial motion for reassignment of counsel prior to sentencing. "Counsel's remarks outlining his efforts on his client's behalf cannot be compared to a situation where an attorney becomes a witness against his client" (*People v Nelson*, 27 AD3d 287, 287 [1st Dept 2006], *affd* 7 NY3d 883 [2006]; *see also People v Mitchell*, 21 NY3d 964, 967 [2013]; *United States v Moree*, 220 F3d 65, 70-72 [2d Cir 2000]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11902 In re Jaylin Elia G.,

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

Jessica Enid G., etc.,
Respondent-Appellant,

Harlem Dowling-Westside Center
for Children and Family Services,
Petitioner-Respondent.

_____

Ballon Stoll Bader & Nadler, P.C., New York (Frederic P. Schneider of counsel), for appellant.

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

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

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Order, Family Court, New York County (Jody Adams, J.), entered on or about November 7, 2012, which, upon a fact-finding determination that appellant mother permanently neglected her child, terminated her parental rights, and committed the care and custody of the child to petitioner agency Harlem Dowling-Westside Center for Children and Family Services and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The agency demonstrated by clear and convincing evidence

that it expended the requisite diligent efforts to reunite appellant with the child by scheduling visitation, providing appellant with transportation funds between New York and Rhode Island, where she was living, and by repeatedly advising her that she needed to complete a drug treatment program, obtain housing and a stable source of income (*see Matter of Jules S. [Julio S.]*, 96 AD3d 448, 449 [1st Dept 2012], *lv denied* 19 NY3d 814 [2012]; *Matter of Dade Wynn F.*, 291 AD2d 218 [1st Dept 2002], *lv denied* 98 NY2d 604 [2002]), and that despite these efforts, appellant permanently neglected the child by failing to complete a drug program, not attending all of the scheduled visits with the child, and otherwise failing to plan for the child's future.

The court's finding that it was in the child's best interest to be freed for adoption is supported by a preponderance of the evidence given the positive environment provided by the

foster mother and her desire to adopt the child (*see Matter of Savannah V.*, 38 AD3d 354, 355 [1st Dept 2007]).

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

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11906 The People of the State of New York, Ind. 6026/04
Respondent,

-against-

Luis Arroyo,
Defendant-Appellant.

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

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

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Judgment of resentence, Supreme Court, New York County (Richard D. Carruthers, J.), rendered June 15, 2012, resentencing defendant, as a second violent felony offender, to an aggregate term of 20 years, with five years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of post-release

supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11907- Index 116200/10
11908-
11909-
11909A Colony Insurance Company,
Plaintiff-Respondent,

-against-

Danica Group, LLC,
Defendant-Appellant,

Zurich American Insurance Company, et al.,
Defendants-Intervenors-Appellants.

- - - - -

New York Marine and General Insurance Company,
Proposed Intervenor-Appellant.

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Hollander & Strauss, LLP, Great Neck (Anthony P. DeCapua of counsel), for Danica Group, LLC, appellant.

White Fleischner & Fino, LLP, New York (Janet P. Ford of counsel), for Zurich American Insurance Company and Pav-Lak Industries, Inc., appellants.

Carroll, McNulty & Kull LLC, New York (Ann Odelson of counsel), for New York Marine and General Insurance Company, appellant.

Kaufman Dolowich & Voluck LLP, Woodbury (Michael L. Zigelman of counsel), for respondent.

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Order, Supreme Court, New York County (Donna M. Mills, J.), entered March 27, 2013, which granted plaintiff's motion for leave to renew its motion to enter a default judgment against defendant as to liability to the extent of deeming the factual allegations of the complaint admitted and setting the matter down

for an inquest upon completion of discovery, and denied defendant's cross motion to dismiss the complaint or for an extension of time to answer; order, same court and Justice, entered September 27, 2013, which denied defendant's motion to vacate its default in answering and to dismiss the complaint; and order, same court and Justice, entered September 30, 2013, which denied defendants-intervenors' motion to renew the motions decided by the March 27, 2013 order, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered October 9, 2013, which denied proposed-intervenor's motion to intervene, unanimously dismissed, without costs, as moot.

Defendant failed to demonstrate a reasonable excuse for its failure to timely answer the complaint (CPLR 5015[a][1]) in support of its motion to vacate the default judgment deeming admitted the factual allegations in the complaint that it made material misrepresentations in its application for insurance that induced plaintiff to issue policies that it would not otherwise have issued. The record belies defendant's contention that plaintiff's conduct lulled it into not responding (*see e.g. Nouveau El. Indus., Inc. v Tracey Towers Hous. Co.*, 95 AD3d 616, 618 [1st Dept 2012]; *Collier, Cohen, Crystal & Bock v Fisher*, 206 AD2d 260 [1st Dept 1994]). Absent a reasonable excuse for its

default, we need not decide whether defendant demonstrated a potentially meritorious defense (*Buro Happold Consulting Engrs., PC. v RMJM*, 107 AD3d 602 [1st Dept 2013]).

The new evidence cited by defendants-intervenors in their motion to renew does not provide a basis for changing the original determination granting the default judgment. Rather, it provides a potential equitable defense against plaintiff's action to rescind the insurance policies based on defendant's material misrepresentations, which defense can be raised, along with all other equitable defenses against rescission, in the proceedings that are continuing before the motion court. Although the default judgment ruling precludes further argument as to whether plaintiff properly pleaded or could sustain its claim of material misrepresentations, this is a reasonable consequence of defendant's unexcused default, and does not unfairly prejudice the rights of defendants-intervenors, who, as indicated, may raise equitable defenses to the rescission claim and may seek a remedy against defendant if rescission is granted and they suffer damage as a result.

Although proposed-intervenor's motion to intervene should

have been granted, its appeal from the order that denied the motion has been rendered moot by the fact that its coverage action has been consolidated with the rescission action, and thus it will have the opportunity to be heard on those claims.

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11910 The People of the State of New York, Ind. 5377/09
Respondent,

-against-

Londell Squire,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered May 17, 2011, as amended July 6, 2011, 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, as a second violent felony offender, to an aggregate term of 25 years, unanimously affirmed.

The People established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Echevarria*, 21 NY3d 1, 11-14 [2013]). Although defendant insists that the court did not conduct an appropriate hearing, it is clear that it relied on a sufficient factual predicate and made specific findings based on that information. Recorded telephone calls made by defendant while

incarcerated demonstrated that defendant was engaged in a campaign to identify and murder any potential witnesses to his crime, which culminated in the near-fatal shooting of one of the two identifying witnesses. This evidence compelled the inference that the second witness would be in grave danger as soon as his identity was revealed, much like the situation described in *People v Sweeper* (122 Misc 2d 386 [Sup Ct, NY County 1984]), and there was nothing speculative about such an inference.

Since the evidence of an objective danger to the witness provided an overriding interest warranting closure, it was not necessary to establish that the witness had a subjective fear of testifying in open court. Under the circumstances, even if the witness had foolishly disclaimed any fear of open-court testimony, closure would have been warranted nonetheless.

The closure was limited to the testimony of the witness at issue (defendant having consented to closure during the other identifying witness's testimony), and the court permitted defendant's family and certain other persons to attend. A fair reading of the court's ruling is that the court concluded that no further alternative would have protected the witness's safety (*see Echevarria*, 21 NY3d at 18-19). We have considered and rejected defendant's remaining arguments on the closure issue.

The court properly exercised its discretion in admitting the above-described recorded calls as evidence of defendant's consciousness of guilt. Defendant's involvement in the shooting of one witness and in efforts to silence all potential witnesses was readily inferrable from the contents of the calls and circumstances in which they were made (*see People v Jones*, 21 NY3d 449, 456 [2013]). In these phone calls, references to potential witnesses and attempts to murder them were thinly veiled by coined phrases that the jurors could have easily understood by means of context and their own common sense. For example, any juror of ordinary intelligence could have deduced that defendant's mention of "no flowers" referred to the fact that a witness survived an assassination attempt and thus did not require a funeral.

No expert testimony was necessary to decipher the calls, because, as indicated, the calls could be deciphered on the basis of context and common sense. Furthermore, it is not clear that there would have been anything for an expert to testify about. There is no indication that in the phone calls defendant was using some kind of standard jargon used generally by persons engaged in similar criminal activity, of a type that can be explained by an expert familiar with such code.

Defendant did not preserve his claim that the prosecutor acted as an expert witness on this subject, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits because the remarks at issue were fair comments on the evidence and proper efforts to ask the jurors to draw reasonable inferences (*see People v Overlee*, 236 AD2d 133 [1997], *lv denied* 91 NY2d 976 [1992]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's failure to object to the prosecutor's summation or to the absence of expert testimony fell below an objective standard

of reasonableness, or that they deprived defendant of a fair trial or affected the outcome of the case (*compare People v Cass*, 18 NY3d 553, 564 [2012], *with People v Fisher*, 18 NY3d 964 [2012]).

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11911 Lucio Cortez, Index 303426/09
Plaintiff-Appellant-Respondent,

-against-

Khondokar B. Mia,
Defendant-Respondent-Appellant,

Consolidated Edison Company
of New York, Inc., et al.,
Defendants-Respondents.

- - - - -

Consolidate Edison Company
of New York, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Felix Associates LLC.,
Third-Party Defendant-Respondent.

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Pena & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for appellant-respondent.

Law Offices of Nancy L. Isserlis, Long Island City (Lawrence R. Miles of counsel), for respondent-appellant.

Carole A. Borstein, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Felix Associates LLC, respondent.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered July 17, 2012, which, inter alia, granted defendant Felix Associates LLC's (Felix) motion and defendant Consolidated Edison

Company of New York, Inc.'s (Con Ed) cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was injured when he was struck by defendant Khondokar Mia's automobile as he tried to cross the street about 30 feet from the crosswalk. Plaintiff elected not to use the crosswalk, even though other pedestrians were using it, because of the placement of traffic cones that were left in the area by Felix and Con Ed and the unplowed condition of the street on what was a snowy day.

Felix, under its subcontract with Con Ed, was required to excavate the roadway, install a conduit, pour a concrete base, and repave the roadway when the work was completed. However, before the work was completed, Felix, under Con Ed's direction, would, at the end of the work day, place steel skid-resistant plates over the construction area and remove them again when work resumed. Plaintiff contends that not only did the construction work cause him not to cross the street using the crosswalk, but as he tried to cross in the middle of the block, he slipped and fell on a steel plate left by Felix, and was struck by Mia's automobile.

Dismissal of the complaint was proper under the

circumstances. Felix did not owe plaintiff a duty of care since plaintiff was not a party to the contract between Felix and Con Ed, and there is no indication that Felix or Con Ed created any dangerous conditions in the crosswalk or on the street, as other pedestrians ahead of plaintiff used the crosswalk and the steel plates were in accord with City requirements (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). Furthermore, plaintiff's action in crossing the street without checking the status of the traffic light or pedestrian crossing signal, and Mia's inability to avoid hitting plaintiff in the snowy conditions, were the proximate causes of his accident (*see e.g. Brown v Muniz*, 61 AD3d 526 [1st Dept 2009], *lv denied* 13 NY3d 715 [2010]; *Rodriguez v Manhattan & Bronx Surface Tr. Operating Auth.*, 117 AD2d 541, 542 [1st Dept 1986], *lv denied* 68 NY2d 602 [1986]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 6, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

11913N In re Government Employees Insurance Company,
Petitioner-Respondent,

-against-

Gary Giamo,
Respondent-Appellant.

Index 651207/13

Ogen & Sedaghati, P.C., New York (Eitan Alexander Ogen of counsel), for appellant.

Montfort, Healy, McGuire & Salley, Garden City (Donald S. Neumann, Jr., of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered July 25, 2013, granting the petition to stay arbitration and directing respondent to provide petitioner with discovery, unanimously reversed, on the law, without costs, the petition denied, and the proceeding dismissed.

Pursuant to CPLR 7503(c), "[a] petition to stay arbitration must be brought within 20 days of service of the demand for arbitration. This limitation is strictly enforced and a court has no jurisdiction to entertain an untimely application" (*Matter of Allcity Ins. Co. [Vitucci]*, 151 AD2d 430, 430 [1st Dept 1989], *affd* 74 NY2d 879 [1989]). The record indicates that respondent served the arbitration demand at issue upon petitioner on October

25, 2012, but petitioner did not initiate the instant petition until April 2013. Hence the petition was plainly untimely and should have been denied.

Petitioner did not provide evidence from a person with personal knowledge to indicate that the arbitration demand was purposely concealed in the October 2012 package that included a copy of respondent's medical records (*cf. Matter of Nationwide Mut. Ins. Co. [Monroe]*, 75 AD2d 765 [1st Dept 1980]). Rather, petitioner's claims adjuster wrote to respondent's counsel on November 5, 2012, acknowledging that it had received his "demand letter," and wrote again on December 3, 2012, indicating that, after careful consideration, it was denying the claim based upon a finding that the injuries did not meet the applicable medical threshold, a conclusion that must have been made after review of the records provided. Under such circumstances, rather than demonstrate concealment, the record indicates that petitioner was likely careless in failing to note the demand (*see State Wide Ins. Co. v Klein*, 90 AD2d 846 [2d Dept 1982]). We further note that the October 2012 package also included a copy of an affidavit of service indicating that an arbitration demand had been served.

As the petition to stay arbitration was untimely, judicial

intrusion into the arbitration proceedings is precluded (*see Matter of Allstate Ins. Co. v LeGrand*, 91 AD3d 502 [1st Dept 2012]), and hence, there is no judicial authority to direct respondent to provide further discovery to petitioner (*see Matter of State Farm Mut. Auto. Ins. Co. v Urban*, 78 AD3d 1064, 1066 [2d Dept 2010]).

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

ENTERED: MARCH 6, 2014

CLERK