SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 6, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Acosta, Clark, JJ.

9756 The People of the State of New York, Ind. 1106/04
Appellant,

-against-

Jose Mercado,
Defendant-Respondent.
- - - - -
Immigrant Defense Project,
Amicus Curiae.

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Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for appellant.

Jorge Guttlein & Associates, P.C., New York (Thomas E. Moseley of counsel), for respondent.

Immigrant Defense Project, New York (Dawn M. Seibert of counsel), for amicus curiae.

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Order, Supreme Court, Bronx County (Leonard Livote, J.), entered on or about July 21, 2011, which granted defendant's CPL 440.10 motion to vacate a judgment of the same court (Maxwell Wiley, J. at plea; John P. Collins, J. at sentencing), rendered April 1, 2005, convicting defendant of criminal sale of a controlled substance in the fourth degree, and sentencing him to a term of five years' probation, unanimously reversed, on the

law, and the judgment reinstated.

The judgment of conviction was vacated pursuant to *Padilla v Kentucky* (559 US 356 [2010]), which was decided after defendant's conviction had become final. In view of the Court of Appeals' determination that the *Padilla* rule will not be applied retroactively in the courts of this state (*People v Baret*, 23 NY3d 777 [2014]), we reverse the order granting defendant's CPL 440.10 motion and reinstate the judgment of conviction.

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

ENTERED: NOVEMBER 6, 2014

CLERK

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

11989 The People of the State of New York, Ind. 3241/07
Respondent,

-against-

Sparkle Daniel,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (T. Charles Won of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J., at hearing and trial), rendered October 25, 2010, convicting defendant, after a jury trial, of murder in the second degree, and sentencing her to a term of 25 years to life, reversed, on the law, defendant's motion to suppress statements granted, and the matter remanded for a new trial.

In June 2007, an informant identified defendant to police as one of two perpetrators of the unsolved 2003 murder of a 91-year-old woman at her home in the Bronx. On July 19, 2007, officers of the Bronx Homicide Task Force located defendant on the street in front of her residence, took her into custody, handcuffed her,

and transported her to the Task Force office. After a 15-minute wait in a holding cell, defendant was brought to an interview room, uncuffed, at about 6:55 p.m. A detective asked her "if she knew why she was here," and she replied, "No." The detective then told her that the police were investigating the death of an elderly woman; defendant did not respond. At that point, the detective was called away from the interview for several minutes. When he returned to the interview room, he asserted that he knew that defendant knew what he was talking about, to which defendant responded, "Yes." Defendant then proceeded to say that she and another woman (subsequently charged as the other perpetrator) had seen the victim outside her home and had asked to use her phone. At that point, the detective stopped defendant and administered *Miranda* warnings to her for the first time. Defendant acknowledged the warnings in writing.

When the detective finished giving the warnings, at about 7:10 p.m., defendant resumed her story, in which she claimed that, after the elderly woman admitted her and her companion into the house to use the phone, her companion committed a theft and then murdered the woman, without defendant's assistance, to avoid

arrest. The detective wrote down the statement, and defendant initialed the writing after reviewing it. The statement was completed at about 7:57 p.m. Thereafter, the detective told defendant he did not believe that she had told the whole story. Defendant then gave a second statement from 8:05 p.m. to 8:27 p.m., which the detective also wrote down and defendant initialed. In the second written statement, defendant admitted to having given her companion assistance in committing the murder, but claimed that she had done so under threat from her companion, who allegedly wielded a knife.

Upon the completion of the second written statement at 8:27 p.m., defendant was given a break of approximately 2 hours and 45 minutes. During the break, defendant consumed a meal of takeout Chinese food and a soda. At about 11:15 p.m., defendant gave a videotaped statement to an assistant district attorney, in the detective's presence. At the beginning of the videotaped statement, the assistant district attorney administered fresh *Miranda* warnings to defendant. The substance of the videotaped statement was generally consistent with the second written statement.

Based on her own statements, the informant's testimony, and other evidence (including fingerprints on the victim's phone), defendant was indicted for the murder of the elderly woman. Defendant moved to suppress her two written statements and her videotaped statement on the ground that she had not been given *Miranda* warnings until after the custodial interrogation had begun. The hearing court denied the motion, finding that the initial *Miranda* warnings given at 7:10 p.m. had been sufficient. After a jury trial, defendant was convicted and sentenced as indicated.[1] Upon defendant's appeal, Court of Appeals precedent leaves this Court with no alternative but to reverse, grant the motion to suppress the statements, and remand for a new trial.

"[W]here an improper, unwarned statement gives rise to a subsequent Mirandized statement as part of a single continuous chain of events, there is inadequate assurance that the *Miranda* warnings were effective in protecting a defendant's rights, and the warned statement must also be suppressed" (*People v Paulman*, 5 NY3d 122, 130 [2005] [internal quotation marks omitted]). On this record, applying the factors identified in *Paulman* as

[1]Defendant's accomplice, who was interrogated and tried separately, was also convicted of second-degree murder, and her conviction has been affirmed (*see People v Panton*, 114 AD3d 450 [1st Dept 2014], *lv denied* 23 NY3d 966 [2014]).

pertinent to this inquiry (*id.* at 130-131), it is clear that defendant's two written statements, although produced after she had been Mirandized, were "part of a single continuous chain of events" that included the detective's initial pre-warning inquiries and statement, defendant's pre-warning acknowledgment that she knew why she had been brought in, and her pre-warning statement that she and the other alleged perpetrator had asked to use the victim's phone outside the latter's house.[2] There was no time differential between the *Miranda* violation and the Mirandized interview that immediately followed, giving rise to the two written statements; the same police personnel were involved before and after the warnings; there was no change in the location or nature of the interrogation; and defendant had never indicated a willingness to speak to the police before the *Miranda* violation. Further, although the pre-warning exchange

[2]We reject the People's contention that the exchange between the detective and defendant before she was Mirandized was not a custodial interrogation. Defendant, who had been brought to the Task Force office involuntarily and in handcuffs, was plainly in custody, and the detective's statements to her were plainly intended to elicit incriminating statements, as he admitted at the hearing (*see People v Ferro*, 63 NY2d 316, 322 [1984], *cert denied* 472 US 1007 [1985] ["'the term "interrogation" under *Miranda* refers . . . to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response'"], quoting *Rhode Island v Innis*, 446 US 291, 301 [1980]).

was very brief and did not include any admission by defendant of criminal conduct, her unwarned statements plainly tended to incriminate her by acknowledging that she knew something about the murder of an elderly woman and by placing herself at the scene of the crime with the victim and the other alleged perpetrator (*see People v White*, 10 NY3d 286, 291 [2008], *cert denied* 555 US 897 [2008] [whether the defendant made any pre-Mirandized inculpatory statement is one of several factors to be considered in determining whether a post-*Miranda* statement was tainted by an earlier *Miranda* violation]).[3]

Under the foregoing circumstances established by the record, it cannot be said that there was, between the *Miranda* violation and the making of the subsequent Mirandized written statements, such a "definite, pronounced break in the interrogation to dissipate the taint from the *Miranda* violation" (*Paulman*, 5 NY3d

[3]The hearing court's determination that any taint was dissipated by the interval between the detective's leaving the room and his returning approximately 15 minutes later was based on an inaccurate characterization of the record. The detective's testimony made clear that, after an absence of a "couple of minutes," he returned to the room and, without reading defendant her *Miranda* rights, told her that he knew that she knew what he was talking about. At that point, defendant made her brief pre-warning statement. This was followed by the detective stopping defendant and administering *Miranda* warnings, which in turn was followed by defendant's first post-warning statement.

at 131 [internal quotation marks omitted]) by "return[ing] [defendant], in effect, to the status of one who is not under the influence of questioning" (*People v Chapple*, 38 NY2d 112, 115 [1975]). We note that we are precluded from considering whether the break of at least 2 hours and 45 minutes between the completion of defendant's second written statement and the commencement of her videotaped statement (which began with renewed *Miranda* warnings administered by the assistant district attorney) sufficed to attenuate any taint from the commencement of the questioning before she was initially Mirandized and, therefore, to render the videotaped statement admissible. The hearing court's decision denying suppression did not consider any such theory, which had not been raised by the People in opposition to the motion seeking suppression of all three recorded statements. Accordingly, under CPL 470.15(1), we are without power to affirm on the ground that the videotaped statement was admissible and that its admission rendered harmless the error in admitting the written statements (*see People v Concepcion*, 17 NY3d 192 [2011]; *People v LaFontaine*, 92 NY2d 470 [1998]).

In sum, we are compelled to grant defendant's suppression motion as to all of her statements to the police and to order a

new trial. There is no basis upon which to find that the admission of the statements was harmless, and the People have made no argument to that effect. Finally, since we are ordering a new trial, we find it unnecessary to discuss defendant's other arguments, except to note that we find that the verdict was not against the weight of the evidence.

All concur except Clark, J. who dissents in a memorandum as follows:

CLARK, J. (dissenting)

While I agree that defendant was in custody and that the pre-*Miranda* questioning of defendant constituted interrogation, I depart from the majority in finding that the extent of the pre-*Miranda* questioning and the nature of the information obtained were sufficient to dissipate the taint of the un-Mirandized custodial interrogation. I would therefore affirm the court's decision and deny suppression of the post-*Miranda* statements.

Defendant was arrested on July 19, 2007, and charged in connection with the January 9, 2003 robbery and murder of 91 year-old Nellie Hocutt. Hocutt was found in her home, asphyxiated, bound to a chair, with a plastic bag tied around her head; she had apparently been forced to ingest wine shortly before her death.

The court conducted a *Mapp/Dunaway/Huntley* hearing, with regard to both defendant and Nadine Panton in September 2010. Defendant sought suppression of three statements she made to police and prosecutors on the night of her arrest. The court denied the motion to suppress the three statements.

The Court of Appeals has set forth a list of factors to be considered in determining whether there is a sufficiently definite, pronounced break in the interrogation to dissipate the

taint of un-Mirandized custodial interrogation (*see People v Paulman*, 5NY3d 122 [2005]). Those factors include

> "the time differential between the *Miranda* violation and the subsequent admission; whether the same police personnel were present and involved in eliciting each statement; whether there was a change in the location or nature of the interrogation; the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning; and whether, prior to the *Miranda* violation, defendant had indicated a willingness to speak to police" (*id.* at 130-131]).

The majority correctly concludes that the same police personnel were involved before and after the warnings; there was no change in the location of the interrogation; and defendant did not indicate a willingness to speak with the police before the *Miranda* violation. Notwithstanding, I disagree with the majority's determination that defendant's statements tended to incriminate her.

Our determination of this appeal requires an examination of both the extent of the un-Mirandized questioning and the nature of the information obtained as a result. As explained in *Paulman*, the court's denial of the suppression motion must be based on "the circumstances surrounding the *Miranda* violation, such as the extent of the improper questioning" (5 NY3d at 130). The majority agrees that the extent of the improper questioning was very brief. Essentially, there were two statements made to

defendant that were designed to elicit a response. One question at 6:55 p.m. was: "[D]o you know what you are here for?" The detective was interrupted, exited the room, and returned a few minutes later to ask: "[D]o you know what I am talking about now?" Thereafter, defendant stated to the detective that "her and Nadine went to her aunt's house. She saw Ms. Nellie . . . and asked her if she could use her phone." The detective immediately stopped defendant and administered the *Miranda* warnings. Until this point, defendant had not confessed or admitted to any wrongdoing.

It was not an incriminating response for defendant to imply that (1) she knew the victim; (2) she was with Nadine Panton; or (3) that she asked to used the victim's phone. The record further demonstrates that defendant's response was not incriminating since the defense case chiefly consisted of evidence that she had a good relationship with the victim and that she frequently visited the victim and often used her phone. In *People v White*, the Court of Appeals explained that "'the absence of any incriminating responses to . . . police questioning' can be one of several factors supporting a conclusion that post-*Miranda* confessions are not tainted" (10 NY3d at 291 [*quoting People v Kinnard*, 62 NY2d 910, 912 (1984)]).

Thus, considering the brevity of the pre-*Miranda* questioning and the inconsequential information obtained by the police, I find that the taint of the pre-*Miranda* statement was sufficiently dissipated.

Further, while the majority indicates that there was no break between the *Miranda* violation and the Mirandized interview, it is important to note that the record is unclear in this regard since the evidence does not present the pace at which they spoke or a precise amount of time between the *Miranda* violation and defendant's post-*Miranda* statement given at 7:10 p.m. I do not agree that this gap in the record establishes the immediacy that the majority finds. Having given consideration to the factors detailed above, I find that suppression was not required, and the post-*Miranda* statements were properly received in evidence.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13391 The People of the State of New York, Ind. 5471/11
Respondent,

-against-

Thomas Webb,
Defendant-Appellant.

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

Cyrus R. Vance Jr., District Attorney, New York (David E.A. Crowley of counsel), and Patterson Belknap Webb & Tyler LLP, New York (Zhiqiang Liu of counsel), for respondent.

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Judgment, Supreme Court, New York County (Lewis Bart Stone, J.), rendered June 7, 2012, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six 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. Defendant's accessorial

liability (*see* Penal Law § 20.00) was established by evidence supporting an inference that defendant entered a building, where he assisted his accomplice in obtaining drugs, which the accomplice then sold to an undercover officer.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13392 In re John Schwartz, Index 107858/11
Petitioner-Appellant,

-against-

Edna Wells Handy, etc., et al.,
Respondents-Respondents.

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Law Office of Kevin P. Sheerin, Mineola (Kevin P. Sheerin of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about December 19, 2011, granting respondents' cross motion to dismiss the petition to annul the determination of respondent New York City Civil Service Commission, which denied petitioner's request for an adjustment of his seniority date from February 13, 1997 to August 8, 1994, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The record establishes that petitioner suffered "actual, concrete injury" (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]) no

later than December 8, 2010, when he was unequivocally informed of the determination that his seniority date was February 13, 1997. Accordingly, the petition, filed in July 2011, was untimely (CPLR 217).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13393 In re Arco Iris Night Club Corp., Index 100001/14
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

_____

Mehler & Buscemi, New York (Martin P. Mehler of counsel), for petitioner.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for respondent.

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Determination of respondent, dated December 4, 2013, upon a finding of a violation of 9 NYCRR 48.3, revoking petitioner's on-premises liquor license with a $1,000 bond claim, unanimously modified, on the facts, to reduce the penalty of revocation of petitioner's license to cancellation of the license, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia S. Kern, J.]), entered on or about February 4, 2014, otherwise disposed of by confirming the remainder of the determination, without costs.

Respondent's finding that petitioner violated 9 NYCRR 48.3 by allowing unlicensed cabaret activity in its premises (*see* Administrative Code of City of NY § 20-360[a]) is supported by

substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 181-182 [1978]). The record includes the uncontroverted testimony of a police officer that on the night of January 20, 2013 he observed patrons dancing and moving around the dance floor at the licensed premises and testimony by petitioner's principal that demonstrated his awareness that illegal dancing was a concern. Petitioner placed "no dancing" signs in the premises and retained security guards to curtail illegal dancing. However, there was no testimony as to any efforts by the security guards, or anyone else employed by petitioner, to stop any of the 20 patrons observed dancing on the night in question (*cf. Matter of Albany Manor Inc. v New York State Liq. Auth.*, 57 AD3d 142, 145 [1st Dept 2008]).

Respondent's promulgation of 9 NYCRR 48.3, which requires on-premises licensees to conform with all applicable building codes and governmental regulations, was not ultra vires, since its purpose is to further implement the Alcoholic Beverage Control Law, it does not "add[] a requirement that does not exist," and it is in harmony with the Alcoholic Beverage Control Law (*Matter of Jones v Berman*, 37 NY2d 42, 53 [1975]; *see also 47 Ave. B. E. Inc. v New York State Liq. Auth.*, 13 NY3d 820 [2009]).

However, viewing the circumstances in their totality, we

find the penalty of revocation, which may result in the loss of two other liquor licenses held by petitioner's principal, so excessive and disproportionate to the single offense of unlicensed cabaret as to shock our sense of fairness (*compare Matter of Cris Place, Inc. v New York State Liq. Auth.*, 56 AD3d 339 [1st Dept 2008]; *Matter of Albany Manor, Inc. v New York State Liq. Auth.*, 44 AD3d 759 [2d Dept 2007]). Petitioner's past history cannot be considered without the mitigation evidence, "which sets forth explanations for the violations and perhaps places them in proper perspective and lack of magnitude" (*Matter of Westwind Rest. v New York State Liq. Auth.*, 89 AD2d 508 [1st Dept 1982] [internal quotation marks omitted]). This evidence includes the facts that petitioner's attempt to obtain a cabaret license was thwarted by its landlord's failure to correct building violations, and when the violations were cleared – before respondent issued its determination – petitioner reported an intent to file an application as soon as the landlord resolved one outstanding issue, and that, before the determination was issued, petitioner replaced the security company it had been

using at the time of the violation. We find that reducing the penalty from revocation to cancellation is appropriate (*see generally Matter of Shore Haven Lounge v New York State Liq. Auth.*, 37 NY2d 187 [1975]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13394 The People of the State of New York, Ind. 3146/11
Respondent,

-against-

Luis Soto,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered on or about September 14, 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: NOVEMBER 6, 2014

CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13395 Jeffrey Blanco, Index 113865/10
Plaintiff-Appellant, 590234/11

-against-

NBC Trust No. 1996A, etc., et al.,
Defendants-Respondents.

- - - - -

NBC Trust No. 1996A, etc., et al.,
Third-Party Plaintiffs,

-against-

Atlas-Acon Electric Service, Corp.,
Third-Party Defendant-Respondent.

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Martin R. Munitz, P.C., New York (Martin R. Munitz of counsel), for appellant.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia Raicus of counsel), for NBC Trust No. 1996, NBC Universal Inc., and Cross Consulting Inc., respondents.

Camacho Mauro Mulholland, LLP, New York (William E. Daks of counsel), for Atlas-Acon Electric Services, Corp, respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 30, 2014, which, insofar as appealed from as limited by the briefs, granted those branches of the motion of defendants NBC Trust No. 1996A, NBC Universal Inc. and Cross Consulting, Inc., and the cross motion of third-party defendant Atlas-Acon Electric Service Corp., for summary judgment dismissing plaintiff's Labor Law § 240(1) claim, unanimously

reversed, on the law, without costs, those branches of the motion and cross motion denied, the section 240(1) claim and third-party complaint reinstated, and, upon a search of the record pursuant to CPLR 3212(b), partial summary judgment is awarded to plaintiff on the issue of liability on the Labor Law § 240(1) claim.

Dismissal of the Labor Law § 240(1) claim was improper in this action where plaintiff electrician was injured when, while in the course of replacing ballasts on 25 light fixtures, he fell when the A-frame ladder he was attempting to descend swayed. Plaintiff's work at the time of the accident was activity covered under the statute, as it was performed in the context of a larger renovation project on the premises and did not constitute routine maintenance work (*see Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881-882 [2003]; *Hernandez v Ten Ten Co.*, 31 AD3d 333 [1st Dept 2006]; *Fox v H & M Hennes & Mauritz, L.P.*, 83 AD3d 889 [2d Dept 2011]; *compare Picaro v New York Convention Ctr. Dev. Corp.*, 97 AD3d 511 [1st Dept 2012]). Given the undisputed evidence as to how the accident occurred, and absence of evidence showing that plaintiff was the sole proximate cause of the accident (*see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [1st Dept 2002]; *cf. Noble v 260-261 Madison Ave., LLC*, 100 AD3d 543 [1st

Dept 2012]), we grant plaintiff partial summary judgment on the issue of liability based upon a search of the record (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 175-176 [1st Dept 2004]; CPLR 3212[b]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13396 The People of the State of New York, Ind. 912/11
Respondent,

-against-

James Landeau,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald A. Zweibel, J.), rendered on or about January 24, 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: NOVEMBER 6, 2014

CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13397 Ricki Rosenblatt, Index 150821/12
Plaintiff-Appellant,

-against-

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

_____

Lindenbaum & Young, P.C., Brooklyn (Catherine P. McGovern of counsel), for appellant.

Lawrence Heisler, Brooklyn, for respondents.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered April 8, 2013, which granted defendants' motion to vacate a judgment entered upon default, unanimously modified, on the facts, to condition the vacatur upon defendants' payment of $6,000 to plaintiff's attorneys within 30 days after service of a copy of this order, and, as so modified, affirmed, without costs.

Defendants demonstrated an excuse of law office failure through the assigned attorney's detailed affirmation setting forth the series of mistakes that resulted in the granting of plaintiff's motion for entry of a default judgment, just after defendants had served an answer, which was about six months late (*see Spira v New York City Tr. Auth.*, 49 AD3d 478 [1st Dept 2008]; *Goldman v Cotter*, 10 AD3d 289 [1st Dept 2004]; CPLR 2005).

Defendants also presented a potentially meritorious defense based on plaintiff's testimony at the General Municipal Law §50-h hearing that rainwater may have been tracked onto the steps by pedestrians, since that condition could have caused or contributed to her fall (*see Hussein v New York City Tr. Auth.*, 266 AD2d 146 [1st Dept 1999]). The State's preference for resolving controversies on the merits weighs in favor of vacating defendants' default. However, in light of the litigation necessitated and costs incurred as a result of defendants' dilatory conduct, we condition vacatur upon payment to plaintiff's attorneys of the amount indicated (*see Spira*, 49 AD3d at 478; *Goldman*, 10 AD3d at 289).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13398 The People of the State of New York, Ind. 2151/12
Respondent,

-against-

Maurice Robinson, also known as
Siler Downs,
Defendant-Appellant.

_____

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

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

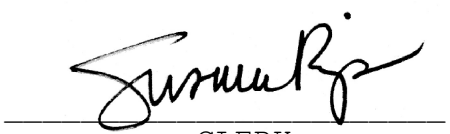
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena Uviller, J.), rendered on or about December 12, 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: NOVEMBER 6, 2014



CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13400 Regine Legrand, Index 114121/10
Plaintiff-Respondent,

-against-

Guilene Ganich, et al.,
Defendants-Appellants.

_____

Paula Schwartz Frome, Garden City, for appellants.

Law Office of Frederic R. Abramson, New York (Frederic R. Abramson of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Arthur F. Engoron, J.), entered April 22, 2013, against defendants in plaintiff's favor in the aggregate amount of $81,121.92, unanimously affirmed, without costs.

Following a nonjury trial, the court concluded that plaintiff made a loan to defendants rather than an equity investment in their business. This decision, which was based on the credibility of the witnesses, is entitled to deference, and could have been reached under a fair interpretation of the

evidence (*see e.g. Thoreson v Penthouse Intl.*, 80 NY2d 490, 495 [1992]; *Matter of Metropolitan Transp. Auth.*, 86 AD3d 314, 320 [1st Dept 2011]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13401 In re Platinum Pleasures, Index 101458/13
Petitioner-Appellant,

-against-

New York State Liquor Authority,
Respondent-Respondent.

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Albert J. Pirro, Jr., White Plains, for appellant.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for respondent.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered March 3, 2014, denying the petition to annul respondent New York State Liquor Authority's determination, dated July 1, 2013, issued on default, to revoke petitioner's on-premises liquor license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, the determination vacated, and the matter remanded for a hearing on the underlying charges.

Regardless of whether petitioner defaulted under 9 NYCRR 54.2, it established that the revocation order should be vacated

because it had a reasonable excuse for the alleged default and a meritorious defense. Petitioner's default was excusable because its former counsel explained that he had a regular custom of emailing respondent's counsel when conducting business, that his communications had never been rejected before, that the email of the notice of appearance and not-guilty plea was never rejected by respondent, and that his repeated requests before the default was issued, inquiring as to the status of the pending administrative proceeding, went unanswered. Further, petitioner made a prima facie showing of a meritorious defense to the charges, as the alleged misconduct occurred on the public sidewalk outside the licensed premises (*see* 9 NYCRR 48.2; Alcoholic Beverage Control Law § 106[6]; *Matter of JA Rocks Inc. v New York State Liq. Auth.*, 43 AD3d 663, 663 [1st Dept 2007]).

We note that upon learning of the revocation order, petitioner's former counsel promptly requested that respondent vacate the finding, and petitioner timely commenced the instant

article 78 proceeding.

Given the foregoing determination, we need not reach petitioner's remaining contentions.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13402 The People of the State of New York, Ind. 67/12
Respondent,

-against-

Alyssia C.,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered on or about November 14, 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 [1st Dept 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: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13403 The People of the State of New York, Ind. 4606/07
Respondent,

-against-

Juan Rios,
Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Bobbi C. Sternheim of counsel), for appellant.

Cyrus R. Vance Jr., District Attorney, New York (Beth Fisch Cohen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered November 21, 2011, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant's challenges to the prosecutor's cross-examination and summation are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

To the extent there were improprieties, the errors were harmless, given the overwhelming evidence establishing defendant's guilt and refuting his affirmative defense of extreme emotional disturbance (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

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

13404 Norma Ingleton, et al., Index 302473/10
Plaintiffs-Respondents, 84052/10

-against-

Brooks Shopping Centers, L.L.C., et al.,
Defendants-Respondents,

The Whiting-Turner Contracting
Company, et al.,
Defendants,

ECI Contracting, Inc.,
Defendant-Appellant.

[And a Third Party Action]

_____

Raven & Kolbe, LLP, New York (Ryan E. Dempsey of counsel), for appellant.

Laurence M. Savedoff, PLLC, Bronx (Laurence M. Savedoff of counsel), for Norma Ingleton and Wade Samuels, respondents.

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for Brooks Shopping Centers, L.L.C., Macerich Management Company and Macerich Property Management Company, L.L.C., respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered May 14, 2013, which, inter alia, denied the motion of defendant ECI Contracting, Inc. (ECI) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

ECI's motion was properly denied in this action where

plaintiff Norma Ingleton alleges that she was injured after falling on a staircase constructed by ECI. Although a contractual obligation does not generally give rise to tort liability in favor of a third party such as plaintiff, a contractor is potentially liable in tort to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139-141 [2002]*; Powell v HIS Contrs., Inc.*, 75 AD3d 463, 464 [1st Dept 2010]). Here, ECI failed to proffer sufficient evidence showing that the staircase was properly constructed or inspected in a reasonable and prudent manner prior to the accident (*see Prenderville v International Serv. Sys., Inc.*, 10 AD3d 334, 337-338 [1st Dept 2004]; *compare Agosto v 30th Place Holding, LLC*, 73 AD3d 492 [1st Dept 2010]).

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

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13406 Amgad S. Garas, Index 20175/06
Plaintiff-Appellant,

-against-

James Cook, 3rd, et al.,
Defendants-Respondents.

_____

Ameduri Galante & Friscia, LLP, Staten Island (Marvin Ben-Aron of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Yolanda L. Ayala of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered May 2, 2013, which granted defendants' motion for summary judgment dismissing the complaint on the ground that it is barred by collateral estoppel, unanimously affirmed, without costs.

The court properly found that plaintiff Garas's claim against defendants is barred by collateral estoppel (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 72 [1969]). The record demonstrates that Garas was afforded a full and fair opportunity to contest the issue of defendant Cook's alleged negligence in the occurrence of the subject accident, in both the New Jersey Superior Court action, in which the court granted these defendants summary judgment, finding that Garas's actions were

the sole proximate cause of the accident, and in the Department of Motor Vehicle administrative hearing, in which the Administrative Law Judge came to the same conclusion.

We have considered plaintiffs remaining arguments and find them unavailing.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13407 The People of the State of New York, Ind. 5003N/08
Respondent,

-against-

Anthony Berry,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered March 10, 2010, as amended March 19, 2010, convicting defendant, after a jury trial, of three counts of unlawfully dealing with a child in the first degree, and sentencing him to concurrent terms of one year, 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.

The evidence supports a reasonable inference that defendant "permit[ted]" several underage children to "enter or remain" in a place of drug activity (Penal Law § 260.20[1]), even though, in

permitting the children to enter or remain, defendant may be viewed as having acted jointly with his codefendant. The statute does not require a defendant to have a legal responsibility for the care or custody of the child (*compare* Penal Law § 260.10[2]), and defendant's guilt was not negated by the fact that the codefendant may have been even more blameworthy, by virtue of her relationship with the children.

There was also ample evidence from which the jury could find that defendant "kn[ew] or had reason to know" that activity involving controlled substances was "being maintained or conducted" (Penal Law § 260.20[1]) in the codefendant's apartment. Defendant's acquittal of drug possession charges does not undermine the conviction of unlawfully dealing with a child (*see People v Rayam*, 94 NY2d 557 [2000]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13408 Yan Lin, et al., Index 104524/10
Plaintiffs-Respondents,

-against-

J & He Transportation, Inc., et al.,
Defendants-Appellants,

Xiong Lin, et al.,
Defendants.

_____

Morrison Mahoney LLP, New York (Christopher P. Keenoy of counsel), for appellants.

Morelli Alters Ratner, LLP, New York (Sara A. Strickland of counsel), for Yan Lin, respondent.

Subin Associates, LLP, New York (Robert J. Eisen of counsel), for Liqui Liu, respondent.

_____

Order, Supreme Court, New York County (George J. Silver, J.), entered May 24, 2013, which, to the extent appealed from, denied the motion of defendants J & He Transportation, Inc. (J&He) and New Hong Kong for summary judgment dismissing plaintiff Yan Lin's complaint against them, unanimously affirmed, without costs.

While defendants J&He and New Hong Kong neither owned nor operated the vehicle at issue, plaintiff Yan Lin raised triable issues of fact as to whether she reasonably relied upon the alleged misrepresentation of the driver, defendant Xiong Lin,

that he was operating the vehicle on J&He's behalf, because of some misleading conduct on the part of J&He (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]; *Fogel v Hertz Intl.*, 141AD2d 375, 376 [1st Dept 1988]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13409-
13410 In re Karma C.,

A Child Under Eighteen Years of Age,
etc.,

Tenequa A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Jashua C.,
Nonparty Respondent.

_____

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Suzanne K. Colt of counsel), for Administration for Children's Services, respondent.

Steven N. Feinman, White Plains, for Jashua C., respondent.

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

_____

Order of disposition, Family Court, New York County (Susan K. Knipps, J.), entered on or about September 4, 2013, which upon a fact-finding determination, same court and Judge, entered on or about April 19, 2013, that respondent mother, due to her impaired mental state, had neglected the subject child, Karma C., granted temporary custody of the child to the father, unanimously

affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that the child's physical, mental or emotional condition was in imminent danger of becoming impaired as a result of the mother's history of mental illness and failure to maintain regular treatment and take prescribed medication (*see Matter of Naomi S. [Hadar S.]*, 87 AD3d 936, 937 [1st Dept 2011], *lv denied* 18 NY3d 804 [2012]; *see also* Family Ct Act §§ 1046 [b][i], 1012 [f][i][B]). The mother suffers from mental illness characterized by, among other things, bipolar disorder, anxiety and depression.

Prior to relocating from Boston, the mother alternated between several shelters and the home of the paternal grandmother, who often provided primary care for the child. Since moving to New York, the mother has lived in various shelters, where she has gotten into physical altercations with shelter staff and residents, in the presence of the child. She also has had panic attacks, for which she has been hospitalized.

The record reflects the mother's lack of insight into the effect of her mental illness on the child, as well as deterioration of her condition due to failure to receive regular treatment and take prescribed medication (*see Matter of Christopher R.* [*Lecrieg B.B.*], 78 AD3d 586, 586-587 [1st Dept

2010]). The record further demonstrates, inter alia, that, on at least one occasion, the mother threatened to kill the child if the agency were to take her away, and reportedly heard voices telling her to kill someone. Thus, the mother's mental illness created an imminent risk of harm to the child (*Matter of Isaiah M. [Antoya M.]*, 96 AD3d 516, 517 [1st Dept 2012]).

Further, under the circumstances, we find the court properly determined that it was in the child's best interests to be released to the temporary custody of the father, who is not a party to the proceeding (*see e.g. Matter of Naomi S.*, 87 AD3d at 937).

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

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

ENTERED: NOVEMBER 6, 2014

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13411 The People of the State of New York, Ind. 5866/11
Respondent,

-against-

Kevin Clor,
Defendant-Appellant.

_____

Norman P. Effman, Warsaw, for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about August 8, 2011,

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

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

ENTERED: NOVEMBER 6, 2014

CLERK

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

Mazzarelli, J.P., Acosta, DeGrasse, Clark, JJ.

13413-
13414 In re Dale Jamal Robertson, Ind. 3214/09
[M-4383 & Petitioner,
3564]

-against-

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

- - - - -

In re Dale Robertson,
Petitioner,

-against-

Hon. Steven L. Barrett, etc.,
Respondent.

_____

Dale J. Robertson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Steven L. Barrett, respondent.

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for Robert T. Johnson, respondent.

_____

The above-named petitioner having presented applications to this Court praying for orders, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceedings, and due deliberation having been had thereon,

It is unanimously ordered that the applications be and the same hereby are denied and the petitions dismissed, without costs or disbursements.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13415 The People of the State of New York, Ind. 2422/11
Respondent,

-against-

Richard Cespedes,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered February 21, 2012, convicting defendant, after a jury trial, of assault in the second degree, unlawful imprisonment in the first degree, reckless endangerment in the second degree and obstructing governmental administration in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

The court meaningfully responded to a note from the deliberating jury (*see People v Almodovar*, 62 NY2d 126, 131 [1984]; *People v Malloy*, 55 NY2d 296, 301-302 [1982], *cert denied* 459 US 847 [1982]). The jury asked what portion of the incident

related to the assault charge, and it suggested alternative temporal limitations. Although the actual injury to an officer occurred during a particular portion of the incident, the entire sequence of events had a bearing on whether the elements of second-degree assault under Penal Law § 120.05(3) had been established. Therefore, the court properly exercised its discretion when it responded by instructing the jury, as it had already done in its main charge, to consider all of the evidence (*see People v Craig*, 293 AD2d 351 [1st Dept 2002], *lv denied* 98 NY2d 674 [2002]). Defendant has not demonstrated that this response could have caused any prejudice (*see People v Agosto*, 73 NY2d 963, 966 [1989]).

The court properly refused to submit the lesser included offense second-degree unlawful imprisonment (*see People v Negron*, 91 NY2d 788 [1998]). There was no reasonable view of the evidence, viewed most favorably to defendant, that he restrained the victim by refusing to let her out of his vehicle but did not expose her to a risk of serious physical injury. First-degree unlawful imprisonment only requires that the circumstances expose the restrained person to a "risk," of unspecified degree, of

serious physical injury. Defendant's grossly reckless driving during a lengthy high-speed chase on busy Manhattan streets clearly established such a risk, even if he was driving a relatively safe type of vehicle, and there was no reasonable view of the evidence to the contrary.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13416 Colleen Duff, Index 103044/09
Plaintiff, 509197/11

-against-

646 Tenth Avenue, LLC, et al.,
Defendants,

J.L. Heating & Contracting, LLC,
Defendant-Respondent.
- - - - -
J.L. Heating & Contracting, LLC,
Third-Party Plaintiff-Respondent,

-against-

M.J.D. Building Maintenance LLC,
Third-Party Defendant-Appellant.

_____

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for appellant.

Farber Brocks & Zane LLP, Garden City (Tracy L. Frankel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered July 30, 2013, which, to the extent appealed from as limited by the briefs, denied third-party defendant's motion for summary judgment dismissing of the third-party complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the third-party complaint.

In this action for personal injuries allegedly sustained by plaintiff when she was burned by hot water while showering in the bathroom of an apartment located at 646 Tenth Avenue in Manhattan, third-party defendant M.J.D. Building Maintenance LLC, the building's superintendent, met its initial burden of demonstrating that it did not create or have actual or constructive notice of the alleged dangerous condition. Although third-party defendant acknowledges acting to address complaints of no heat or hot water on the upper floors of the building within two weeks of the incident which resulted in plaintiff's injuries, the undisputed evidence estabishles that the domestic hot water supply system and the heating system for the building were separate, and that adjustments made by third-party defendant to the heating system would have had no effect on the domestic hot water supply system *(see Baumgardner v Rizzo,* 35 AD3d 223, 224 [1st Dept 2006], *lv denied* 8 NY3d 806 [2007]).

Third-party plaintiff failed to present evidence that any action taken by third-party defendant caused excessively hot water. Third-party plaintiff's expert expressly stated that he did not evaluate the heating system, which was different from the domestic hot water supply system. Although he opined that leaving the domestic hot water supply system in the hands of an

inexperienced person, such as third-party defendant, was dangerous and negligent, no evidence was presented that any action by third-party defendant proximately caused plaintiff's injuries or that third-party defendant was responsible for repairs to the domestic hot water supply system *(see LaTronica v F.N.G. Realty Corp.*, 47 AD3d 550, 550-551 [1st Dept 2008]; *Baumgardner,* 35 AD3d at 224-225).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13417 The People of the State of New York, Ind. 2359/03
Respondent,

-against-

Arcide Figueroa,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Lewis Bart Stone, J.), rendered April 19, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13418 Jamie Vidal, Index 302583/10
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

New York City Housing Authority,
Defendant-Appellant.

_____

Cullen & Dykman LLP, New York (Joseph C. Fegan of counsel), for appellant.

Eisenberg and Baum, LLP, New York (Sagar Shah of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 17, 2014, which denied the motion of defendant New York City Housing Authority (NYCHA) for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

NYCHA established its entitlement to judgment as a matter of law in this action where plaintiff allegedly slipped and fell on an icy condition on NYCHA's property. NYCHA's supervisor of grounds testified that he and his crew had shoveled snow, removed ice, and salted and sanded the parking lot after a snow fall the

day before the accident, and that any icy condition was addressed. Such evidence showed that NYCHA did not have actual or constructive notice of the icy condition (*see Cyril v Mueller*, 104 AD3d 465 [1st Dept 2013]).

In opposition, plaintiff failed to raise a triable issue of fact. He presented no evidence that NYCHA created the condition, that it was readily apparent, or that it was present for a sufficiently long period of time so that NYCHA had an opportunity to remedy the alleged hazard (*see Robinson v 156 Broadway Assoc., LLC*, 99 AD3d 604 [1st Dept 2012]). Nor did plaintiff describe with any specificity the alleged condition that caused him to fall, from which it might be inferred, without speculation, that it was visible and apparent, particularly in view of the testimony of the supervisor of grounds that he had cleared the area and no snow or ice remained (*see Jenkins v Rising Dev.-BPS, LLC*, 105 AD3d 568 [1st Dept 2013]).

Although the issue was not addressed by the motion court, there is no triable issue as to whether the lighting in the parking lot contributed to plaintiff's fall. The record shows that NYCHA's supervisor of grounds inspected the exterior lights

several days prior to plaintiff's fall and found them to be functioning properly, and plaintiff did not submit any evidence contradicting such testimony.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13420 The People of the State of New York, Ind. 184/12
Respondent,

-against-

Jeffrey Hierro,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 15, 2012, convicting defendant, after a jury trial, of attempted assault in the first degree (two counts) and assault in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of seven years, unanimously affirmed.

Defendant did not preserve his claim that the evidence supporting the attempted first-degree assault convictions was legally insufficient to establish the element of intent to cause serious physical injury, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342,

348-349 [2007]). The evidence supports reasonable inferences that defendant slashed the victim's face with an unidentified sharp object, and that he did so with intent to cause the victim serious physical injury (*see e.g. People v Jones*, 110 AD3d 493 [1st Dept 2013]).

The court properly exercised its discretion in admitting evidence of defendant's gang affiliation, since it was highly probative of defendant's motive, and "was central to the jury's understanding of an otherwise unexplained assault" (*People v Wilson*, 14 AD3d 463, 463 [1st Dept 2005], *lv denied* 4 NY3d 857 [2005]). Testimony from the victim and from a police officer demonstrated why members of defendant's gang would be motivated to target this victim. Furthermore, the court's limiting instructions minimized any prejudicial effect.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13421 The People of the State of New York, Ind. 1154/11
Respondent,

-against-

Karl Cooper,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about January 16, 2013,

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: NOVEMBER 6, 2014

CLERK

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

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13422 Albina Darzimanova, Index 152968/12
Plaintiff, 590488/13

-against-

Bernard Le Clere,
Defendant.
- - - - -
Bernard Le Clere,
Third-Party Plaintiff-Respondent,

-against-

MV Public Transportation, Inc., et al.,
Third-Party Defendants-Appellants,

John Doe, etc.,
Third-Party Defendant.

_____

Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellants.

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered November 15, 2013, which denied third-party defendants' pre-answer motion to dismiss the third-party complaint, unanimously affirmed, without costs.

The third-party defendants (appellants) were originally named as defendants, along with third-party plaintiff Le Clere, in the main action, which alleges that plaintiff, a passenger in

the access-a-ride vehicle owned and operated by the various appellants, was injured when the vehicle collided with Le Clere's on the Westside Highway in New York County. Supreme Court previously granted appellants' pre-answer CPLR 3211(a)(7) motion to dismiss the complaint as against them for failure to state a cause of action, based on the complaint's failure to allege any specific negligence on the part of appellants or their driver. However, as appellants had moved before issue was joined by Le Clere, the court expressly stated that it granted the motion in the absence of any evidence of cross claims asserted by Le Clere against the moving appellants. Hence, the action was severed and continued only against Le Clere.

During the pendency of the previous motion, but unbeknownst to the court, Le Clere answered the complaint, and asserted cross claims against appellants, alleging that the accident was caused due to the negligence of their driver. After the court granted appellants' first dismissal motion, Le Clere commenced a third-party action against appellants, asserting a claim for contribution. Appellants moved to dismiss the third-party complaint on the ground that law of the case mandated its dismissal.

Even assuming the law of the case doctrine is applicable

there was no identity of issue in the two motions, and the motion court properly found that its "holding in relation to the prior motion to dismiss was based on the facts and law presented by the parties in that procedural posture, and no more" (*191 Chrystie LLC v Ledoux*, 82 AD3d 681, 682 [1st Dept 2011]). Le Clere's claim for contribution from appellants is not dependent upon their direct liability towards plaintiff, but is instead based on appellants' purported duty owed directly to him, which may have had a part in causing or augmenting the injury for which contribution is sought (*see Sommer v Federal Signal Corp.*, 79 NY2d 540, 558-559 [1992]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Andrias, J.P., Saxe, Richter, Gische, JJ.

13423-
13424 Michael Flomenhaft, Index 150293/10
Plaintiff-Appellant,

-against-

Jacoby & Meyers, LLP, et al.,
Defendants-Respondents.

_____

The Flomenhaft Law Firm, PLLC, New York (Stephen D. Chakwin, Jr. of counsel), for appellant.

Hinshaw & Culbertson LLP, New York (Katie M. Lachter of counsel), for respondents.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 7, 2014, which granted plaintiff's motion for leave to reargue defendants' motion to dismiss the second cause of action for slander per se, and upon reargument, modified the prior order, same court and Justice, entered June 24, 2013, to reinstate the second cause of action as against defendant Sharon A. Scanlan, unanimously modified, on the law, to reinstate the second cause of action as against all defendants, and otherwise affirmed, without costs. Appeal from the June 24, 2013 order, unanimously dismissed, without costs, as academic.

The court properly reinstated the slander per se claim against defendant Scanlan. However the claim should have been

reinstated as against all defendants, since plaintiff's allegations that some of the slanderous statements were made "[b]etween December 28, 2009 and January 31, 2010" was sufficient to satisfy the specificity required for a claim alleging defamation (*see Herlihy v Metropolitan Museum of Art* (214 AD2d 250, 261 [1st Dept 1995]).

Plaintiff's demand for punitive damages cannot be sustained, since the allegations do not rise to a level "of such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Weiss v Lowenberg*, 95 AD3d 405, 407 [1st Dept 2012]; *Morsette v The Final Call*, 309 AD2d 249, 253-255 [1st Dept 2003], *appeal dismissed* 5 NY3d 756 [2005]).

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: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13425- Index 650229/12
13426-
13427-
13428-
13429 Mark Herbert, et al.,
Plaintiffs,

-against-

Platinum Capital Partners, Inc.,
Defendant-Appellant,

Tarter Krinsky & Drogin LLP,
Defendant.

- - - - -

Law Office of Michael C. Rakower, P.C.,
Nonparty Respondent.

_____

Tarter Krinsky & Drogin LLP, New York (Christopher Tumulty of counsel), for appellant.

Rakower Lupkin PLLC, New York (Michael C. Rakower of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered March 17, 2014, awarding the total sum of $59,718.55 in favor of nonparty Law Office of Michael C. Rakower, P.C. (Rakower Law) against defendant Platinum Capital Partners, Inc., and bringing up for review an order of the same court and Justice, entered August 7, 2013, an amended order of the same court and Justice, entered September 20, 2013, and an amended order of the same court and Justice, entered November 8, 2013,

all of which referred the calculation of attorneys' fees to a special referee, an order of the same court and Justice, entered October 28, 2013, which denied Platinum's motion to renew and reargue, and an order of the same court and Justice, entered March 11, 2014, which directed entry of judgment in favor of Rakower Law, unanimously affirmed, without costs. Appeals from the aforementioned orders, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court properly directed Platinum to pay attorneys' fees to plaintiffs' counsel Rakower Law under the terms of the operative agreement mandating the payment of fees to the prevailing party. Given that the agreement provided that the prevailing party in "any dispute" shall be entitled to an award, the outcome of a separate action between the parties is irrelevant. Furthermore, Rakower Law has an enforceable charging

lien against the award of attorneys' fees (*see Judiciary Law § 475; Rosen v Rosen*, 97 AD2d 837 [2d Dept 1983]. There is no basis for a grant of attorneys' fees and expenses in connection with this appeal.

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13430 The People of the State of New York, Ind. 1188/12
Respondent,

-against-

Parrish Rodriguez,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about October 2, 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: NOVEMBER 6, 2014

CLERK

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

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13431-
13431A Keilany B., an Infant by her Mother and Natural Guardian Xiomara S., et al.,
Plaintiffs-Appellants,

-against-

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

Index 350436/09

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Michael Shender of counsel), for respondents.

Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered August 12, 2013, dismissing the complaint pursuant to an order, same court and Justice, entered July 15, 2013, which, inter alia, granted defendants' motions for summary judgment, unanimously affirmed, without costs. Appeal from the above order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

After 8-year-old Keilany B. collapsed in her schoolyard and suffered an acute ischemic stroke (AIS), plaintiffs brought this negligence and medical malpractice action regarding her care and treatment against defendants Department of Education (DOE), the

New York City Health and Hospitals Corporation (Jacobi Hospital), and the City of New York (City). As to the DOE and the City, plaintiffs alleged that their delays worsened the infant plaintiff's condition. As to Jacobi Hospital, plaintiffs alleged that it delayed CT scan testing for over an hour, and failed to administer tissue plasminogen activator (tPA), a treatment using drugs to lyse (dissolve) dangerous clots in blood vessels, which departures worsened the infant's condition.

All defendants moved for summary judgment dismissing the complaint. In response to defendants' motions, plaintiffs alleged that Jacobi failed to administer anticoagulants, specifically Heparin, a drug designed to prevent blood clots, and proffered an expert's affirmation to support this claim.

Jacobi Hospital established its prima facie entitlement to summary judgment by submitting an affirmation of a medical expert establishing that it had rendered acceptable medical care to the infant plaintiff. Its expert affirmed that tPA was untested on children and, therefore, unsafe for children with AIS (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]).

In opposition to defendants' summary judgment motions, plaintiffs failed to raise an issue of fact. The merits of plaintiffs' new theory of recovery, raised for the first time in

opposition to Jacobi's motion for summary judgment, will not be considered (*see Ostrov v Rozbruch*, 91 AD3d 147, 154 [1st Dept 2012]; *Abalola v Flower Hosp.*, 44 AD3d 522 [1st Dept 2007]). In any event, the medical literature on which plaintiffs' expert relied was in agreement with the defense expert's opinion that anticoagulants and tPA were both untested and unsafe for children who had suffered a stroke. Thus, no issue of fact exists, and there is no merit to plaintiffs' request to amend the bill of particulars (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364 [1st Dept 2007]). Moreover, Jacobi has demonstrated that it is prejudiced by the new theory of liability, which alleges that it departed from the standard of care by failing to administer a different class of drugs to Keilany, and which theory was not set forth until after discovery was complete and the case was on the trial calendar (*see Ostrov* at 154).

The DOE, by having staff present in the schoolyard when Keilany collapsed, one of whom caught her before she fell, and by promptly assessing her condition and contacting EMS personnel when it became apparent that the child had difficulty standing and moving her leg, demonstrated that it fulfilled its duty of "adequately supervis[ing] the students in their charge" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]).

The City is not a proper party to this action (*see Bailey v City of New York*, 55 AD3d 426 [1st Dept 2008]).

Contrary to plaintiffs' assertion, their expert's opinion that anticoagulants are the standard of care in treating acute ischemic strokes in children is not the type of novel theory that necessitates a hearing pursuant to *Frye v United States* (293 F 1013 [DC Cir 1923]) (*see e.g. Marsh v Smyth*, 12 AD3d 307 [1st Dept 2004]). It was merely an opinion explaining one form of treatment, albeit one conceded by the expert's supporting literature to be untested and unsafe (*see Rowe v Fisher*, 82 AD3d 490 [1st Dept 2011]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13435 The People of the State of New York, Ind. 671/12
Respondent,

-against-

Thomas Currie,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about November 28, 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 [1st Dept 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: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13436 Bluewaters Communications Holdings, LLC,
Plaintiff-Appellant,

-against-

Bernard Ecclestone, et al.,
Defendants-Respondents,

Gerhard Gribkowsky,
Defendant.

Index 653965/12

_____

Arnold & Porter LLP, New York (Kent A. Yalowitz of counsel), for appellant.

LeClairRyan, A Professional Corporation, New York (Thomas E. Butler of counsel), for Bernard Ecclestone, respondent.

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for Bambino Holdings, Ltd., respondent.

Freshfields Bruckhaus Deringer US LLP, New York (Cheryl Howard of counsel), for CVC Capitol Partners Ltd., Alpha Prema UK Ltd., Alpha Topco Ltd., and Delta Topco Ltd., respondents.

Reed Smith LLP, New York (Jordan W. Siev of counsel), for Bayerische Landesbank Anstalt Des Offentlichen Rechts, respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 21, 2014, which granted defendants-respondents' motions to dismiss the complaint as against them, unanimously affirmed, with costs.

New York courts do not have jurisdiction over defendants

Bernard Ecclestone (an Englishman), Alpha Prema UK Ltd. (an English company), and Alpha Topco Ltd., Delta Topco Ltd., and Bambino Holdings, Ltd. (Jersey [Channel Islands] companies) (the personal jurisdiction defendants) pursuant to CPLR 302(a)(1), (2), or (3)(ii).

Plaintiff maintains that the personal jurisdiction defendants committed a tort outside the state that caused injury within the state (*see* CPLR 302[a][3][ii]), i.e., its loss of New York-based customers, nonparties Apollo Management, L.P. and King Street Capital Management, L.L.C. However, the complaint does not refer to Apollo and King Street as plaintiff's customers; rather, it refers to them as plaintiff's financiers. Contrary to plaintiff's argument, the complaint does not allege tortious interference with plaintiff's economic relations with Apollo and King Street.

In any event, the event that gave rise to the injury did not occur in New York (*see CRT Invs., Ltd. v BDO Seidman, LLP*, 85 AD3d 470, 471-472 [1st Dept 2011]). That event occurred when Ecclestone persuaded defendant Gerhard Gribkowsky (a German), via the promise of money, to steer the sale by defendant Bayerische Landesbank Anstalt des Öffentlichen Rechts (BLB) (a German bank) of its shares of nonparty Speed Investments Limited (a Jersey

company) to defendant CVC Capital Partners Ltd. (an English company) instead of plaintiff's predecessor in interest (a Jersey company with offices in Jersey and London).

Plaintiff argues that the personal jurisdiction defendants are subject to New York jurisdiction because they conspired with CVC, which transacted business in the state (*see* CPLR 302[a][1]) by buying the Speed shares owned by nonparty Lehman Commercial Paper, Inc., which had an office in New York. However, plaintiff does not meet the requirements for establishing conspiracy jurisdiction (*see e.g. Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427 [1st Dept 2013]). For example, CVC's purchase of Lehman's Speed shares was not a tort, and the complaint does not allege that CVC bought those shares at the direction, under the control, at the request, or on behalf of the personal jurisdiction defendants. "[T]he mere conclusory claim that an activity is a conspiracy does not make it so" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 97 [1st Dept 2010]; *see also e.g. Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG*, 23 AD3d 269, 270 [1st Dept 2005]).

Plaintiff alleges that Ecclestone and Bambino bribed Gribkowsky in U.S. dollars and that the payments went from nonparties First Bridge Holding Limited (a Mauritius company) and

Lewington Invest Limited (a British Virgin Islands company) to nonparty GG Consulting (an Austrian company). Plaintiff contends that, because the payments were made in U.S. dollars, they must have gone through New York banks (*see Banque Worms v BankAmerica Intl.*, 77 NY2d 362, 370 [1991]; *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137 [2014]). However, Ecclestone's and Bambino's indirect use of the New York banking system does not constitute the transaction of business in New York pursuant to CPLR 302(a)(1) (*see Pramer*, 76 AD3d at 96-97; *see also Magwitch, L.L.C. v Pusser's Inc.*, 84 AD3d 529 [1st Dept 2011], *lv denied* 18 NY3d 803 [2012]). Nor does it constitute the commission of a tort within New York pursuant to CPLR 302(a)(2). Unlike the third-party defendants in *Mashreqbank PSC v Ahmed Hamad Al Gosaibi & Bros. Co.* (2010 NY Slip Op 33909[U], *12 [Sup Ct, NY County 2010], *revd on other grounds* 101 AD3d 1 [1st Dept 2012], *revd on other grounds* 23 NY3d 129 [2014]), Ecclestone and Bambino – the alleged payors of the bribe – did not fraudulently gain funds for their own benefit. Nor does *American BankNote Corp. v Daniele* (45 AD3d 338 [1st Dept 2007]) avail plaintiff with respect to its CPLR 302(a)(2) argument, since that case dealt with jurisdictional discovery and involved a greater connection to the New York metropolitan area than the instant

action.

The motion court properly dismissed this action on the ground of forum non conveniens (*see e.g. Ghose v CNA Reins. Co. Ltd.*, 43 AD3d 656 [1st Dept 2007], *lv denied* 10 NY3d 712 [2008]). As indicated, this case stems from the failure of a Jersey company (with offices in Jersey and London) to acquire the shares of another Jersey company from a German bank, allegedly because an Englishman bribed a German. The cause of action "lack[s] a substantial nexus with New York" (*Martin v Mieth*, 35 NY2d 414, 418 [1974]). All the defendants are foreign (*see Wyser-Pratte*, 23 AD3d at 270; *see also Adamowicz v Besnainou*, 58 AD3d 546, 547 [1st Dept 2009]). Germany has already tried and convicted Gribkowsky. Germany has an interest in how BLB – a German bank – was run (*see Phat Tan Nguyen v Banque Indosuez*, 19 AD2d 703, 295 [1st Dept 2005], *lv denied* 6 NY3d 703 [2006]; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 178 [1st Dept 2004]). By contrast, New York's interest is minimal (*see Mashreqbank*, 23 NY3d at 137-138). Germany, England, and Jersey are all available alternative fora (*see e.g. Sears Tooth v Georgiou*, 69 AD3d 464

[1st Dept 2010] [England]; *Wyser-Pratte*, 23 AD3d at 270 [Germany]; *Chawafaty v Chase Manhattan Bank*, 288 AD2d 58 [1st Dept 2001] [Jersey], *lv denied* 98 NY2d 607 [2002]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13437 Anthony Hill, Index 305287/08
Plaintiff-Appellant,

-against-

Acies Group, LLC, et al.,
Defendants-Respondents,

Stoneledge Scaffolding Corp.,
Defendant.

[And a Third-Party Action]

_____

Jason Levine, New York, for appellant.

Baxter, Smith & Shapiro, P.C., White Plains (Sim R. Shapiro of counsel), for Acies Group, LLC and CS Melrose Site D, LLC, respondents.

Methfessel & Werbel, P.C., New York (Fredric P. Gallin of counsel), for Skye Construction, LLC, respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered November 27, 2012, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted as against defendants Acies Group, LLC, CS Melrose Site D, LLC, and Skye Construction, LLC.

Plaintiff established his entitlement to judgment as a matter of law on the issue of liability on his Labor Law § 240(1)

claim by submitting, among other things, his testimony that he was performing his assigned work of cleaning debris from the ground level, just outside the north side of the subject building under construction, when he was suddenly struck by a falling brick, in the absence of any overhead netting or other such protective devices (*see Mercado v Caithness Long Is. LLC*, 104 AD3d 576 [1st Dept 2013]; *Zuluaga v P.P.C. Constr., LLC*, 45 AD3d 479 [1st Dept 2007]). Defendants' witnesses further established their liability by confirming that the brick fell out of the hands of a masonry worker several stories above plaintiff, and that safety netting which had been installed on other sides of the building was absent from the north exterior. The lack of overhead protective devices was a proximate cause of plaintiff's injuries under any of the conflicting accounts (*see Arnaud v 140 Edgecomb LLC*, 83 AD3d 507, 508 [1st Dept 2011]), and plaintiff's comparative negligence is not a defense to a Labor Law § 240(1) claim (*see Stolt v General Foods Corp.*, 81 NY2d 918, 920 [1993]). Moreover, contrary to defendants' argument that plaintiff had been instructed not to cross the barricade or go underneath the scaffolding while any work was being performed overhead, "an instruction by an employer or owner to avoid using unsafe equipment or engaging in unsafe practices is not a 'safety

device' in the sense that plaintiff's failure to comply with the instruction is equivalent to refusing to use available, safe and appropriate equipment" (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 563 [1993]). In addition, the conflicting accounts of "what type of work he was doing at the time of the accident" do not raise a triable issue of fact (*see Marrero v 2075 Holding Co. LLC*, 106 AD3d 408, 409 [1st Dept 2013]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13438 In re Kerry S.,
Petitioner-Respondent,

-against-

Avelda B.,
Respondent-Appellant.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Jo Ann Douglas, New York, for respondent.

John R. Eyerman, New York, attorney for the child.

_____

Order of filiation, Family Court, New York County (Monica Shulman, Referee), entered on or about March 6, 2013, declaring petitioner to be the biological father of the subject child, unanimously affirmed, without costs.

Respondent mother initially consented to having a DNA test performed to determine whether petitioner was the child's biological father, and the test found there was a 99.99% probability that petitioner is the biological father of the child. She then raised an equitable estoppel defense based on the presence in the child's life of another man who acted as a "father figure" for the child. The attorney for the child did not assert equitable estoppel on the child's behalf, because the child would not be harmed, whatever the test determined. The

Referee properly found that it was in the child's best interests to deny respondent's motion, without a hearing, because respondent presented no evidence that the child would suffer irreparable loss of status, destruction of his family image, or other harm to his physical or emotional well-being if the proceeding were permitted to go forward (*see Matter of Todd S. v Lauri B.*, 110 AD3d 526 [1st Dept 2013]; *Matter of David G. v Maribel G.*, 93 AD3d 526 [1st Dept 2012]; *Matter of Derrick H. v Martha J.*, 82 AD3d 1236, 1238-1239 [2d Dept 2011]).

Contrary to respondent's contention, under Family Court Act § 532, DNA test results which indicate at least a 95% probability of paternity were not only admissible, but create a rebuttable presumption of paternity (*see Matter of Commissioner of Social Servs. of City of N.Y. v Hector S.*, 216 AD2d 81, 84 [1st Dept 1995]; *Matter of Beaudoin v Robert A.*, 199 AD2d 842, 844 [3d Dept 1993]). Accordingly, the certified DNA test results

were properly admitted into evidence and relied upon by the Referee (CPLR 4518[c]; *Matter of Angela L. v Edward B.*, 237 AD2d 359, 360 [2d Dept 1997]).

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13439 The People of the State of New York, Ind. 1851/00
Respondent,

-against-

Meshach Valladi, also known as
Mesach Vallade, etc.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Judgment of resentence, Supreme Court, Bronx County (John S. Moore, J.), rendered February 15, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 15 years, with five years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: NOVEMBER 6, 2014

CLERK

Sweeny, J.P., Andrias, Saxe, Richter, Feinman, JJ.

13440 In re Theophilus Burroughs, Ind. 3216/10
[M-3561] Petitioner,

-against-

Hon. Steven Barrett, et al.,
Respondents.

_____

Theophilus Burroughs, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Steven Barrett, respondent.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: NOVEMBER 6, 2014

CLERK

Renwick, J.P., Richter, Manzanet-Daniels, Feinman, Gische, JJ.

12566 Matthew Moorhouse, Index 112956/10
Plaintiff-Appellant,

-against-

The Standard, New York, et al.,
Defendants-Respondents,

Kimberly Russell,
sued herein as Kimberly Russel,
Defendant.

_____

Ferber Chan Essner & Coller LLP, New York (Robert M. Kaplan of counsel), for appellant.

Callan, Koster, Brady and Brennan LLP, New York (Louis E. Valvo, Kenneth T. Bierman and Arshia Hourizadeh of counsel), for The Standard, New York and André Balazs Properties, respondents.

Quirk and Bakalor, P.C., Garden City (Richard Bakalor of counsel), for respondent.

_____

Order Supreme Court, New York County (Joan M. Kenney, J.), entered January 25, 2013, affirmed.

Opinion by Richter, J. All concur.

Order filed.

Corrected Order - November 28, 2014

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick, J.P.
Rosalyn H. Richter
Sallie Manzanet-Daniels
Paul G. Feinman
Judith J. Gische, JJ.

12566
Ind. 112956/10

Matthew Moorhouse,
Plaintiff-Appellant,

-against-

The Standard, New York, et al.,
Defendants-Respondents,

Kimberly Russell, sued herein as Kimberly Russel,
Defendant.

Plaintiff appeals from the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered January 25, 2013, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motions for summary judgment dismissing the causes of action for defamation, malicious prosecution and respondeat superior, and denied as moot plaintiff's motion to amend the complaint.

Ferber Chan Essner & Coller LLP, New York (Robert M. Kaplan and Robert N. Chan of counsel), for appellant.

Callan, Koster, Brady and Brennan LLP, New York (Louis E. Valvo, Kenneth T. Bierman and Arshia Hourizadeh of counsel), for the Standard, New York and André Balazs Properties, respondents.

Quirk and Bakalor, P.C., Garden City (Richard Bakalor, Robert E. Quirk and Janet Lee of counsel), for **G.P.**, respondent.

RICHTER, J.

On November 7, 2009, plaintiff Matthew Moorhouse, an Australian citizen, was arrested for the attempted rape of defendant G.P. charged incident occurred while Moorhouse was a guest at the Standard Hotel located in the Meatpacking District in Manhattan. G.P., a Chinese immigrant who was working at the hotel as a housekeeper, alleged that while she was cleaning Moorhouse's room, he pushed her onto the bed, sexually abused her, and attempted to rape her. G.P. fled from the room and immediately reported the incident to her supervisors, hotel security and the police.

Moorhouse was subsequently indicted by a grand jury, went to trial, and was found not guilty. After the acquittal, he commenced this action against G.P., her purported employers, defendants The Standard, New York, and André Balazs Properties (the hotel defendants), and defendant Kimberly Russell, a housekeeping supervisor at the hotel. In the complaint, Moorhouse asserts causes of action for malicious prosecution, false imprisonment, defamation, intentional infliction of emotional distress, conversion and respondeat superior.

In the fall of 2009, Moorhouse traveled to the United States to attend an educational seminar and conduct a series of business

meetings.[1] After first visiting Miami and Boston, he arrived in New York on Friday, November 6, and checked into room 924 at the Standard Hotel. Moorhouse had a business meeting on Monday and planned on spending the weekend in the city. On the night he arrived, he went to a Broadway show, took a walk around the hotel neighborhood and went to bed. The next day, Saturday, November 7, he woke up early, went for a walk and returned to the hotel where he spent the day in his room sleeping and sending emails.

That afternoon, Russell noticed that Moorhouse's room had not yet been cleaned. According to Russell, she knocked on his door and Moorhouse told her that he wanted the room to be serviced. Russell then instructed G.P. and another housekeeper, Cai Qing Chen, to clean Moorhouse's room. G.P. and Chen went to Moorhouse's room and knocked on the door, and Moorhouse let them in. After G.P. and Chen picked up trash and towels, they left the room to get fresh linens. Chen went to clean another room and G.P. returned to Moorhouse's room alone to change the bedsheets.

G.P. testified that while she was making the bed, Moorhouse, who was sitting on a nearby sofa, started to engage her in conversation. He asked if she had a boyfriend, if she thought he

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[1] The facts are taken from testimony at both the criminal trial and civil depositions.

was handsome, and if she wanted to visit him that night. When G.P. answered, "No," Moorhouse, who stands 5 feet 10 inches tall and weighs 175 pounds, got up off the sofa, walked behind her and told her that she was sexy. Upon hearing that, G.P., who is only 5 feet 2 inches and weighs 105 pounds, started to run. Moorhouse grabbed her, put both of his hands on her shoulders and forcefully shoved her onto the bed. As G.P. lay on her back with her feet dangling off the side of the bed, Moorhouse laid on top of her pressing his body against hers. He continued to ask, "Don't you think I am handsome?" and G.P. responded, "No, no, no."

G.P. testified that Moorhouse started to kiss her on her neck and face. She tried to push him away, but the force he was using was so great she could not even move. Moorhouse continued to kiss G.P., and touched her left breast with his right hand. He tried to squeeze her breast, but G.P. pushed his hand away. Moorhouse then moved his hand down and pressed it in between G.P.'s legs. He inserted his finger into her vagina through her undergarments and pushed very hard, causing G.P. tremendous pain. At the same time, Moorhouse started to pull G.P.'s underwear off. She tried again to push him away, to no avail.

According to G.P., Moorhouse then stood up, placed his legs against the outside of her legs and pulled his pants down,

exposing himself. G.P. tried again to resist the attack, but Moorhouse threw her down. He tried to push her hand into his penis saying, "Touch me," and G.P. responded, "No, no." G.P. then heard a knock on the door and Moorhouse began to put his pants back on. G.P. ran to the door, opened it, and fled into the hallway past the room service employee who had just knocked. G.P. ran out so fast, she left her cleaning supplies in the room. She noticed that the room next door was being cleaned so she fled inside for safety. G.P. found Russell in that room, and immediately told her about Moorhouse's assault.

Russell testified that while checking rooms on the floor, she heard G.P. screaming, "No!" or "Stop!" from inside Moorhouse's room. Russell decided to go into the room next door to see if she could hear another scream through the walls. As she entered, she noticed a room service employee in the hallway. Seconds later, G.P. ran into Russell's room with her hand on her chest, loudly exclaiming, "Oh my God, oh my God, this man i[s] crazy!" According to Russell, G.P. was "hysterical" and "in shock" and her hands were shaking. Russell asked G.P. to explain what happened. G.P. told Russell that Moorhouse threw her on the bed and touched her. Russell told G.P. not to say another word, and then called hotel security to report the incident. Russell testified that as she waited in the hallway for security to

arrive, Moorhouse walked by with a smirk on his face.

G.P. promptly went to the office of Paolo Moratin, the hotel's housekeeping director, and told him about Moorhouse's assault. Moratin described G.P. as being in shock and not her normal self; her eyes were red, her body was shaking, and she appeared embarrassed and uncomfortable talking about the incident. She told Moratin that Moorhouse was "crazy" and had pushed her onto the bed and kissed her on the neck. At the moment G.P. told Moratin that Moorhouse had touched her, Moratin instructed her to stop talking and called hotel security. Moratin testified that although G.P. appeared to have more to say about the incident, he wanted to follow hotel protocol by having security personnel present.

Hotel security officers arrived, and after questioning G.P., they called 911. Police officers Frank Bellotti and Michael Schilling responded to the hotel and interviewed G.P., who provided further details about Moorhouse's assault. G.P. told the officers that Moorhouse kissed her neck, threw her onto the bed, held her down, tried to remove her clothing, and put his finger in her vagina. Bellotti described G.P. as having puffy eyes and being nervous and shy. He also explained that G.P. had trouble expressing herself, could not bring herself to say the word "vagina," and instead resorted to hand gestures to describe

how Moorhouse had sexually abused her. After speaking to G.P., the police went to Moorhouse's room and arrested him.

Some time later, G.P. went to the hotel locker room to change her clothes and saw Chen. Chen testified that G.P. came into the locker room crying, her eyes red, and her body shaking. G.P. told Chen that Moorhouse tried to rape her, and described how he pushed her onto the bed, started kissing her on the neck, touched her breast and vagina, tried to tear off her undergarments, and pulled down his pants. Chen testified that G.P. told her that she was so scared and shocked, she could not cry out for help, but just said, "No, no, no."

At the criminal trial, Moorhouse testified that on the afternoon of the incident, after placing a room service order, he let G.P. and another housekeeper into his room to clean. They took the towels and bed sheets out of the room and G.P. returned alone to make the bed. As he was sitting on a couch watching television, Moorhouse noticed that there was no activity around the bed, so he got up to see where G.P. was. He claimed that he saw her squatting down near the entrance to the room with her hand in his Prada bag. He asked G.P. what she was doing and she said she was moving bags. He told her she was not moving bags

and that he would have to talk to her boss about her behavior.[2] Moorhouse told G.P. to "finish the bed and get the fuck out." G.P. complied with his demand and continued to make the bed. There was a knock on the door and a room service employee came in, put the food on the table and left. According to Moorhouse, G.P. left a few minutes later.

Moorhouse conceded that he did not report G.P.'s alleged misconduct to hotel personnel or the arresting officers that day. Instead of calling the front desk, Moorhouse left the room and went outside to purchase some beverages. He saw Russell in the hallway, recognized her as a hotel employee and waved to her, but did not tell her about G.P.'s alleged actions. As he entered the elevator, Moorhouse saw a hotel staff member getting off another elevator, but Moorhouse did not say anything to that employee about the alleged theft attempt. Nor did he report it to the front desk or hotel security when he left the hotel. Shortly after he returned to his room, two police officers arrived and arrested him. Even then, Moorhouse did not tell the police that G.P. had attempted to steal from him. Moorhouse denied touching or sexually assaulting G.P. and claimed she made up the story to

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[2] G.P. testified that she had never before been accused of theft, dishonesty, or any other misconduct at the hotel. Both Russell and Moratin testified that G.P. is a good employee, and confirmed that she had no disciplinary or other problems.

cover up her attempted theft.

After Moorhouse brought this action, G.P. and the hotel defendants each moved for summary judgment dismissing the complaint. Moorhouse moved for leave to amend the complaint to add Hotels AB Gansevoort Employees, LLC as a defendant. In a decision and order entered January 25, 2013, the motion court granted the motions of G.P. and the hotel defendants, and denied Moorhouse's motion as moot. Moorhouse appeals from the motion court's dismissal of the malicious prosecution, defamation and respondeat superior causes of action, and the denial of his motion to amend.[3] We now affirm.

In the malicious prosecution cause of action, Moorhouse contends that G.P. initiated the criminal proceeding against him without probable cause and with malice.[4] The Court of Appeals has imposed "stringent requirements" for bringing malicious prosecution claims (*Curiano v Suozzi*, 63 NY2d 113, 119 [1984]). The Court explained that this is necessary "to effectuate the

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[3] Moorhouse abandoned his appeal from the dismissal of the remainder of the causes of action and the dismissal of the complaint as against Russell.

[4] At oral argument, Moorhouse's counsel conceded that there was no viable direct claim against the hotel defendants for malicious prosecution. Instead, Moorhouse only seeks to hold the hotel defendants vicariously liable under respondeat superior.

strong public policy of open access to the courts for all parties without fear of reprisal in the form of a retaliatory lawsuit" (*id.*). To prevail on such a claim, a plaintiff has a "heavy burden" (*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]), and must establish the following four elements: "(1) the initiation of a criminal proceeding by the defendant against the plaintiff, (2) termination of the proceeding in favor of the accused, (3) lack of probable cause, and (4) malice" (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). A plaintiff's failure to prove any one of these elements will defeat the entire claim (*id.*).

A civilian who simply provides information to law enforcement authorities, who are then free to exercise their own independent judgment as to whether an arrest should be made and criminal charges filed, will generally not be held liable for malicious prosecution (*see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131 [1st Dept 1999]). To establish the element of initiation of a criminal proceeding, it typically must be shown that the defendant did something "more than merely report a crime to the police and cooperate in its prosecution" (*Maskantz v Hayes*, 39 AD3d 211, 213 [1st Dept 2007]; *see Present v Avon Prods.*, 253 AD2d 183, 189 [1st Dept 1999] [one who merely discloses to a prosecutor all material information within her

knowledge is not deemed to have initiated the proceeding], *lv dismissed* 93 NY2d 1032 [1999]). Instead "[t]he defendant must have affirmatively induced the officer to act, such as taking an active part in the arrest and procuring it to be made or showing active, officious and undue zeal, to the point where the officer is not acting of his own volition" (*Mesiti v Wegman*, 307 AD2d 339, 340 [2d Dept 2003] [internal quotation marks omitted]; *see Viza v Town of Greece*, 94 AD2d 965, 966 [4th Dept 1983], *appeal dismissed* 64 NY2d 776 [1985]).

Applying these principles, we conclude that the motion court properly dismissed the cause of action for malicious prosecution. The evidence in the record shows that G.P. did not play an active role in Moorhouse's arrest and prosecution, but merely reported a crime to the police and prosecutors. She did not contact, encourage, or direct the police or prosecutors to arrest and prosecute plaintiff. Hotel security personnel, not G.P., called the police, and G.P. testified that she did not ask them to do so. She further testified that she never insisted that the police arrest Moorhouse. This testimony was corroborated by Officer Bellotti, who submitted an affidavit stating that G.P. did not direct or demand Moorhouse's arrest. Instead, Bellotti explained that he and Officer Schilling alone made the decision to arrest Moorhouse after speaking with G.P. and observing her

demeanor. Based on this unrefuted evidence, it cannot be said that G.P. initiated the criminal proceeding (*see Narvaez v City of New York*, 83 AD3d 516, 516 [1st Dept 2011] [malicious prosecution claim dismissed where the defendants did not participate in the arrest or prosecution of the plaintiff except as witnesses]).

A person can also be said to have initiated a criminal proceeding by knowingly providing false evidence to law enforcement authorities or withholding critical evidence that might affect law enforcement's determination to make an arrest (*see Maskantz*, 39 AD3d at 213; *Brown*, 297 AD2d at 210). Here, however, there is no credible evidence in the record that the information G.P. gave to the police or prosecutors was false. G.P. testified, in graphic detail, about the prolonged sexual assault committed by Moorhouse in his hotel room. She described how Moorhouse threw her onto the bed, pressed against her, kissed her face and neck, touched her breast, tried to remove her undergarments, inserted his finger in her vagina, pulled his pants down and straddled her on the bed. Through this testimony, G.P. met her prima facie burden of establishing that the information she provided to law enforcement was true.

The record contains compelling evidence corroborating G.P.'s testimony that Moorhouse sexually assaulted her. Russell, who

was in the hallway at the time, testified that she heard G.P.'s screams coming from inside Moorhouse's room.[5] Russell described how, seconds later, G.P. came running to her "hysterical" and "in shock" exclaiming, "Oh my God, oh my God, this man i[s] crazy!" G.P. told Russell that Moorhouse threw her on the bed and touched her. Russell immediately sent G.P. to Moratin's office, where she repeated what had happened. Moratin testified that G.P.'s eyes were red and her body was shaking as she described how Moorhouse assaulted her. G.P.'s prompt outcries to Russell and Moratin further corroborate her testimony that an assault had taken place (*see People v Rosario*, 17 NY3d 501, 511 [2011] [evidence that sexual assault victim promptly complained about the incident was admissible to corroborate allegation that an assault occurred]).[6]

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[5] Moorhouse contends that Russell lied in her testimony at the criminal trial, but provides no motive for her to have done so. Notably, at the time of the criminal trial, Moorhouse had not yet filed his complaint. Thus, it cannot be argued that Russell's status as a defendant in this action gave her reason to testify untruthfully.

[6] Other evidence in the record provides additional corroboration of G.P.'s account of the incident. Chen corroborated G.P.'s testimony that Russell had instructed her and G.P. to clean Moorhouse's room, that they started to clean the room together, and that she left G.P. alone to complete the job. Russell testified that when she heard G.P.'s screams, she observed a room service employee in the hallway, which corroborates G.P.'s testimony that a hotel employee knocked on the door to Moorhouse's room. Russell also testified that after

In opposition to G.P.'s prima facie showing, Moorhouse points to no credible evidence that G.P.'s representations to law enforcement were false. Moorhouse relies solely on his own testimony, uncorroborated by any other witnesses or evidence, denying that any sexual assault had taken place. In evaluating testimony, courts "should not discard common sense and common knowledge" (*Loughlin v City of New York*, 186 AD2d 176, 177 [2d Dept 1992] [internal quotation marks omitted], *lv denied* 81 NY2d 704 [1993]). "While generally credibility determinations are left to the trier of the facts, where testimony is physically impossible [or] contrary to experience, it has no evidentiary value" (*Espinal v Trezechahn 1065 Ave. of the Am., LLC*, 94 AD3d 611, 613 [1st Dept 2012] [internal quotation marks omitted]).

Moorhouse's entire case hinges upon his claim that G.P. immediately fabricated an allegation of sexual assault to conceal her attempted theft of his personal belongings and then faked hysteria when she ran into the next room to report it to her supervisor. It strains credulity that G.P. would, within a matter of seconds, spin such an elaborate tale simply as a preemptive strike against the possibility that Moorhouse might

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the incident, she retrieved G.P.'s cleaning supplies from Moorhouse's room, thus corroborating G.P.'s testimony that she left them there when she made her escape.

subsequently decide to report her. We also see no reason why she would repeat these claims to the police and the prosecutor when the record fails to show that either agency was pursuing criminal charges against her for the alleged attempted theft.

Furthermore, Moorhouse's uncorroborated allegation that G.P. tried to steal something from his bag while cleaning the room is fatally undermined by the fact that he never reported the supposed theft attempt that day despite having had numerous opportunities to have done so. When he allegedly saw G.P. brazenly reach inside his bag, he did not call the front desk or hotel security, or even ask G.P. to leave the room. Instead, inexplicably, he claims to have instructed her to continue cleaning the room. Moorhouse did not report the alleged incident to the room service employee who entered his room shortly after. Nor did he tell Russell when he passed her in the hallway, despite recognizing her as a member of the hotel staff and even waving hello to her. Likewise, he said nothing to the hotel employee he encountered upon entering the elevator. And when Moorhouse exited the hotel, he passed by the front desk without saying a word.[7]

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[7] Moorhouse also testified that when he went outside to get a drink, he left his computer in the room. If he had really just seen G.P. trying to steal his property, it would make no sense for him to leave the room with his computer inside and not report

Most glaringly, Moorhouse did not tell the officers who arrested him that G.P. had tried to take his belongings. Moorhouse fails to convincingly explain, even in this civil action, why he did not tell the police, who were arresting him for a serious sexual assault, that the person who made the allegation had herself just tried to steal from him. Moorhouse's repeated failure to tell anyone about G.P.'s alleged misconduct constitutes behavior so contrary to common experience as to render his testimony about the alleged theft attempt without evidentiary value (*see Espinal*, 94 AD3d at 613; *Loughlin*, 186 AD2d at 177).

Moorhouse's credibility is further undermined by the contradictory reasons he gave for not reporting G.P. At one point, he explained that he was skeptical that the hotel would do anything about it. At another point, he said that he was no longer concerned about the incident and was more interested in going out to get a soda. He also testified that he did not report the alleged incident because he did not get a chance to. When reminded of the various hotel personnel he walked past, Moorhouse changed his story again, saying that he was undecided about whether he should make a report.

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the incident, especially in light of the fact that G.P. had a key to the room.

Moorhouse makes a number of unpersuasive attacks on G.P.'s credibility. First, he alleges that G.P. is unworthy of belief because she did not include all of the details of the attack when she initially reported it to her fellow employees and the police. This, however, is behavior typical of sexual assault victims. In any event, there are sound reasons why G.P. did not initially provide a detailed recounting of the incident. When speaking to Russell and Moratin, G.P. began to explain how Moorhouse had pushed her on the bed and touched her. Upon learning that a hotel guest had engaged in inappropriate conduct, both Russell and Moratin instructed G.P. to stop talking. G.P. also explained that she was embarrassed talking about such a personal matter. G.P.'s account of the incident is not undermined by the absence of physical or forensic evidence of a sexual assault because it is undisputed that the police and prosecutors did not collect any evidence or conduct any forensic analysis.

In sum, G.P. has made a prima facie showing that she did not initiate Moorhouse's criminal prosecution, one of the requisite elements of a malicious prosecution claim. She has submitted evidence establishing that she did not play an active role in Moorhouse's arrest and prosecution, and that she did not provide false information to law enforcement authorities. In response, Moorhouse points to no credible evidence raising a triable issue

of fact. Moorhouse's acquittal in the criminal case does not satisfy his burden to raise an issue of fact, because this appeal involves civil causes of action having a different burden of proof. The criminal acquittal was not a finding that Moorhouse was innocent, but only reflected that the prosecution had not satisfied its burden of proving guilt beyond a reasonable doubt (*see Reed v State of New York*, 78 NY2d 1, 7-8 [1991]). Accordingly, under the specific facts presented here, the malicious prosecution cause of action against G.P. was properly dismissed.

For similar reasons, Moorhouse's defamation claim against G.P. also fails. In that cause of action, Moorhouse contends that G.P. falsely told other hotel employees and the police that he had sexually assaulted her.[8] To prove a claim for defamation, a plaintiff must show, inter alia, that the complained-about statements are false (*see Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). "Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense" (*Stepanov v Dow Jones &*

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[8] On appeal, Moorhouse does not contend that the hotel defendants participated in making any of these statements. Thus, he has abandoned any direct defamation claim against the hotel defendants, leaving only the claim that they are vicariously liable for G.P.'s statements.

Co., Inc., 120 AD3d 28, 34 [1st Dept 2014]). Since no triable issue of fact exists as to the falsity of G.P.'s statements, the defamation cause of action against G.P. was correctly dismissed.

Moorhouse cannot prevail against the hotel defendants under the doctrine of respondeat superior because the underlying torts against G.P. have been dismissed (*see Pistilli Constr. & Dev. Corp. v Epstein, Rayhill & Frankini*, 84 AD3d 913, 914 [2d Dept 2011] ["claim of vicarious liability cannot stand when there is no primary liability upon which such a claim of vicarious liability might rest"] [internal quotation marks omitted]).

In light of our disposition, Moorhouse's appeal from the denial of his motion to amend the complaint is moot.

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

Accordingly, the order of the Supreme Court, New York County (Joan M. Kenney, J.), entered January 25, 2013, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motions for summary judgment dismissing

the causes of action for defamation, malicious prosecution and respondeat superior, and denied as moot plaintiff's motion to amend the complaint, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 6, 2014

CLERK