SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 24, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Acosta, Saxe, Kapnick, JJ.

13941 Carla Farrulla, Index 306208/08
Plaintiff-Appellant,

-against-

Happy Care Ambulette Inc., et al.,
Defendants-Respondents.

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Melcer Newman PLLC, New York (Roger Rodriguez of counsel), for appellant.

Ryan & Conlon, LLP, New York (Michael Couglin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about July 15, 2013, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action for personal injuries allegedly sustained by plaintiff while she was a passenger in an ambulette van, defendants established their prima facie entitlement to summary judgment by demonstrating that they had no involvement with the subject accident. In opposition, plaintiff failed to raise a triable issue of fact (*see DiPierro v City of New York*, 25 AD3d

306, 308 [1st Dept 2006]). Her deposition testimony establishes that the ambulette van in which she was riding when the accident occurred had a black exterior, and that "Action Ambulette" was displayed on the side of the vehicle. Defendants submitted the affidavit of John Colagrande, defendant Happy Care Ambulette Inc.'s ("Happy Care") vice president in which he asserted that the company never owned ambulettes that were painted black nor was it affiliated with an entity called Action Ambulette.

Contrary to plaintiff's contention, the Workers' Compensation form and her affidavit fail to demonstrate the existence of a triable issue of fact as to whether Happy Care owned or maintained the vehicle involved in the accident or was legally responsible for the person who allegedly caused her injuries.

The motion court properly determined that Happy Care was not estopped from asserting that it was an improper party to the action, because the record demonstrates that plaintiff could not have been taken by surprise that it would assert this defense. Indeed, Happy Care asserted in its answer that it did not cause plaintiff's alleged injuries and was not legally responsible for the person who did. Moreover, the record demonstrates that plaintiff is not prejudiced because she knew on the day of the alleged accident that the abmulette involved in the accident had

an affiliation with "Action Ambulette," since she saw that name on the side of the vehicle (*see Arteaga v City of New York*, 101 AD3d 454, 454 [1st Dept 2012]; *Rosario v City of New York*, 261 AD2d 380, 380-381 [2d Dept 1999]).

Contrary to plaintiff's contention, Happy Care's failure to definitively deny ownership of the offending vehicle in its answer is not comparable to a purposeful, strategic silence intended to mislead her as to the proper defendant. Accordingly, the theory of estoppel is inapplicable and defendant cannot be held liable for an ambulette it did not own, maintain or operate when the accident happened (*see McHale v Anthony*, 70 AD3d 463, 465-466 [1st Dept 2010], *lv denied* 15 NY3d 710 [2010]). Even accepting plaintiff's contention that the driver of the offending vehicle was employed by Happy Care as true, the record is devoid of any evidence establishing a triable issue of fact as to whether he was working in his capacity as a Happy Care employee at the time of the accident.

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

ENTERED: FEBRUARY 24, 2015

CLERK

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

14128 In re Asian American Legal Defense and Education Fund, et al., Petitioners-Appellants, Index 103802/12

-against-

New York City Police Department, et al., Respondents-Respondents.

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Weil, Gotshal & Manges LLP, New York (Gregory Silbert of counsel), for appellants.

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

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered on or about May 21, 2013, denying the petition to compel respondents to disclose 13 categories of documents generated by the Intelligence Division of respondent New York City Police Department (NYPD), requested by petitioners pursuant to the Freedom of Information Law (FOIL), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondents' determination denying the FOIL request was not affected by an error of law (*see Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y.*, 87 AD3d 506, 507 [1st Dept 2011], *lv denied* 18 NY3d 806 [2012]).

Petitioners failed to meet their "burden . . . to reasonably

describe the documents requested so that they can be located" (*Mitchell v Slade*, 173 AD2d 226, 227 [1st Dept 1991], *lv denied* 78 NY2d 863 [1991]). Parts of the request sought documents relating to NYPD intelligence operations concerning unreasonably broad categories, such as any New York City businesses "frequented" by Middle Eastern, South Asian, or Muslim persons. Respondents also submitted an affidavit of an NYPD intelligence expert noting that a complete response to the request would entail searching more than 500,000 documents which, though mostly electronic, are not necessarily searchable by ethnicity, race, or religion. Thus, NYPD met its burden to establish that some of the descriptions in the FOIL request "were insufficient for purposes of locating and identifying the documents sought before denying a FOIL request for reasons of overbreadth" (*Matter of Konigsberg v Coughlin*, 68 NY2d 245, 249 [1986] [internal quotation marks and citations omitted]).

Moreover, even assuming that all of the documents sought were reasonably described, the requested documents are exempt from disclosure under Public Officers Law § 87(2)(e)(iii), (iv), commonly known as the "law enforcement privilege," in that disclosure of the requested documents would identify confidential sources, confidential information relating to criminal investigations, and nonroutine investigative techniques or

procedures (*see Matter of Fink v Lefkowitz*, 47 NY2d 567, 571-572 [1979]). Although petitioners note that they are amenable to redactions of identifying information such as names, addresses, and phone numbers, any attempt at redacting the records would likely allow such information to be deduced from details left unredacted, as set forth in NYPD's expert affidavit.

The court also properly found that the requested disclosure "could endanger the life or safety of any person" (Public Officers Law § 87[2][f]). Granting the broadly worded request for a trove of NYPD Intelligence Division documents replete with sensitive information about the unit's methods and operations, which could be publicly disseminated and potentially exploited by terrorists, would create "a possibility of endangerment" (*Matter of Bellamy v New York City Police Dept.*, 87 AD3d 874, 875 [1st Dept 2011] [internal quotation marks, brackets, and citations omitted], *affd* 20 NY3d 1028 [2013]). In addition, the court properly recognized that the requested records are exempt from FOIL because disclosure would constitute an unwarranted invasion of personal privacy (*see Matter of New York Times Co. v City of N.Y. Fire Dept.*, 4 NY3d 477, 485 [2005]; *see also* Public Officers Law § 87[2][b]). Petitioners emphasize the public interest in scrutinizing whether NYPD engaged in improper surveillance or profiling of certain communities, but this is outweighed by the

privacy interests at stake given the specific purpose of this counterterrorism police operation. The revelation that a certain person, business, or organization was the subject of counterterrorism-related surveillance would not only have the potential to be embarrassing or offensive, but could also be detrimental to the reputations or livelihoods of such persons or entities.

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

ENTERED: FEBRUARY 24, 2015

CLERK

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

14139- Index 652092/13
14140-
14140A Harry Jones, etc.,
Plaintiff-Appellant-Respondent,

-against-

Natalya Voskresenskaya,
Defendant-Respondent,

Discover Technologies, LLC,
Defendant-Respondent-Appellant.

_____

Peska & Associates, P.C., White Plains (Adam M. Peska of counsel), for appellant-respondent.

Greenberg Traurig LLP, New York (James W. Perkins of counsel), for respondent-appellant.

Law Office of Thomas M. Mullaney, New York (Thomas M. Mullaney of counsel), for respondent.

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Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 14, 2014, awarding defendant Discover Technologies, LLC (Discover) $81,807.60 in attorneys' fees, disbursement and interest, unanimously affirmed, without costs. Orders, same court and Justice, entered November 8, 2013 and on or about November 4, 2013, which granted the motions to dismiss the complaint brought against defendants Discover and Natalya Voskresenskaya, unanimously modified, on the law, to reinstate plaintiff's claim for breach of fiduciary duty against defendant Voskresenskaya, and otherwise affirmed, without costs.

The motion court erred in dismissing plaintiff's cause of action for breach of fiduciary duty against defendant Voskresenskaya. Plaintiff alleges that he and Voskresenskaya are equal members of the computer technology firm, Arcovis, LLC, pursuant to an operating agreement. The members of an LLC may stand in a fiduciary relationship to each other and the LLC (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Although Voskresenskaya raises issues about the viability of the operating agreement and the relative percentages of ownership and control, plaintiff's allegations are entitled to the benefit of every favorable inference at this point in the litigation (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Plaintiff further alleges that following extensive communications and negotiations between Arcovis and Discover about work Arcovis would do on an FDA contract awarded to Discover, Voskresenskaya was directly hired by Discover to do the work in her individual capacity. Plaintiff claims to have suffered $5 million in damages, representing lost business opportunity. Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]). The facts alleged adequately support the claim and are set forth with sufficient particularity to survive a motion to dismiss (CPLR 3211[a],

3016[b]; *Stewart Title Ins. Co. v Liberty Title Agency*, LLC, 83 AD3d 532, 533 [1st Dept 2011]).

To the extent that plaintiff is suing derivatively on behalf of Arcovis, he has sufficiently plead demand futility, in that Voskresenskaya, a coequal member of the LLC, has an interest in the challenged transaction (*Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008).

The cause of action as against defendant Voskresenskaya for tortious interference with prospective contractual relations was, however, properly dismissed since plaintiff failed to sufficiently allege that defendant Voskresenskaya acted "solely [out of] malice" or used improper means *(Lion's Prop. Dev. Group LLC v New York City Regional Ctr., LLC*, 115 AD3d 488, 489 [1st Dept 2014]).

The motion court also correctly dismissed the complaint as against defendant Discover. The cause of action for breach of contract failed to sufficiently articulate that Discover breached the nondisclosure agreement it entered into with Arcovis, LLC. The allegations supporting this cause of action are vague, speculative and unsupported by any facts (*see Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Contrary to plaintiff's contention, defendant Discover is entitled to attorneys' fees pursuant to the parties' nondisclosure agreement.

We note that it specifically requested fees and expenses in its notice of motion and that its request was granted sub silentio by the motion court which indicated that the motion was granted in its entirety.

The Special Referee's determination denying recovery of "fees on fees" was proper since the parties' agreement does not explicitly provide for such fees (*see 546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 120 [1st Dept 2012]). The Special Referee also properly denied Discover legal fees incurred in defending Voskresenskaya because she is not a party to an agreement which provides for recovery of attorneys' fees (*see Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203, 204 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14296 The People of the State of New York, Ind. 3706/11
Respondent,

-against-

Jermaine Wilkins,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 30, 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: FEBRUARY 24, 2015

CLERK

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

Tom, J.P., Renwick, Andrias, Richter, JJ.

14297 Geri Bauer, Index 110211/11
Plaintiff-Appellant,

-against-

Beekman International Center LLC,
Defendant-Respondent.

_____

Himmelstein, McConnell, Gribben Donohue & Joseph, New York (Kevin R. McConnell of counsel), for appellant.

D'Agostino, Levine, Landesman & Lederman, LLP, New York (Bruce H. Lederman of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered August 20, 2013, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

While defendant sponsor sold a majority of the newly-constructed condominium's residential units, contrary to plaintiff unit owner's contention, it was not under an implied obligation to sell all of them. Plaintiff's reliance on *511 W. 232nd Owners Corp. v Jennifer Realty Co.* (98 NY2d 144 [2002]), involving a cooperative conversion of a rent-stabilized building where the owner sold a minority of the shares and the pleading was upheld to the extent that it alleged an implied promise to sell "a sufficient number of shares," is misplaced. In any

event, the motion court correctly found that defendant demonstrated its prima facie entitlement to judgment regarding the elements of condominium viability relied on by plaintiff, which tracked the language in *Jennifer Realty* but without elaboration, and plaintiff failed to raise an issue of fact in opposition.

In view of the foregoing, we need not address the other grounds urged for affirmance.

We have considered plaintiff's remaining contentions and find them unavailing. We deny defendant's request for sanctions on appeal, as we find them unwarranted.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14298 In re Jaylen Derrick Jermaine A., etc.,

A Dependant Child Under the
Age of Eighteen Years, etc.,

Samuel K., etc.,
Respondent-Appellant.

Graham Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

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

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about November 19, 2013, insofar as it determined that respondent father Samuel K. had abandoned and permanently neglected the subject child, unanimously affirmed, without costs, and the appeal therefrom otherwise dismissed.

The finding of abandonment is supported by clear and convincing evidence that the father failed for the relevant time period to visit with the child, although he was able to do so and was not prevented or discouraged from doing so by petitioner agency (*see* Social Services Law § 384-b[4][b], [5][a]). The record shows that the agency advised the father that it would help make arrangements and pay for the father's visits to the

child's school. The father's minimal contacts with the agency and the school are insufficient to preclude a finding of abandonment (*see Matter of Jasiaia Lew R. [Aylyn R.]*, 101 AD3d 568, 569 [1st Dept 2012]). The paternal grandmother's communication with the agency and the school may not be attributed to the father (*see Matter of Andre W.*, 298 AD2d 206, 206 [1st Dept 2002]).

The finding of permanent neglect is supported by clear and convincing evidence (*see* Social Services Law § 384-b[7]). The agency made diligent efforts to encourage and strengthen the parental relationship by, among other things, encouraging the father to maintain contact with the child through letters and telephone contact, as well as offering financial assistance to the father to facilitate visitation (*see* § 384-b[7][f]). Despite these efforts, however, the father failed to maintain contact with the child or plan for the child's future. For instance, the father failed to obtain suitable housing, demonstrate any understanding of the child's special needs, or respond to the agency's requests for authorization for medical and dental care for the child, which resulted in the child's failure to receive necessary dental care and medication (*see* § 384-b[7][c]).

No appeal lies from the dispositional portion of the order,

since the father defaulted at the dispositional hearing (*see Matter of Jaquan Tieran B. [Latoya B.]*, 105 AD3d 498, 499 [1st Dept 2013]). The court properly deemed the father to be in default, given his nonappearance and his attorney's representation that he would not be participating in the father's absence (*id.*).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14299 New York State Insurance Fund, Index 403198/09
Plaintiff-Respondent,

-against-

Everest National Insurance Company,
Defendant-Appellant,

Liberty Insurance Underwriters, Inc., et al.,
Defendants.

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Coughlin Duffy LLP, New York (Kevin E. Wolff of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered March 18, 2014, inter alia, declaring that the limit of the commercial excess liability policy issued by defendant Everest National Insurance Company to nonparty El Sol Contracting and Construction Corp. is $2 million, unanimously affirmed, with costs.

The commercial excess liability policy issued by Everest to El Sol unambiguously provided that Everest's obligation was to pay the lesser of the $2 million coverage limit called for under the trade contract between El Sol and nonparty Triborough Bridge and Tunnel Authority or the $10 million limit of the Everest policy. Everest's argument that it is entitled to an off-set of

the $1 million paid by the primary insurer towards the underlying claim is unsupported in the policy language at issue. Everest contends that it was left to cover a $1 million shortfall, since the trade contract required minimum insurance coverage limits of only $2 million, and the primary insurer paid $1 million. However, the extent of insurance is governed not by the terms of the underlying trade contracts among the insureds but by the policy terms (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 146 [1st Dept 2008]). Everest may not read into unambiguous policy language terms that it failed to include in the policy. Moreover, if the disputed policy language were ambiguous, it would be construed against Everest, the drafter of the policy, since Everest offered no extrinsic evidence that supports its interpretation (*see generally Matter of Mostow v State Farm Ins. Co.*, 88 NY2d 321 [1996]; *QBE Ins. Corp. v Public Serv. Mut. Ins. Co.*, 102 AD3d 442 [1st Dept 2013]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14300 The People of the State of New York, Respondent, Ind. 2417/12

-against-

Isma McGhee, also known as Izzy, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered January 3, 2013, convicting defendant, after a jury trial, of 10 counts of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender whose prior felony conviction was a violent felony, to concurrent terms of 12 years, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request to question a detective regarding certain federal lawsuits in which the detective was one of the named defendants, and the court's ruling did not deprive defendant of his right to confront witnesses and present a defense (*see Delaware v Van Arsdall*, 475 US 673, 678-679 [1986]). Defendant failed to establish a good faith basis for eliciting the underlying facts of these lawsuits under the theory that they

involved prior bad acts by this detective bearing on his credibility (*see People v Andrew*, 54 AD3d 618 [1st Dept 2008], *lv denied* 11 NY3d 895 [2008]; *see also People v Smith*, 122 AD3d 456 [1st Dept 2014]), as defendant did not specify any factual allegations supporting the assertion that this detective had participated in false arrests. In any event, any error in precluding cross-examination based on the federal litigation was harmless, because the People's case rested primarily on the credibility and reliability of the testimony of the undercover officers who made the charged drug purchases, not on that of this detective, who supervised the case and provided an overview of the investigation (*see Andrew*, 54 AD3d at 619).

The court properly exercised its discretion in ruling that defendant's impeachment of the detective regarding a discrepancy in a document prepared by him opened the door to evidence of the detective's knowledge of defendant's involvement in uncharged sales that were part of the same investigation (*see generally People v Mateo*, 2 NY3d 383, 425 [2004]; *People v Rojas*, 97 NY2d 32, 38 [2001]). This evidence tended to dispel a misleading impression that the discrepancy reflected the actual state of the detective's knowledge, as opposed to being a paperwork error. Since this evidence was not offered for its truth, but as evidence of the detective's state of mind, defendant's hearsay

and Confrontation Clause arguments are unavailing. In addition, we find that this evidence was not unduly prejudicial under the circumstances of the case.

The court properly denied defendant's motion to suppress a photographic identification. The record supports the court's finding that the photo array was not unduly suggestive, since defendant and the other participants were reasonably similar in appearance. The difference between defendant's photo and the other photos was not sufficient to create a substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]).

The sentencing court properly adjudicated defendant a second felony drug offender whose prior felony conviction was a violent felony. Defendant's conviction of criminal possession of a weapon in the third degree qualifies as a violent felony, and defendant's arguments to the contrary are similar to arguments this Court has previously rejected (*see People v Thomas*, 122 AD3d

489 [1st Dept 2014]; *People v Bowens*, 120 AD3d 1148 [1st Dept 2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14302 The People of the State of New York, Respondent, Ind. 5519/12

-against-

Robert Vega, Jr., Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Richard B. Carruthers, J.), rendered on or about May 8, 2013, 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: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14303 Jaqueline A. Bouet, Index 113609/10
Plaintiff-Appellant,

-against-

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

John Doe 1 & 2 etc.,
Defendants.

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Julien & Schlesinger, P.C., New York (Mary Elizabeth Burns of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Janet L. Zaleon of counsel), for respondents.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered April 16, 2013, which granted defendants' motion for summary judgment dismissing the complaint and any cross claims against them, unanimously affirmed, without costs.

Plaintiff alleges that on October 18, 2009, at approximately 1:30 a.m., she was struck by a privately owned motor vehicle, while attempting to cross Bowery Street at its intersection with Bond Street in Manhattan. Defendant Police Officer Timothy Harrington and two other unknown defendant officers were employed by defendant City of New York when they responded to the accident, and in their reporting of the incident, failed to record the identity of the owner and/or operator of the vehicle

that struck plaintiff.

Defendants are entitled to summary judgment, because the investigation of the accident at issue here is a governmental function, and therefore, the City of New York is not liable for failing to properly investigate the incident unless there existed a special duty to plaintiff, in contrast to a general duty owed to the public.

Contrary to plaintiff's contention, she may not establish a special relationship through defendants' violation of a statutory duty, because none of the sections of the Vehicle and Traffic Law cited by plaintiff authorize a private right of action, nor were they otherwise enacted for the benefit of a particular class of persons as opposed to the public at large (*see Applewhite v Accuhealth, 21 NY3d 420* [2013]; *McLean v City of New York*, 12 NY3d 194, 200 [2009]). Although section 600 of the Vehicle and Traffic Law imposes criminal liability for willful violations of its provisions upon the operator of a vehicle involved in an accident that fails to identify himself, there is no statutory provision for governmental tort liability (*see Metz v State of New York*, 20 NY3d 175, 179-181 [2012]).

Since the complaint only alleges violations of sections 603, 603-b and 604 of the Vehicle and Traffic Law, which merely require the Police Department to report the accident to the

Commissioner of Motor Vehicles, the plain language of these statutes indicates that the Legislature never intended to create a private benefit for a particular class of persons with a concomitant right of action against the Police Department for negligently failing to record or preserve information required by another public agency (*see Ortega v City of New York*, 9 NY3d 69, 82-83 [2007]; *Albino v New York City Hous. Auth.*, 78 AD3d 485, 488-489 [1st Dept 2010]). Thus, absent some special relationship creating a duty to exercise care for the benefit of plaintiff, liability may not be imposed upon the City for its employees' failure to record the identity of the vehicle that struck her or its operator as required by the Vehicle and Traffic Law (*see Worth Distribs. v Latham*, 59 NY2d 231, 237 [1983]; *Gandler v City of New York*, 57 AD3d 324, 324-325 [1st Dept 2008]).[1]

In addition, the complaint also fails to set forth a claim against the City of New York under 42 USC § 1983, because it does not allege that the municipality had a custom or an official policy that caused the claimed violation to plaintiff's constitutional rights or that the City's purported failure to train or supervise its employees was tantamount to an official policy or custom under this statute (*see Crawford v New York*

[1] We find *Cunningham v City of New York* (28 Misc3d 84 [App Term, 1st Dept 2010]) unpersuasive and decline to follow it.

County Dist. Attorney, 99 AD3d 600, 601-602 [1st Dept 2012]; *315-321 Realty Co. Assoc., LLC v City of New York*, 33 AD3d 509, 509-510 [1st Dept 2006]). The single incident of objectionable conduct committed by the City as alleged by plaintiff is insufficient to establish the existence of policy or custom for § 1983 purposes (*see Dillon v Perales*, 181 AD2d 619 [1st Dept 1992], *lv dismissed* 80 NY2d 892 [1992]). Moreover, plaintiff does not have a protected property interest regarding the investigation into her motor vehicle accident under the due process clause (*see Harrington v County of Suffolk*, 607 F3d 31, 32-36 [2d Cir 2010]).

Finally, since it is undisputed that the officers were acting within the scope of their employment when they failed to record the information regarding the vehicle and the operator of the vehicle that struck plaintiff, the claim of negligent hiring, training and supervision must fail (*see Leftenant v City of New York*, 70 AD3d 596, 597 [1st Dept 2010]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14304 U.S. Bank, N.A., etc., Index 380386/08
Plaintiff-Appellant,

-against-

Silvio Bernabel, et al.,
Defendants-Respondents,

Mortgage Electronic Registration
Systems, Inc., etc., et al.,
Defendants.

_____

Locke Lord LLP, New York (R. James De Rose, III of counsel), for appellant.

David J. Broderick, P.C., Forest Hills (David J. Broderick of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 26, 2012, which granted the Bernabel defendants motion to, among other things, vacate a judgment of foreclosure and sale entered in plaintiff's favor on January 12, 2011, unanimously reversed, on the law, without costs, the motion denied, and the judgment of foreclosure and sale reinstated. The Clerk is directed to enter judgment accordingly.

There was no basis for vacatur of the judgment of foreclosure and sale. By defaulting in this mortgage foreclosure action, defendants waived any argument that plaintiff lacked standing to commence the action (*see Wells Fargo Bank, NA v Edwards*, 95 AD3d 692, 692 [1st Dept 2012]; *see also Security Pac.*

Natl. Bank v Evans, 31 AD3d 278, 278-279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). In any event, plaintiff established its standing by showing that it was both the holder and assignee of the subject mortgage and the underlying note at the time of the commencement of the action (*see Bank of N.Y. Mellon Trust Co. NA v Sachar*, 95 AD3d 695, 695 [1st Dept 2012]). That the note was indorsed in blank is no impediment to plaintiff's enforcement of the note as the holder (*see e.g. Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674, 674 [2d Dept 2007]; *see also* former NY UCC 1-201[20]). Plaintiff also established a prima facie right to foreclosure by producing the note and mortgage, as well as affidavits from its servicing agent showing that defendants failed to make a monthly payment in November 2007, thereby causing the entire loan to accelerate (*see Red Tulip, LLC v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], *lv dismissed* 10 NY3d 741 [2008], *lv denied* 13 NY3d 709 [2009]).

Contrary to defendants' contention, plaintiff complied with Administrative Order 548-10 of the Chief Administrative Judge.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14305 Hi-Tech Construction & Management Services Inc., Plaintiff-Appellant,

-against-

The Housing Authority of the City of New York, Defendant-Respondent.

- - - - -

Hi-Tech Construction & Management Services Inc., Plaintiff-Appellant,

-against-

The Housing Authority of the City of New York, Defendant-Respondent.

Index 602377/05
603609/05

_____

Foreht Associates LLP, New York (Richard S. Last of counsel), for appellant.

David Farber, New York City Housing Authority, New York (Paul A. Marchisotto of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel Mendez, J.), entered August 2, 2013, which granted defendant New York City Housing Authority's motion for summary judgment dismissing the consolidated complaints, unanimously affirmed, without costs.

Plaintiff failed to provide timely written notice of its intention to make a claim for damages arising out of defendant's delay, a condition precedent to commencing an action pursuant to section 23 of the parties' contract (*see A.H.A. Gen. Constr. v*

New York City Hous. Auth., 92 NY2d 20, 30-31 [1998]; *Everest Gen. Contrs. v New York City Hous. Auth.*, 99 AD3d 479 [1st Dept 2012]). Neither plaintiff's letter concerning its opinion on preparing walls for painting, which stated that plaintiff would consider its claim for payment of skim coating a "continuous claim," without stating how much the claim was for, or delineating itself as a notice of claim, nor plaintiff's various requests for change orders, satisfied the contract (*see Bat-Jac Contr. v New York City Hous. Auth.*, 1 AD3d 128 [1st Dept 2003]).

Defendant's defense of this litigation and participation in settlement negotiations did not constitute a waiver of section 23, nor was defendant estopped from moving for dismissal on that ground (*see Huff Enters. v Triborough Bridge & Tunnel Auth.*, 191 AD2d 314,316-317 [1st Dept 1993], *lv denied* 89 NY2d 655 [1993]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14306 The People of the State of New York, Ind. 3477/11
Respondent,

-against-

Lenny Abreu,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered on or about March 19, 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: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14307 In re Cashmere S.,

A Child Under Eighteen Years
of Age, etc.,

Administration for Children's Services,
Petitioner-Appellant,

Rinell S., et al.,
Respondents-Respondents.

_____

Zachary W. Carter, Corporation Counsel, New York (Fay Ng of counsel), for appellant.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel) for Rinell S., respondent.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for Wendy W., respondent.

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

_____

Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about May 5, 2014, which, after a fact-finding hearing, dismissed a petition alleging that respondent father and respondent mother neglected the subject child by failing to exercise a minimum degree of care in providing the subject child with proper supervision and guardianship, unanimously reversed, on the law, without costs, the petition granted, and the matter remanded to Family Court, New York County for a dispositional hearing.

The Family Court erred in dismissing the neglect petition against the father. A preponderance of the evidence presented by petitioner at the fact-finding hearing demonstrated that the father was convicted, upon his guilty plea, of attempted sodomy in the first degree, and that he was designated a risk level 2 sex offender based on that conviction. The father admitted that his conviction arose from an incident during which he placed his penis in the mouths of his 6-year old son and 9-year old niece. Following his release from prison, the father attended a sex offender program, and admitted he pleaded guilty to the sex offenses, but denied committing the acts. At the fact-finding hearing, he testified that he regretted pleading guilty, because he did not have any sexual contact with his son or niece, and it resulted in his having to register as a sex offender. He also stated that he only attended sex offender treatment programs because it was a condition of his parole. The father's failure to accept responsibility for his sex offenses poses an imminent risk to the subject child (*see Matter of Anastacia L. [Vito L.]*, 90 AD3d 452, 453 [1st Dept 2011], *lv denied* 18 NY3d 809 [2012]). Further, although 10 years had passed between the father's sex offense adjudication and the filing of the neglect petition, an adjudication of neglect is warranted since the father failed to demonstrate that his proclivity for abusing children has changed

(*see Matter of Ahmad H.*, 46 AD3d 1357 [4th Dept 2007], *lv denied* 12 NY3d 715 [2009]).

The Family Court also erred in dismissing the neglect petition against the mother. The mother acknowledged that she was aware of the father's sex offense conviction, and that he was a registered sex offender. She nevertheless allowed the father to act as the child's sole caretaker and to have unsupervised access to the child (*see Matter of Destiny EE. [Karen FF.]*, 90 AD3d 1437, 1443 [3rd Dept 2011], *lv dismissed* 19 NY3d 856 [2012]).

Contrary to the father's and mother's contentions, the Court of Appeals decision in *Matter of Afton C. (James C.)* (17 NY3d 1 [2011]) does not warrant a dismissal of the petition. In that case, the Court found that the fact that the father was a risk-level 3 sex offender who had never sought sex offender treatment, and was living in the same home as the subject children, was insufficient to establish neglect (*id.* at 6). The Court further noted, however, that "there are circumstances in which the facts underlying a sex offense are sufficient to prove neglect. Where, for example, sex offenders are convicted of abusing young relatives or other children in their care, their crimes may be evidence enough" (*id.* at 11). Here, the father's sexual abuse of

his young son and young niece is sufficient evidence to prove neglect of the subject child, especially when coupled with the father's refusal to accept responsibility for his crime, and distinguishes this case from *Afton C*.

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

ENTERED: FEBRUARY 24, 2015

CLERK

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

14308 The People of the State of New York, Respondent, Ind. 3584/01

-against-

Otto Gonell, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (William Terrell III of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered on or about November 27, 2013, which adjudicated defendant a level two sexual offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant did not

warrant such a departure, given the egregious circumstances of the underlying crime against a 13-year-old child and defendant's overall criminal record, including his history of absconding and remaining a fugitive.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14309 In re Ralph Brannon, Index 102203/12
Petitioner,

-against-

New York City Office of Administrative Hearings and Trials, et al.,
Respondents.

_____

Mayne Miller, New York, for petitioner.

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

_____

Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated November 17, 2011, adopting the report and recommendation of an administrative law judge, which, after a hearing, found petitioner guilty of misconduct and terminated his employment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Eileen A. Rakower, J.], entered September 24, 2012), dismissed, without costs.

Substantial evidence supports the determination that petitioner engaged in misconduct by representing a tenant in litigation against the New York City Housing Authority while petitioner was employed as an attorney for respondent, by using respondent's resources in the course of that representation, and

by refusing to comply with directives to appear for investigatory interviews (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-182 [1978]). Although petitioner is correct that a violation of New York City Charter § 2604(b)(7) was not established given the absence of any evidence that he received any compensation for representing the tenant (*see* NY City Charter § 2601[4]), there was substantial evidence that petitioner violated other laws and orders in connection with that representation, including New York City Charter § 2604(b)(2) and HPD Commissioner Order 2009-1(4)(a).

The penalty imposed does not shock our sense of fairness (*see Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]), given, among other things, petitioner's refusal to appear for duly scheduled investigatory interviews even after receiving use immunity (*see Matter of Waugh v New York City Fire Dept.*, 34 AD3d 401 [1st Dept 2006], *lv denied* 9 NY3d 802 [2007]), and his prior

30-day suspension for misconduct (*see Brannon v Mills*, 89 AD3d 536, 537 [1st Dept 2011]).

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

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14310 Ace Fire Underwriters Index 154920/13
Insurance Company, etc.,
Petitioner-Appellant,

-against-

Special Funds Conservation Committee,
Respondent-Respondent.

_____

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

Steven M. Licht, Albany (Jill B. Singer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 17, 2013, which denied the petition for an order directing respondent to consent nunc pro tunc to settlement of the underlying personal injury action, unanimously affirmed, without costs.

Workers' Compensation Law § 29(5) permits an employee to settle a lawsuit arising out of the same accident as gave rise to his workers' compensation claim for less than the amount of the compensation he has received only if the employee has obtained written consent to the settlement from the carrier or, in the alternative, judicial approval. We find that, just as the employee is required to obtain the carrier's consent prior to settlement, the carrier is required to obtain the Special Funds

Conservation Committee's consent prior to the settlement where it is entitled to reimbursement by the Committee pursuant to Workers' Compensation Law § 15(8)(d) (*see* Workers' Compensation Law § 29[5]; *Matter of Catapano v Jow, Inc.*, 91 AD3d 1018 [3rd Dept 2012], *lv denied* 19 NY3d 809 [2012], citing, inter alia, *Employer: Brigotta Farmland*, 2006 WL 1064007, 2006 NY Wrk Comp LEXIS 3343 [WCB No. 8021 3739, Apr. 18, 2006]).

Petitioner, having failed to obtain the Committee's consent prior to the settlement of the underlying personal injury action, seeks a court order directing the Committee to consent nunc pro tunc.

Since the Committee is an administrative agency governed by the Workers' Compensation Law and subject to the authority of the Workers' Compensation Board, we find that petitioner should seek a determination as to appropriate relief from the Board, which has already determined the injured claimant's entitlement to

certain payments and petitioner's entitlement to reimbursements under Workers' Compensation Law § 15(8)(d) (*see Matter of Selective Ins. Co. of Am. v State of N.Y. Workers' Compensation Bd.*, 102 AD3d 72 [3d Dept 2012]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14312 The People of the State of New York, Respondent, Ind. 2310/11

-against-

David Felder, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Roger S. Hayes, J.), rendered April 27, 2012, convicting defendant, after a jury trial, of burglary in the third degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 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]). Defendant's overall course of conduct supports an inference that when he entered an employees-only part of a department store, he did so with intent to commit a crime (*see People v Castillo*, 47 NY2d 270, 277-278 [1979]).

The court properly received limited evidence of an uncharged trespass that occurred shortly before the charged crime. Defendant's entries into the employees-only sections of two

department stores were plainly part of the same chain of events, and defendant's arguments to the contrary are without merit. The evidence of the first trespass was necessary to complete the narrative of events leading up to defendant's arrest, including explaining why the police targeted defendant and focused on his continuing activity (*see People v Morris*, 21 NY3d 588 [2013]). The court properly exercised its discretion in determining that the stipulations proposed by defendant were not suitable alternatives to the introduction of this evidence (*see id.* at 599). Any prejudice was minimized by the court's limiting instruction.

The challenged portions of the prosecutor's summation did not contain any material misstatements of law, and did not deprive defendant of a fair trial.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Renwick, Andrias, Richter, Gische, JJ.

14314 Father Mark Rossetti, et al., Index 653305/13
Plaintiffs-Respondents,

-against-

Ambulatory Surgery Center of Brooklyn, LLC, et al.,
Defendants-Appellants,

Brooklyn Ambulatory Physicians Associates, P.C., et al.,
Defendants.

_____

Steven G. Legum, Mineola, for appellants.

Peter Panaro, Massapequa, for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered February 14, 2014, which denied defendants Ambulatory Surgery Center of Brooklyn, LLC, Terry Lazar, and Kimberly Lazar's motion to dismiss the first, fourth through eleventh, and thirteenth through fifteenth causes of action and to strike the demands for punitive and treble damages as against them, unanimously modified, on the law, to grant the motion as to the first, fourth, fifth, sixth, tenth, eleventh and fifteenth causes of action, and the fourteenth cause of action to the extent it is asserted by plaintiff Rossetti, and to strike the demand for treble and punitive damages, and otherwise affirmed, without costs.

Plaintiff Olivieri was employed as the medical director of defendant Ambulatory Surgery Center of Brooklyn (ASC) for some 10 years, until his termination in or about June 2013. Plaintiffs allege, inter alia, that during that time, defendants Terry Lazar and Kimberly Lazar, the owners of ASC, deceived Olivieri into lending ASC approximately $550,000 through fraudulent representations about ASC's solvency and their intention to maintain his employment as medical director, and that they induced Olivieri's friend, plaintiff Rossetti, a priest, into lending them $450,000 based on misrepresentations about ASC's solvency and a false promise that they would cause ASC to stop providing pregnancy termination services. Plaintiffs further allege that the Lazars forged Olivieri's signature on loan documents with a bank, resulting in his being liable for the loan. In addition to seeking to recover on promissory notes executed by ASC, plaintiffs assert causes of action for breach of an oral employment agreement, fraud, conversion, breach of fiduciary duty, and intentional infliction of emotional distress, and seek to pierce the corporate veil to recover the money loaned to ASC from the Lazars personally.

Giving plaintiffs the benefit of every inference, we find that the complaint states a cause of action for fraudulent inducement, by alleging that defendants knowingly misrepresented

a present fact in order to induce plaintiffs to loan money to ASC (*see GoSmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 782 [2011]). An unjust enrichment cause of action is stated by allegations that defendants obtained funds by forging Olivieri's name on loan documents; this is not duplicative of any breach of contract claim (*see Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 572 [2005]). The requirements for demonstrating intentional infliction of emotional distress are "rigorous, and difficult to satisfy" (*Howell v New York Post. Co.*, 81 NY2d 115, 121 [1993] [internal quotation marks omitted]). Those requirements have not been met here. No basis is pleaded for the demand for treble or punitive damages.

The complaint states a basis for piercing the corporate veil, by alleging that the Lazars commingled and misused corporate funds and used their domination and control of the corporate defendant to commit a fraud or wrong against plaintiffs (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 140 [1993]; *see also Teachers Ins. Annuity Assn. of Am. v Cohen's Fashion Opt. of 485 Lexington Ave., Inc.*, 45 AD3d 317 [1st Dept 2007]).

Olivieri's claims of breach of an oral employment agreement and wrongful termination fail to state causes of action (*see*

Sullivan v Harnisch, 19 NY3d 259, 261 [2012]). Plaintiffs' references to article 28 of the Public Health Law do not aid in pleading a cognizable claim for breach of an oral employment contract for an indefinite period of time (*see Sater v Wyckoff Hgts. Hosp.*, 228 AD2d 427 [2d Dept 1996]). Nor have plaintiffs identified any basis for a breach of fiduciary duty claim based on the arm's-length loan transactions and employment relationships alleged (*see Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 463 [1st Dept 2007]). The causes of action alleging breach of the implied covenant of good faith and fair dealing and conversion are based on the same allegations as underlie the breach of contract claims and should be dismissed as duplicative (*see Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 [1st Dept 2014]).

The cause of action seeking recovery of attorneys' fees is sufficient as to Olivieri, based on the terms of his promissory notes, but Rossetti has not shown any contract or statutory basis for the claim, which therefore must be dismissed as to him (*see Gotham Partners, L.P. v High Riv. Ltd. Partnership*, 76 AD3d 203 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

We have considered defendants' remaining contentions, and find them unavailing.

Defendants raise no arguments with respect to the fourteenth cause of action.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14316 The People of the State of New York, Ind. 2182N/10
Respondent,

-against-

Cian Alexander,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Michael Sonberg, J.), rendered on or about April 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: FEBRUARY 24, 2015

CLERK

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

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14317-
14318 Wilson Heredia,
Plaintiff,

-against-

1454 St. Nicholas Avenue
Associates, et al.,
Defendants.

- - - - -

1454 St. Nicholas Avenue Associates, et al
Third-Party Plaintiffs-Appellants,

-against-

Apicella Fish Co. Of N.Y. Inc.,
Third-Party Defendant-Respondent.

Index 18896/07
83767/11

_____

Anita Nissan Yehuda, P.C., Roslyn Heights (Anita Nissan Yehuda of counsel), for appellants.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered July 15, 2013, which, insofar as appealed from as limited by the briefs, granted third-party defendant tenant's motion for summary judgment dismissing the third-party cause of action for contractual indemnification for amounts that defendant third-party plaintiff 1454 St. Nicholas Avenue Associates (owner) recovers from insurance, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court and Justice, entered April 14, 2014, which, insofar as

appealable, denied defendants/third-party plaintiffs' motion for renewal of the July 15, 2013 order, unanimously dismissed, without costs, as academic.

Plaintiff, an employee of tenant, was allegedly injured on premises leased from the owner. Paragraph 46 of the rider to the lease unambiguously requires, inter alia, that "tenant shall indemnify owner for, and hold owner harmless and free from damages sustained by person or property." Even if we were to agree with tenant's contention that paragraph 46 to the rider was ambiguous, the remedy would not be to render it a nullity as tenant urges, but to admit extrinsic evidence to determine its meaning. In either event, tenant's motion for summary judgment should have been denied.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14319 Nicolae Calinescu, Index 305717/11
Plaintiff-Appellant,

-against-

167 LLC,
Defendant-Respondent.

_____

Nicolae Calinescu, appellant pro se.

Law Office Of Lauren K. Popper, New York (Lauren K. Popper of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 20, 2014, which struck plaintiff's note of issue, and directed plaintiff to comply with the directives of the preliminary conference order, unanimously dismissed, without costs, as taken from a nonappealable paper.

The court's order did not resolve a motion made on notice, and thus is not appealable as of right (*see* CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 336 [2003]; *see also Smith v*

United Church of Christ, 95 AD3d 581, 582 [1st Dept 2012], *lv denied and dismissed* 19 NY3d 940 [2012]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14322 The People of the State of New York, Ind. 1392/12
Respondent,

-against-

Darrell Frazier,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case, New York (Matthew Nicholson of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Daniel McCullough, J.), rendered January 17, 2013, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree, assault in the third degree, menacing in the second degree (two counts) and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of two to four years, unanimously affirmed.

The court properly exercised its discretion in precluding defendant from calling his mother as a witness since she was not present during the incident and the probative value of her proposed testimony was outweighed by the risk of confusing the issues, misleading the jury or inviting improper speculation (*see*

People v Corby, 6 NY3d 231, 234-235 [2005]; *People v Aska*, 91 NY2d 979, 981 [1998]). In any event, any error in the preclusion of defendant's mother's testimony was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14324 The People of the State of New York, Respondent, Ind. 3977/11

-against-

Annette N. Baez, 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 (Richard Carruthers, J.), rendered on or about May 1, 2013, 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: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14325 Francisco Diaz, et al., Index 311195/11
Plaintiffs-Respondents,

-against-

Felix Dela Cruz, et al.,
Defendants-Appellants.

_____

DeSena & Sweeney, LLP, Bohemia (Shawn P. O'Shaughnessy of counsel), for appellants.

Eric H. Green, New York (Marc Gertler of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered December 12, 2013, which denied defendants' motion for summary judgment dismissing the complaint based on the failure to meet the serious injury threshold pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Assuming defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury to his cervical or lumbar spine by submitting the affirmed report of an orthopedist who found full ranges of motion (*see Perl v Meher*, 18 NY3d 208, 216-217 [2011]; *Levinson v Mollah*, 105 AD3d 644 [1st Dept 2013]), plaintiff raised an issue of fact as to whether he sustained serious injuries by submitting the affirmed report of a radiologist who interpreted plaintiff's cervical and lumbar spine MRIs, and found herniated discs at several levels. Plaintiff

also submitted an affidavit from his treating chiropractor who found deficits in ranges of motion in the cervical and lumbar spines, shortly after the accident and currently, and causally connected these deficits to the accident, opining that they were unrelated to his age or any prior trauma, as evidenced by his ability to work full time as a taxi driver prior to the accident (*see Santos v Perez*, 107 AD3d 572, 573 [1st Dept 2013]; *Torain v Bah*, 78 AD3d 588 [1st Dept 2010]).

Defendants also met their prima facie burden of showing lack of a 90/180-day injury by relying on plaintiff's allegations in his bill of particulars and report to an examining chiropractor that he missed less than 90 days from work (*see Rosa-Diaz v Maria Auto Corp.*, 79 AD3d 463 [1st Dept 2010]). However, plaintiff raised an issue of fact by submitting his own affidavit averring that he was disabled from work for three months, and his chiropractor's affidavit averring that plaintiff was disabled

from work for three months due to a medically determined injury to his spine. This conflict precludes summary judgment.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14326 Candida Duverge, Index 308427/10
Plaintiff-Respondent,

-against-

Washfield Management, et al.,
Defendants-Appellants.

_____

Epstein Gialleonardo & Rayhill, Elmsford (Jonathan R. Walsh of counsel), for appellants.

Marder, Eskesen & Nass, New York (Clifford D. Gabel of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered October 22, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The tenant of the apartment at issue testified that defendants' superintendent was told about and shown the defective condition of the tiles on which plaintiff tripped, but repeatedly

refused requests to repair the floor. Defendants' denial of any such knowledge merely raises triable issues of fact.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14328 The People of the State of New York, Respondent, Ind. 1685/12

-against-

Juvian Rodriguez, 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 (Renee A. White, J. at plea; Juan M. Merchan, J. at sentencing), rendered on or about August 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: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14329 Alessandro Calastri, Index 152851/12
Plaintiff-Appellant-Respondent,

-against-

Hannah Overlock,
Defendant-Respondent-Appellant.

_____

Wrobel Schatz & Fox LLP, New York (Phillip R. Schatz of counsel), for appellant-respondent.

Carter Ledyard & Milburn LLP, New York (Alan S. Lewis of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered April 29, 2014, to the extent it granted defendant's motion for partial summary judgment dismissing plaintiff's false arrest claim, denied plaintiff's cross motion for summary judgment dismissing defendant's counterclaims for conversion and frivolous claims (CPLR 8303-a), granted in part plaintiff's motion to compel, and denied defendant's motion to amend her amended answer to allege malicious prosecution, unanimously modified, on the law, the counterclaims for conversion and frivolous claims dismissed, and otherwise affirmed, without costs. Appeal from aforementioned order, insofar as it compels defendant to produce medical authorizations, unanimously dismissed, without costs, as moot.

The court properly dismissed plaintiff's false arrest claim.

Plaintiff did not dispute before the trial court that his guilty plea to one count of criminal mischief in the fourth degree, stemming from a September 21, 2011 incident, was in full satisfaction of charges in the misdemeanor complaint, including those relating to his February 21, 2012 arrest. As a result, plaintiff's plea constitutes probable cause for his arrest and thus provides defendant an affirmative defense to his false arrest claim (*Marrero v City of New York*, 33 AD3d 556, 556-557 [1st Dept 2006]; *Bennett v New York City Hous. Auth.*, 245 AD2d 254, 254 [2d Dept 1997]; *Lluberes v City of Troy*, 2014 WL 1123413, *15, 2014 US Dist LEXIS 39799, *49 [ND NY 2014]). Plaintiff's argument that a more detailed court colloquy or plea allocution is required before such a plea can be deemed to dispose of a false arrest claim might be relevant to the validity of his plea, but his remedy then lies in challenging his guilty plea in the criminal proceeding, which was pending for nearly 16 months when he pleaded guilty with the advice of counsel.

The court did not abuse its discretion in denying defendant's motion for leave to amend her answer to allege a malicious prosecution counterclaim. Only plaintiff's false arrest claim was dismissed, the other claims against defendant are still pending, and thus the action has not yet terminated favorably to her (CPLR 3025[b]; *McGhee v Odell*, 96 AD3d 449, 450

[1st Dept 2012]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see also Health-Chem Corp. v Adler*, 201 AD2d 326, 327 [1st Dept 1994]; *Flaks, Zaslow & Co. v Bank Computer Network Corp.*, 66 AD2d 363, 366 [1st Dept 1979], *appeal dismissed* 47 NY2d 951 [1979]).

The court should have dismissed defendant's conversion counterclaim, as it was duplicative of her trespass to chattel counterclaim, as the former arose from the same facts as the latter and alleges the same damages (*see Inkine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003]).

The court also should have dismissed defendant's purported counterclaim seeking costs for bringing a frivolous action pursuant to CPLR 8303-a(a), as no independent cause of action exists under that provision (*Cerciello v Admiral Ins. Brokerage Corp.*, 90 AD3d 967 [2d Dept 2011]).

Finally, the portion of defendant's cross appeal challenging the court's order directing her to produce authorizations for the exchange of medical information without requiring that her medical records be designated for "attorney's eyes only" should be dismissed as moot. Apparently, the parties have executed a so-ordered confidentiality stipulation, without an attorneys'-eyes-only provision, and defendant has since produced her medical records to plaintiff. In any case, the court properly denied

defendant's request, as she failed to elaborate as to how plaintiff's alleged history of violence toward her necessitated such a restriction (*see Chavoustie v New York Hosp.- Cornell Med. Ctr.*, 253 AD2d 702 [1st Dept 1998], *lv denied* 93 NY2d 805 [1999]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14331- Index 158055/12
14331A- 158056/12
14331B AIG, et al., 158057/12
Petitioners-Respondents,

-against-

Health Insurance Plan of Greater New York, etc., et al.,
Respondents-Appellants.

- - - - -

AIG, et al.,
Petitioners-Respondents,

-against-

Group Health Incorporated, etc., et al.,
Respondents-Appellants.

- - - - -

AIG, et al.,
Petitioners-Respondents,

-against-

Health Insurance Plan of Greater New York, etc., et al.,
Respondents-Appellants.

_____

Bond, Schoeneck & King, PLLC, Albany (Hermes Fernandez of counsel), for appellants.

Weiss, Wexler & Wornow, P.C., New York (Cory I. Zimmerman of counsel), for respondents.

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Three orders and judgments (three papers), Supreme Court, New York County (Alice Schlesinger, J.), entered July 22, 2013, which granted petitioners' CPLR article 75 petitions to vacate July 5, 2012 arbitration awards rendered in favor of respondents

and against petitioners, and directed respondents to submit HIMP-1 forms to petitioners in the event they seek new arbitrations in these matters, unanimously affirmed, with costs.

Although the IAS court, in analyzing the petitions, should have applied CPLR 7511, instead of CPLR 5015 (*see Ingham v Thompson*, 113 AD3d 534, 534 [1st Dept 2014], *lv denied* 22 NY3d 866 [2014]), the court correctly granted the petitions, as petitioners did not have proper notice of these compulsory arbitrations (*see* 12 NYCRR subpart 325-6; *see also Matter of Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214, 223 [1996] [closer judicial scrutiny is applied where arbitration is compulsory]). Although respondents submitted sufficient proof of the mailing and delivery of their HIMP-1 and HIMP-3 forms, it is undisputed that the notices of the requests for arbitration before the AAA, the "dispute forum," were faxed and not mailed to petitioners, as required by 22 NYCRR 325-6.10. Since petitioners were prejudiced by the awards entered upon their unintentional default, the court correctly vacated the awards (*see* CPLR 7511[b][2][i], [b][1][i]; *compare Thermasol, Ltd. v Dreiske*, 78 AD2d 838 [1st Dept 1980], *affd* 52 NY2d 1069 [1981], *cert denied* 454 US 826 [1981][court erred in vacating award, where the respondent received proper notice of the pending arbitration proceedings and thus his rights were not impaired]).

Upon vacating the awards, rather than remanding to the same or new arbitrator (*see* CPLR 7511[d]), the IAS court properly directed respondents to restart the dispute resolution process in accordance with 12 NYCRR subpart 325-6 in the event they decide to seek new arbitrations in these matters.

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Clark, JJ.

14332 In re Tanveer L.,

A Dependent Child Under
Eighteen Years of Age, etc.

Vikram L.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kathy Chang Park of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about March 7, 2014, which, to the extent appealed from as limited by the briefs, brings up for review a fact-finding determination, same court and Judge, entered on or about December 12, 2013, that respondent father neglected the subject child by reason of domestic violence against nonparty mother, unanimously affirmed, without costs.

The court properly found that petitioner sustained its burden of demonstrating by a preponderance of the evidence that the father engaged in domestic violence against the mother in the child's presence and that this conduct was detrimental to the

child's physical and emotional health (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-369 [2004]). The court's credibility determination with respect to the conflicting testimony of the parents is entitled to deference (*see Matter of Irene O.*, 38 NY2d 776 [1975]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Feinman, Clark, JJ.

14333 In re 339 West 29th Street LLC, Petitioner-Appellant,

-against-

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

- - - - -

Friends of Hopper-Gibbons Underground Railroad Site, et al., Proposed Intervenors-Respondents.

Index 100459/13

Law Offices of Marvin B. Mitzner LLC, New York (Marvin B. Mitzer of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake Colley of counsel), for municipal respondents.

Jack L. Lester, New York, for Friends of Hopper-Gibbons Underground Railroad Site and Lamartine Place Historic District, respondents.

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered August 8, 2013, denying the petition to annul the determination of respondent Board of Standards and Appeals (BSA), dated February 12, 2013, which required prior approval by the Landmarks Preservation Commission (LPC) for reinstatement of petitioner's building permit, granting respondents' cross motion for summary judgment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BSA's determination that, in order to work at the site, petitioner was required to obtain the approval of the LPC, was

rational and was not arbitrary and capricious (*see generally Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). At the time of the designation of the historic district, the permit previously issued to petitioner had been revoked and there was no permit in place. Thus, pursuant to Administrative Code of City of NY § 25-305(b)(1), petitioner was required to obtain approval from the LPC before obtaining a new permit or a reinstated permit for the work, and the exception outlined in Administrative Code § 25-321 was unavailable.

To the extent that petitioner challenges the Department of Buildings' revocation of the permit and BSA's purported failure to reinstate the permit, we note that petitioner never appealed the revocation of the permit, thereby failing to exhaust its administrative remedies (*see* CPLR 7801[1]; *Lehigh Portland Cement Co. v New York State Dept. of Envtl. Conservation*, 87 NY2d 136, 140 [1995]).

There is also no basis to apply the vested rights doctrine in this case, as a vested rights analysis is only appropriate where there is reliance on a valid permit and petitioner did not have such a permit at the time of the historic district

designation (*see Matter of Perrotta v City of New York*, 107 AD2d 320, 325 [1st Dept 1985], *affd* 66 NY2d 859 [1985]).

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

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14334 The People of the State of New York, Respondent, Ind. 4395/08

-against-

Tyrell Ingram, Defendant-Appellant.

_____

Stanley Neustadter, Cardozo Appeals Clinic, New York (Jeremy Gutman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered March 14, 2011, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to a term of 12 years, unanimously affirmed.

The record fails to support defendant's assertion that the court precluded him from impeaching the credibility of a police witness by way of prior bad acts. The court correctly precluded inquiry regarding the existence of a federal lawsuit in which the officer was one of the named defendants, because the mere existence of the lawsuit was not a proper subject for cross-examination (*see People v Antonetty*, 268 AD2d 254 [1st Dept 2000], *lv denied* 94 NY2d 945 [2000]). The court also correctly excluded a police Firearms Discharge/Assault Report, which

contained an unelaborated reference to two prior shootings by the officer in question, because defendant only offered the report under a plainly meritless present-sense-impression theory (*see People v Brown*, 80 NY2d 729, 732-733 [1993]). Defendant did not seek to ask the officer anything about the underlying facts of the lawsuit, or about the prior shootings referenced in the report, and the court did not prevent him from making such requests. In any event, by failing to provide any specific factual allegations, defendant failed to establish a good faith basis for eliciting the underlying facts of the lawsuit or the prior shootings under the theory that they involved prior bad acts by this officer bearing on his credibility, or under any other theory of admissibility (*see People v Andrew*, 54 AD3d 618 [1st Dept 2008], *lv denied* 11 NY3d 895 [2008]; *see also People v Smith*, 122 AD3d 456 [1st Dept 2014]).

The court responded meaningfully to the deliberating jury's request for a readback of specific testimony (*see People v Almodovar*, 62 NY2d 126, 131 [1984]). The court's ruling regarding the testimony to be included or excluded was based on a reasonable interpretation of the jury's note, and was a proper

exercise of discretion. In any event, defendant has not demonstrated that the court's determinations regarding the scope of the readback "seriously prejudiced" him (*see People v Lourido*, 70 NY2d 428, 435 [1987]).

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

ENTERED: FEBRUARY 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14336N Renardo Carney, et al., Index 305355/11
Plaintiffs-Respondents,

-against-

Alphonso Gil, et al.,
Defendants,

Kondaur Capital Corporation,
Defendant-Appellant.

_____

Pollock & Maguire, LLP, White Plains (Peter S. Dawson of counsel), for appellant.

Nicholas Edelson, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 17, 2013, which denied defendant Kondaur Capital Corporation's motion for a default judgment on its counterclaims, unanimously affirmed, without costs.

The motion court properly found plaintiffs' excuse for their delay in replying to Kondaur's counterclaims and their statement of merit sufficient (*see e.g. Navarro v A. Trenkman Estate, Inc.*, 279 AD2d 257, 258 [1st Dept 2001]). That plaintiffs' excuse was not as detailed as Kondaur wished does not alter our conclusion (*see Mediavilla v Gurman*, 272 AD2d 146, 148 [1st Dept 2000]). As the court noted, it is "the strong public policy of this State that matters be decided on their merits" (*Navarro*, 279 AD2d at 258).

The first and second counterclaims seek a declaration that Kondaur's mortgage is a valid first lien against 302 Alexander Avenue. Relying on Real Property Law § 266, Kondaur contends that it was a good faith mortgagee for value and that the deceased John Carney (whose estate is a defendant) had the authority to mortgage the property. However, "a bona fide encumbrancer is only protected when the challenged conveyance is voidable, not when it is void" (*Solar Line, Universal Great Bhd., Inc. v Prado*, 100 AD3d 862, 864 [2d Dept 2012]; *see also LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 599-600 [2d Dept 2007]). The complaint, now verified by plaintiff Renardo Carney, sets forth a meritorious defense to these counterclaims by alleging that the transfer of the property from Carney Holdings, LLC (Holdings) to John Carney and defendant David Strause (guarantors of the mortgage later assigned to Kondaur) was invalid because it did not have the written approval of all of Holdings's members, as required by Holdings's operating agreement. Moreover, contrary to Kondaur's contention, the court did not determine whether the assignor of the mortgage knew of the alleged fraud or of "facts that would have led a reasonable mortgagee to make inquiry of the possible fraud at the time the mortgage was entered into" (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 1126 [2d Dept 2011]).

The third counterclaim seeks an equitable mortgage lien under principles of equitable subrogation. However, there was no unknown, intervening mortgage on 302 Alexander Avenue (*see King v Pelkofski*, 20 NY2d 326, 333-334 [1967]).

The fourth counterclaim seeks an equitable mortgage lien against 75% of 302 Alexander Avenue on the theory that defendants Strause and Alphonso Gill, and John Carney, each own or owned 25% of Holdings, which owned 302 Alexander Avenue. However, the complaint (again, now properly verified) implies that Gill tricked John Carney into creating Holdings and transferring his properties into it. It also raises questions as to whether Gill and Strause were unjustly enriched by obtaining 50% of Holdings.

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

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

ENTERED: FEBRUARY 24, 2015

CLERK

Tom, J.P., Friedman, Andrias, Saxe, JJ.

11930 The People of the State of New York, Ind. 2712/06
Respondent,

-against-

Peter DiTommaso,
Defendant-Appellant.

_____

Zuckerman Spaeder, LLP, New York (Paul Shechtman of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stuart P. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered April 2, 2013, reversed, on the law, and the matter remanded for a new trial.

Opinion by Andrias, J. All concur except Tom, J.P. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Richard T. Andrias
David B. Saxe, JJ.

11930
Ind. 2712/06

_____x

The People of the State of New York,
Respondent,

-against-

Peter DiTommaso,
Defendant-Appellant.

_____x

Defendant appeals from a judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered April 2, 2013, convicting him, after a jury trial, of two counts of perjury in the first degree, and imposing sentence.

Zuckerman Spaeder, LLP, New York (Paul Shechtman, Megan Quattlebaum and Maggie Lynaugh of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Stuart P. Levy, Peter D. Coddington and Diane A. Shearer of counsel), for respondent.

ANDRIAS, J.

Defendant was convicted, after a jury trial, of two counts of perjury in the first degree. The only arguments he raises on appeal are that the trial court erred when it allowed the People to admit certain grand jury testimony on their direct case under the past recollection recorded exception to the hearsay rule, and when it excluded, on relevancy grounds, a document critical to his perjury trap defense. For the reasons that follow, we find that the grand jury testimony should not have been admitted into evidence because the People failed to establish that the witness's recollection of the matter was fairly fresh when recorded or adopted during the grand jury proceeding, and the witness could not attest at trial that the testimony was accurate when given.

The indictment alleges that on June 15, 2006 and March 30, 2006, respectively, defendant Peter DiTommaso and his brother, codefendant Frank DiTommaso, committed perjury when they testified before a grand jury investigating Bernard Kerik.[1] The investigation stemmed from allegations that in 1999 and 2000, Kerik, then Commissioner of the New York City Department of Corrections, accepted renovations to his apartment that were paid

[1]Frank DiTommaso was tried jointly with defendant and found not guilty of the perjury count against him.

for by companies owned by the DiTommasos (the Interstate companies or Interstate). In return, Kerik allegedly vouched for the DiTommasos' integrity in investigations by public agencies in connection with applications by the Interstate companies for permits needed to obtain government contracts.[2]

Another witness who testified before the grand jury was Tim Woods, whose company, Woods Restoration, allegedly received payments from Interstate for renovations it performed on Kerik's apartment that were hidden by having Woods bill the work to other projects. The indictment alleges that when defendant was recalled to the grand jury on June 15, 2006 to clarify certain aspects of his March 28, 2006 testimony, he committed perjury when he testified that Woods Restoration worked on a project for St. Vincent's nursing home and that Interstate did not pay Woods Restoration for renovations to Kerik's apartment.

At the trial of the DiTommasos, when the prosecutor asked if defendant referred the Kerik job to him, Woods replied, "As far as I can remember." However, he qualified this by stating that "we've [he and the prosecutor] gone over this so many times I

[2]The jury heard testimony that on June 30, 2006, Kerik pleaded guilty to two misdemeanors for "[taking] a gift from Interstate Companies or it's [sic] subsidiary [and speaking to] city officials about Interstate on two occasions and on another occasion permit[ting] [his] office to be used for a meeting between Trade Waste authorities and Interstate officials."

can't remember if this is what we discussed or what happened[,]" and that he was "kind of mixed up whether or not it's [an] independent recollection or it's you and I having gone over it so many times." When Woods persisted in his claim that he did not know whether his recollection had been reinforced or created by his discussions with the prosecutor over the past six years, the prosecutor, believing that Woods was feigning an inability to remember, sought to impeach Woods with his 2006 grand jury testimony. The court ruled that the use of the grand jury testimony for impeachment based on his purported failure to remember was "inappropriate," but suggested that "there may be other avenues" for its admission.

Upon continued direct examination, Woods stated that based on his discussions with the prosecutor, it looked like Interstate paid Woods Restoration for the Kerik job, but that he had no independent recollection of that or of "a discussion with [defendant] about Bernard Kerik." The prosecutor then offered Woods's grand jury testimony under the past recollection recorded exception to the hearsay rule. Defense counsel objected, and the court conducted a hearing outside the jury's presence to determine whether the foundational requirements for the past recollection recorded exception were satisfied.

At the hearing, Woods testified on direct examination by the

prosecutor that he honestly was not sure about where his recollection of the Kerik job came from. While Woods repeatedly stated that he believed that he had testified truthfully and accurately before the grand jury, he also stated that "[a]s I sit here right now, I can't tell you if everything that's in that Grand Jury that I said was --- is accurate, [or if] it's the result of, you know, prep sessions that we had." Woods explained:

> "What you just asked me whether or not it was truthful in the Grand Jury, I can't tell you right now, I'm so confused with the facts and what happened, and where these things happened, and the millions of prep sessions that what's in the those Grand Jury [sic], whether or not that was exactly what happened, that was a result of, you know, these prep sessions. ¶ I[,] I'm just not clear. I try my best to be truthful at all times, which is why I'm telling you, and I've been telling you that I don't have a close recollection of this whole thing. ¶ I know more about the events from our prep sessions than I actually can remember."

On cross-examination, Woods testified that he believed that he did not have a present recollection of the events during the prep sessions or when he appeared before the grand jury, and reiterated that he could not tell whether his grand jury testimony was based on his own recollection or the cumulative effect of all of the interviews and testimony he had previously given.

The trial court found that it was "clear" that when Woods testified before the grand jury "the events were fresh in his mind." The court noted that Woods had testified before the grand jury with specificity and "never stated in either the grand jury testimony or any other proceeding, deposition or interview that he was confused or that his memory was muddled in any way." Furthermore, Woods testified at the hearing that he believed that his grand jury testimony was truthful and accurate and the testimony itself was corroborated by other evidence. Thus, finding that Woods "was being less than candid about his memory of the events in question," the court permitted the People to introduce, under the past recollection recorded exception to the hearsay rule, Woods's grand jury testimony stating that defendant had asked him to bill the Kerik work to other Interstate jobs, including the St. Vincent's project, which Woods Restoration had in fact not worked on.

The court rejected defendant's argument that the admission of Woods's grand jury testimony would violate his Sixth Amendment right of confrontation under *Crawford v Washington* (541 US 36 [2004]). The court reasoned that

> "although [the] Crawford decision limits the use of testimonial evidence, such as Grand Jury testimony, or where a witness is not subject to previous cross-examination, that is true only when the witness is physically unavailable at trial. Here, the

> confrontation clause is satisfied, as the defendants will be given the opportunity to examine and cross examine Woods, before the jury regarding his actions, what he did and did not recall, and the reasons for his failure of recollection. ¶ Thus, there is no confrontation clause violation in the admission of Woods'[s] Grand Jury testimony."

Under the past recollection recorded exception to the hearsay rule, a memorandum of a fact known or an event observed in the past may be admitted if the witness is unable or unwilling to testify as to its contents, and otherwise competent evidence establishes that "the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (*People v Taylor*, 80 NY2d 1 [1992]).

"The rationale for the doctrine is that the recorded information is essential to further the truth-seeking function of the trial proceeding and that when the conditions for admission have been met, there is sufficient assurance of the accuracy of the recordation and its trustworthiness" (*Taylor*, 80 NY2d at 8-9). When a proper foundation is laid, grand jury testimony may be admitted as past recollection recorded (*see People v Linton*, 21 AD3d 909, 910 [2d Dept 2005], *lv denied* 5 NY3d 854 [2005]; *People v Holmes*, 291 AD2d 247, 248 [1st Dept 2002] ["court

properly exercised its discretion in admitting a witness's grand jury testimony as past recollection recorded since the People laid a sufficient foundation for such evidence"], *lv denied* 98 NY2d 676 [2002]; *People v Turner*, 210 AD2d 445 [2d Dept 1994], *lv denied* 85 NY2d 915 [1995]).

We now hold that protection of the integrity of these fundamental principles requires that defendant's conviction be reversed and a new trial ordered. Although there is no rigid rule as to how soon after the event the statement must have been made (*see People v Caprio*, 25 AD2d 145, 150 [2d Dept 1966], *affd* 18 NY2d 617 [1966]), here the assurance of the accuracy of the recordation and its trustworthiness are diminished by the six-year gap between the underlying events, which concluded in 2000, and Woods's grand jury testimony in 2006 (*see People v Eli*, 250 AD2d 418, 419 [1st Dept 1998] [defendant had "failed to lay a proper foundation for admission of ... Grand Jury testimony, taken months after the event, as past recollection recorded"], *lv denied* 92 NY2d 851 [1998]; *see also People v Wilkinson*, 120 AD3d 521, 522 [2d Dept 2014] ["In light of the one-year gap between the time the witness allegedly heard the defendant's alleged inculpatory statements and the witness's grand jury testimony, the People failed to establish that the witness's recollection of the matter was 'fairly fresh when recorded or adopted' during the

grand jury proceeding"]).

The People argue that Woods's testimony is admissible despite the six-year gap because the trial court found that he was "feigning a lack of memory." However, even if Woods's lack of memory demonstrates that he was unable or unwilling to testify, it does not abrogate the People's obligation to satisfy the foundational requirement that the recollection was fairly fresh when recorded or adopted.

Nor was Woods able to "presently testify that the record correctly represented his knowledge and recollection when made" (*Taylor*, 80 NY2d at 8; *see also People v Fields*, 89 AD3d 861 [2d Dept 2011], *lv denied* 18 NY3d 882 [2012]). Although Woods testified that he believed his grand jury testimony was truthful and accurate, he also testified that "[a]s I sit here right now, I can't tell you if everything that's in that Grand Jury that I said was ... accurate"; that although he "wanted to be accurate" and "wouldn't testify untruthfully," he could not swear that "what's in the ... Grand Jury ... was exactly what happened," and that he could not "remember [if] ... what I was talking to was my clear recollection or ... was resulting from [my prep sessions] with people." Thus, Woods's testimony reflects that although he would not have purposefully lied to the grand jury, he could not presently state that his testimony accurately

reflected his own recollection of the events in question at the time that he testified before it (*see People v Wilkinson*, 120 AD3d at 522 ["Moreover, the witness's trial testimony was equivocal as to whether her testimony in the grand jury correctly represented her knowledge and recollection when given"]).

In his concurring opinion, our colleague acknowledges that the issue of whether Woods's grand jury testimony was properly received as evidence in chief under the past recollection recorded exception is the focus of the parties' briefs. Nevertheless, he finds that the issue is immaterial because the use of such testimony "is precluded as a matter of statute under the factual circumstances of this case." Particularly, our colleague asserts that "[p]rocedural rules prevent [the] admission [of grand jury testimony] into evidence where, as here, the witness is available for cross-examination (CPL 60.35) and, contrariwise, where the witness is not available for examination (CPL 670.10)." However, this statutory argument, which was not raised by defendant at trial or in his appellate brief, is not properly before this Court, and is in any event without merit under the circumstances of this case.

CPL 60.35(1) states:

> "When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the

> position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony."

Pursuant to CPL 60.35(2), such evidence "may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief."

Grand jury testimony may be introduced into evidence for *impeachment* purposes where the witness's conflicting trial testimony on a material issue affirmatively damages the People's case (*see People v Harris*, 112 AD3d 738 [2d Dept 2013], *lv denied* 23 NY3d 1020 [2014]; *People v Faulkner*, 220 AD2d 525 [2d Dept 1995], *lv denied* 87 NY2d 901 [1995]). However, the mere lack of recollection of events in question will not trigger the right to impeach (*see People v Ayala,* 121 AD3d 1124, 1125 [2d Dept 2014] ["the testimony of the eyewitness that she did not remember the face of the shooter and could not identify the shooter because of the passage of time between the shooting and the trial, and because of her struggles with alcohol and depression, did not tend to disprove or affirmatively damage the People's case"]).

At trial, the court denied the People's request to introduce Woods's grand jury testimony for impeachment purposes pursuant to CPL 60.35, holding that the statute is inapplicable because Woods

said, "I don't remember." Defendant was not aggrieved by this ruling, which is not challenged by any party on appeal. Thus, as the concurrence concedes, the propriety of this ruling is not before us. Nor did defendant argue at trial or in his appellate brief that, where a witness is available, the admission of grand jury testimony as evidence in chief under the past recollection recorded exception to the hearsay rule is always barred by CPL 60.35 as a matter of law. Accordingly, this issue, raised only by the concurrence, also is not properly before us.

I find the concurrence's focus on CPL 670.10 even more perplexing. CPL 670.10 creates an exception to a defendant's right of confrontation under the Sixth Amendment to the federal constitution and article I, §6 of the state constitution. CPL 670.10(1) states:

> "Under circumstances prescribed in this article, testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved *when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court*" (emphasis added).

Relying on *People v Green* (78 NY2d 1029 [1991]), which

defendant cites in a footnote, the concurrence states that the three categories listed in the statute are exclusive and that "since prior testimony usable as evidence in chief under the statute does not include grand jury testimony (CPL 670.10[2]), the availability of a hearsay exception rendering it 'otherwise admissible' does not overcome the statutory exclusion." However, CPL 670.10 is inapplicable, because Woods was not "unable to attend the [trial] by reason of death, illness or incapacity," and does not bar the admission of Woods's grand jury testimony under the past recollection recorded exception to the hearsay rule under the circumstances before us.

In *Crawford v Washington* (541 US 36 [2004], *supra*), the United States Supreme Court held that it was a violation of an accused's right to confront the witnesses against him, where testimonial evidence was admitted from a presently unavailable witness and there was no prior opportunity to cross-examine the witness. Grand jury testimony falls within the class of prior testimonial evidence that implicates the Confrontation Clause in the event the witness is not available for cross-examination at trial (*id.* at 68). However, "[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements ... The Clause does not bar admission of a statement so long as

the declarant is present at trial to defend or explain it" (*id.* at 59 n 9). Here, Woods appeared at trial. He did not invoke his Fifth Amendment rights or otherwise refuse to testify, and was available for cross-examination. Although Woods maintained that he did not know whether his recollection had been reinforced or created by his discussions with the prosecutor over the last six years, a witness's inability to recall or remember does not deprive a defendant of the opportunity to cross-examine the witness (*see People v Linton*, 21 AD3d at 910).

In *Linton*, at the time of trial, the witness no longer remembered the details of the shooting. The appellate court held that "his grand jury testimony, which he described as accurate when given, was properly admitted as a past recollection recorded to supplement his in-court testimony, which was subject to cross-examination" (*id.*). The court found that there was no violation of the Confrontation Clause because "the victim, whose prior grand jury testimony was read to the petit jury, testified at trial and was subject to cross-examination" (*id.*). Here, too, Woods was available for cross-examination. Unlike the nine-year-old witness in *People v Green* (78 NY2d 1029 [1991], *supra*), he had not suffered a total memory loss since his grand jury appearance. Nor did he refuse to testify, as did the witness in *People v Concepcion* (228 AD2d 204 [1st Dept 1996]). Rather,

Woods testified at considerable length, albeit not in the way that the prosecutor anticipated, persisting in his claim that he did not know whether his recollection had been reinforced or created by his discussions with the prosecutor over the past six years. Thus, whether Woods could not remember, or feigned an inability to remember, CPL 670.10 is inapplicable, and the People were well within their right to seek to introduce his grand jury testimony as a past recollection recorded exception to the hearsay rule.

Asserting that state law extends greater protection to a defendant's right to confront a witness than the Sixth Amendment, the concurrence states that "defendant's right of confrontation could not be protected even with the availability of Woods for cross-examination because by the time of trial he no longer recalled, with specificity, the events in issue." However, when defendant raised his Confrontation Clause argument at trial, he relied on *Crawford*, and did not contend that he had broader rights under the state constitution. Therefore, *Crawford* properly serves as the basis for our decision under both the federal and state constitutions (*see People v Bradley*, 8 NY3d 124, 126 [2006]). Furthermore, in *People v Concepcion*, on which the concurrence so heavily relies, this Court stated that finding a witness to be unavailable due to "incapacity," even where she

refused to testify, is "a rather dubious proposition" (228 AD2d at 205).

Even if CPL 670.10 were theoretically applicable, the issue of whether the statute precludes the introduction of Woods's grand jury testimony on the People's direct case under the past recollection recorded exception to the hearsay rule was not raised at trial and is unpreserved for appellate review (*see* CPL 470.05; *People v Rodriguez*, 73 AD3d 815, 816 [2d Dept 2010], *lv denied* 15 NY3d 777 [2010]; *People v Lluveres*, 15 AD3d 848 [4th Dept 2004], *lv denied* 5 NY3d 807 [2005]). At trial, defendant's only reference to CPL 670.10 was in the context of his argument that "[e]ven in circumstances where a witness is rendered unavailable due to the fault of the defense and Grand Jury testimony comes in, it doesn't mean that everything comes in." Defendant did not argue that the admission of grand jury testimony is precluded in its entirety by the statute as a matter of law because it does not fall within the three exclusive categories set forth therein.

Nor should we review the issue in the interest of justice. In his brief, defendant argues that the grand jury testimony should not have been admitted because it "was given six years after the events at issue, and Woods could not attest at trial that the testimony was accurate when given." In a footnote, he

states that "[n]o other exception authorizes the admission of Woods' grand jury testimony," and cites *People v Green* for the proposition that "the exception for former testimony is inapplicable." However, even if the footnote were construed as presenting the argument that grand jury testimony does not fall within the exceptions to the Confrontation Clause codified by CPL 670.10, defendant did not argue that CPL 670.10 precludes the introduction of grand jury testimony under the present recollection recorded exception to the hearsay rule in all cases as a matter of law. That argument was not raised by defendant at trial. Nor was it raised by defendant in his appellate brief.

The concurrence believes that we should nevertheless consider the issue "[s]ince defendant based his objection to the evidence on the abridgement of his right of confrontation and because that right is governed by statute in this state." However, defendant does not contest the trial court's finding that Woods's purported inability to independently remember all of the specific facts related to the Kerik project did not render him unavailable to testify within the meaning of the Confrontation Clause, and he has abandoned any arguments relating thereto by failing to address them in his brief (*see People v Price*, 113 AD3d 883, 884 n 1 [3d Dept 2014]). In any event, it has been held that "[w]hile CPL 670.10 delineates specific

instances where prior testimony may be used in a criminal proceeding, it does not bar the admission of prior testimony which is otherwise independently admissible under a recognized exception to the hearsay rule" (*People v Rose*, 224 AD2d 643, 643 [2d Dept 1996]; *see also People v Rodriguez*, 73 AD3d at 816; *People v Gardner*, 237 AD2d 895 [4th Dept 1997], *lv denied* 90 NY3d 893 [1997]; *People v Turner*, 210 AD2d at 245).

In sum, the concurrence seeks to decide this appeal not on the arguments made by the parties in their briefs, but on arguments it thinks should have been presented. However, the concurrence's conclusion that prosecutors in this state are precluded in all instances by CPL 60.35 and 670.10 from using a witnesses's grand jury testimony on their direct case, even though there is a long-standing common-law exception allowing its use (*see People v Williams*, 5 Misc 3d 1014[A], 2004 NY Slip Op 51368[U] [Sup Ct, Bronx County 2004]), flies in the face of the well settled principle that we should not decide appeals on the basis of arguments that are not raised by the parties. The propriety of admitting Woods's testimony under the past recollection recorded exception to the hearsay rule is the only appropriate subject of this appeal, which was thoroughly and ably argued by the parties.

In light of the foregoing, we decline to address defendant's

remaining argument, which challenges an evidentiary ruling that is not binding on the court upon a new trial (*see People v Evans*, 94 NY2d 499, 504 [2000]; *People v Malizia*, 62 NY2d 755, 758 [1984], *cert denied* 469 US 932 [1984]).

Accordingly, the judgment of the Supreme Court, Bronx County (John W. Carter, J.), rendered April 2, 2013, convicting defendant, after a jury trial, of two counts of perjury in the first degree, and sentencing him to a term of five years' probation with 1500 hours of community service and a fine of $10,000, should be reversed, on the law, and the matter remanded for a new trial.

All concur except Tom, J.P. who concurs in a separate Opinion.

TOM, J.P. (concurring)

I write to direct attention to an issue that has not yet been resolved, although a number of Appellate Division cases treat it as such – whether prior testimony that is otherwise admissible under an exception to the hearsay rule may be admitted in contravention of CPL 670.10. While I concur in the result in this case, my rationale is constrained by the well recognized statutory restriction on the use of prior testimony, to which only a single exception (not pertinent here) has been recognized by the Court of Appeals (Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 670.10 at 72-73).

The issue briefed by the parties and resolved by the majority is whether a witness's prior grand jury testimony was properly received as evidence in chief under the past recollection recorded exception to the hearsay rule. The threshold issue, however, is whether the evidence, though otherwise admissible, may be *used* in this criminal proceeding. Because use of the prior grand jury testimony is precluded as a matter of statute under the factual circumstances of this case, whether or not the People have established a basis for its admission under an exception to the hearsay rule is immaterial. Alternatively stated, unless it can be established that an

exception to the statutory bar permits a witness's grand jury testimony to be used against a criminal defendant, this Court need not reach the issue of whether the elements of a particular exception to the rule against hearsay have been demonstrated.

FACTS

Defendant Peter DiTomasso was charged with two counts of perjury in the first degree based on his testimony before the grand jury that he or the two corporate entities jointly owned by him and his brother, Frank DiTommaso, did not pay for renovation work to an apartment owned by former New York City Police Commissioner Bernard Kerik.

In 1997, the DiTommaso brothers filed applications on behalf of their two construction companies to do business in Atlantic City, New Jersey. They were introduced to Kerik to assist in expediting the investigation of their applications before the New Jersey Division of Gaming Enforcement. The People's theory is that the brothers assisted Kerik with the renovation of his new apartment, including financing, while Kerik attempted to use his position and influence to assist them in the approval of the various investigations in conjunction with the Atlantic City permits.

The DiTommasos engaged Timothy Woods of Woods Restoration as

the general contractor for the Kerik renovation. Woods had a very close personal relationship with defendant. The Kerik job was completed in or about March 2000. Kerik, who had purchased his apartment in 1999 for $170,000, sold it in 2003, after extensive renovations, for $460,000.

In December 2004, President Bush announced that Kerik was his choice for the position of Secretary of Homeland Security. Thereafter, newspaper articles appeared containing allegations about Kerik and the renovations to his apartment. An investigation led to a grand jury presentation as to whether Kerik should be charged with receiving bribes, and related crimes, for accepting the renovations to his apartment from the DiTommasos. Defendant testified before the grand jury and denied that he or his two construction companies ever made payments for the Kerik renovations.

However, Woods testified before the grand jury that when he presented a bill for certain renovation work to defendant, after Kerik had failed to pay, defendant told him to increase his billing on other jobs that Woods supervised for defendant's construction companies, unrelated to the Kerik project – in effect, billing the other projects for the Kerik job. Woods wrote invoices for the jobs that defendant told him to bill, including the St. Vincent's Nursing Home project, which Woods had

not in fact worked on. Witnesses who were familiar with the St. Vincent's project confirmed that Woods Restoration had never worked on that project. The DiTomasso brothers, through their construction companies, paid over $255,000 for the Kerik restoration. A substantial amount of this money was paid to Woods for his renovation services.

PROCEEDINGS

At defendant's trial for perjury, the People called Timothy Woods as their witness. However, Woods professed an inability to recall events to which he had previously testified, in considerable detail, before the grand jury. When the People sought to introduce that testimony, defendant objected on the ground that his right to confront the witness was being infringed (citing *Crawford v Washington*, 541 US 36 [2004] [barring, inter alia, the introduction of prior testimony taken without opportunity for cross-examination]). Defendant argued that the People were attempting to introduce contradictory hearsay evidence to impeach their own witness, testimony which "does not constitute evidence in chief" (CPL 60.35[2]). While the People argued that supplementing a witness's recollection does not

amount to impeachment, the court disagreed.[1]

The People then moved, successfully, to have the witness's grand jury testimony admitted as past recollection recorded. Counsel again objected, noting that the right of confrontation was implicated and the matter was governed by specific rules. The court opined that the Confrontation Clause "'does not bar admission of a statement so long as the declarant is present at trial to defend it or explain it'" (quoting *Crawford*, 541 US at 59, n 9). Without attempting to reconcile this pronouncement with state law, specifically the previous ruling under CPL 60.35, the court granted the People's application, at which time counsel reiterated that the court had erred in failing to treat the issue as one arising under the Confrontation Clause.

ANALYSIS

The appellate briefs concentrate on the propriety of the trial court's resort to the past recollection recorded exception to the hearsay rule as a basis for the admission of Woods's grand jury testimony. Defendant's discussion of the statutory grounds

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[1] While the propriety of this ruling is not before us, it has been observed that even accepting the People's position that their witness is not being impeached, the evidence is excludable under the rule precluding the use of prior testimony "in a manner that discloses its contents to the trier of the facts" (*People v Rudd*, 125 AD2d 422, 425 [2d Dept 1986], quoting CPL 60.35[3]).

for receipt of prior testimony is confined to a passing reference to CPL 60.35 and the Legislature's hostility to the admission of the grand jury testimony of a forgetful witness. In a footnote, defendant asserts that admission of Woods's testimony is not authorized by any other hearsay exception, including "the exception for former testimony" under CPL 670.10 (citing *People v Green*, 78 NY2d 1029 [1991]). The People's brief is devoid of any discussion of the pertinent statutes.

It should be noted that defendant's allusion to legislative hostility to the use of grand jury testimony in criminal proceedings is accurate. Procedural rules prevent its admission into evidence where, as here, the witness is available for cross-examination (CPL 60.35) and, contrariwise, where the witness is not available for examination (CPL 670.10), reflecting a policy best regarded as encompassing. CPL 670.10 ("Use in a criminal proceeding of testimony given in a previous proceeding; when authorized") allows for the receipt of "testimony given by a witness at (a) a trial of an accusatory instrument or (b) a hearing on a felony complaint conducted pursuant to section 180.60, or (c) an examination of such witness conditionally" under article 660, where the witness is unavailable due to "death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot

with due diligence be brought before the court." However, the Court of Appeals has construed the provision to be the legislative expression of the exclusive classes of prior testimony that can be admitted in a criminal action as evidence in chief. "Largely a codification of common law" (*People v Arroyo*, 54 NY2d 567, 569 [1982], *cert denied* 456 US 979 [1982]), the statute is an "exception to the Sixth Amendment right of confrontation" (*People v Diaz*, 97 NY2d 109, 114 [2001]), providing "three carefully worded and enumerated exceptions" for prior testimony (*People v Harding*, 37 NY2d 130, 134 [1975]).

It is clear from case law that prior testimony is generally inadmissible as hearsay unless it satisfies the requirements of CPL 670.10 (*People v Ayala*, 75 NY2d 422, 428 [1990]) and that the three categories of prior proceedings, designated therein, that may be received into evidence are exclusive (*id.* at 429, citing *Harding*, 37 NY2d at 133-134; *People v Gonzalez*, 54 NY2d 729 [1981]). In *Ayala*, the People introduced a redacted version of testimony given at a *Wade* hearing by an eyewitness who had since become unavailable. The Court of Appeals concluded that CPL 670.10 should be strictly construed and confined to "the three categories of prior proceedings delineated in the statute, i.e., felony hearings, article 660 conditional examinations and trials of accusatory instruments" (75 NY2d at 428). The opinion goes on

to note that, unlike the felony hearing, the conditions necessary to promote vigorous cross-examination do not exist at a *Wade* hearing, which might not adequately explore – or even reach – substantive trial issues. And because no jury is present and the defendant's guilt is not being assessed, counsel might pursue strategies prejudicial to his or her client's interests, fail to interpose objections to testimony by the People's witnesses or delve into facts tending to implicate the client in the crime (*id.* at 429-430). The decision further emphasizes that the opportunity for adequate cross-examination at the prior proceeding is "an *additional*, constitutional requirement for the admissibility of prior testimony that otherwise satisfies CPL 670.10; it is not a substitute for the satisfaction of the clear statutory terms" (*id.* at 430).

It is abundantly plain that "Grand Jury proceedings are not encompassed within the statute" (*People v Robinson*, 89 NY2d 648, 652 [1997]) for similar reasons. As stated in *People v Geraci* (85 NY2d 359, 368 [1995]):

> "[H]earsay evidence such as the Grand Jury testimony at issue here is especially troubling because 'although given under oath, [it] is not subjected to the vigorous truth testing of cross-examination' [quoting, inter alia, *United States v Thevis*, 665 F2d 616 (8th Cir 1982), *cert denied*, 456 US 1008, 458 US 1109, 459 US 825 (1982)]. Furthermore, Grand Jury testimony is often obtained

> through grants of immunity, leading questions and reduced attention to the rules of evidence--conditions which tend to impair its reliability."

It is settled that grand jury testimony may not be used under the circumstances presented by the instant matter. *People v Green* (78 NY2d 1029 [1991]) cited by defendant (albeit in a footnote), is directly on point. There, a nine-year-old boy who had witnessed a murder identified the defendant from a lineup as a participant in the crime. By the time of trial, however, the witness professed a complete loss of memory regarding the events and, over objection, the court received his grand jury testimony into evidence. This Court affirmed the conviction (159 AD2d 432 [1990]), reasoning that the right of confrontation is not denied if the witness whose prior testimony is admitted is available for cross-examination at trial – precisely the rationale embraced by the majority and the trial court herein.

In a succinct reversal, the Court of Appeals remanded the matter for a new trial, stating:

> "The Grand Jury testimony of an eyewitness to the crime, which identified defendant as one of the perpetrators, did not fall within the classes of prior testimony rendered admissible in criminal proceedings by CPL 670.10. Inasmuch as the statute's 'three carefully worded and enumerated exceptions' are exclusive (*People v Harding*, 37 NY2d 130, 134; *see*, *People v Ayala*, 75 NY2d 422, 429), the trial court erred in

> allowing the witness' prior testimony to be admitted as evidence-in-chief against the defendant. Under the circumstances of this case, in which identification was the central issue, we cannot conclude that the error was harmless" (*Green*, 78 NY2d at 1030).

The statute expressly addresses the use of prior testimony "otherwise admissible" (CPL 670.10[1]), and since prior testimony usable as evidence in chief under the statute does not include grand jury testimony (CPL 670.10[2]), the availability of a hearsay exception rendering it "otherwise admissible" does not overcome the statutory exclusion. Further, while the witness was available for cross-examination *at trial*, which is acceptable under federal law (*Crawford*, 541 US at 59, n 9), it contravenes state law requiring an opportunity for cross-examination during the prior proceeding (*Ayala*, 75 NY2d at 430 [construing the opportunity for cross-examination as "an *additional*, constitutional requirement" for the receipt of testimony otherwise satisfying CPL 670.10]). As Woods's grand jury testimony was the only evidence against defendant, the error was not harmless. Thus, the matter is indistinguishable from *Green*.

While acknowledging that CPL 670.10 is an "exception to a defendant's right of confrontation" and stating that it does not bar the use of Woods's grand jury testimony as evidence in chief, the majority resorts to federal case law to conclude that "CPL

670.10 is inapplicable." It further opines that this Court should not consider CPL 670.10 in deciding this appeal because defendant made no mention of the statute in asserting his objection to the admission of Woods's prior testimony at trial.

Since defendant based his objection to the evidence on the abridgment of his right of confrontation and because that right is governed by statute in this state, it would seem that we have not only the latitude but the duty to take judicial notice "without request" of provisions pertaining to matters necessary to the disposition of an appeal (CPLR 4511[a]). Furthermore, the existence of a state statute renders federal case law inapposite to the extent that the state-law provision extends greater protection to a defendant's right to confront witnesses against him than the Sixth Amendment, as construed by the United States Supreme Court. State law mandates that the right to confront the witness be available at the time testimony is taken so as to ensure its reliability (*see Geraci*, 85 NY2d at 368). This state right of confrontation is not diminished by federal case law deeming the availability of the witness for cross-examination at the time the testimony is introduced at trial to be sufficient to protect the defendant's confrontation right as a matter of federal constitutional interpretation (*e.g. Crawford*, 541 US at 68). Moreover, defendant's right of confrontation could not be

protected even with the availability of Woods for cross-examination, because by the time of trial he no longer recalled, with specificity, the events in issue.

The majority's analysis proceeds on the tenuous proposition that CPL 670.10 "does not bar the admission of prior testimony which is otherwise independently admissible under a recognized exception to the hearsay rule" (quoting *People v Rose*, 224 AD2d 643, 643 [2d Dept 1996]). This sweeping declaration is predicated on a line of cases holding that grand jury testimony may be introduced against a defendant where the testimony constitutes a declaration against penal interest (*People v Rodriguez*, 191 AD2d 597, 598 [2d Dept 1993], *lv denied* 82 NY2d 725 [1993]; *People v Koestler*, 176 AD2d 1207, 1208 [4th Dept 1991]; *see also People v Rodriguez*, 73 AD3d 815, 816 [2d Dept 2010] [dictum]; *cf. People v Gardner*, 237 AD2d 895 [4th Dept 1997] [testimony from prior trial], *lv denied* 90 NY2d 893 [1997]). The Second Department cited, in support of its pronouncement, *People v Morgan* (151 AD2d 221, 224 [4th Dept 1989], *affd* 76 NY2d 493 [1990]). However, in affirming *Morgan*, the Court of Appeals restricted its analysis to the question of whether the testimonial statement admitted truly qualified as an admission against penal interest, agreeing that it did not. Significantly, the Court went on to state, "We do not decide the

question whether Grand Jury testimony can qualify for this hearsay exception" (*id.* at 499). Thus, the Court of Appeals has not recognized even the declaration against penal interest exception to the hearsay rule, much less each and every other such exception, as a permissible basis for the receipt of a witness's grand jury testimony as evidence in chief.

As to preservation of the issue upon review, it is acknowledged that defendant cites *Green* in his brief for the proposition that "the exception for former testimony" under CPL 670.10 does not authorize the receipt of Woods's prior grand jury testimony. The majority finds *Green* to be distinguishable on the ground that Woods did not sustain a total memory loss and was available to testify at trial; thus, he was not "unavailable" as provided under the statute, which the majority concludes is therefore inapplicable.

Significantly, the Court of Appeals did not consider the availability of the child witness in *Green* to preclude applying the statute to dispose of the appeal. That the Court of Appeals did not arrive at its decision by simply finding the statute to be facially inapplicable, as the majority proposes, merely illustrates that CPL 670.10 is considered to be a reflection of state policy on the use of prior testimony in criminal proceedings. Indeed, this Court's own jurisprudence supports the

application of *Green* to factually identical circumstances in which the witness, likewise available for examination at trial, portrayed an inability, if not outright refusal, to testify (*People v Concepcion*, 228 AD2d 204, 205 [1st Dept 1996] [construing the attempt to equate the inability to testify with unavailability under the statute as "a rather dubious proposition"]). As we stated in *Concepcion*, "[T]he only recognized exception to the common-law rule barring the admission of prior Grand Jury testimony in a criminal prosecution [is] where the defendant's own misconduct has procured the witness's unavailability at trial" (*id.*). We found that the stated exception was inapplicable and that the introduction of the "Grand Jury testimony on the People's direct case, which raised hearsay and Confrontation Clause issues, was in clear violation of the limited statutory authorization for the use of prior testimony" (*id.*). Thus, I conclude that I am breaking no new ground by invoking CPL 670.10 and *Green* to resolve this appeal, in which a Confrontation Clause issue is clearly presented.

While unnecessary to the disposition of this appeal, it should be noted that the function of the past recollection recorded doctrine is not as extensive as the People presume. Even when properly admitted, a memorandum received as past recollection recorded "is not independent evidence" but merely

"supplementary to the testimony of the witness," at trial, who caused the memorandum to be recorded, and the testimony and the memorandum's contents "are to be taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge" (*People v Taylor*, 80 NY2d 1, 9 [1992]). In the matter before us, Woods failed to provide the requisite supporting trial testimony, and his grand jury testimony cannot stand on its own, even if it could be received into evidence.

The cases cited by the majority in support of the conclusion that, assuming a proper foundation, "grand jury testimony may be admitted as past recollection recorded," cannot be reconciled with *Green* and *Concepcion*, nor with the strict construction afforded to CPL 670.10 as reflected in *Robinson*, *Ayala*, *Gonzalez* and *Harding*, all of which declined to extend the statute to embrace testimony taken in the course of proceedings not specified in the statute. For instance, in *People v Linton* (21 AD3d 909, 909-910 [2d Dept 2005], *lv denied* 5 NY3d 854 [2005]), which was also relied upon by the trial court, a "shooting was witnessed by several individuals who testified at trial." There, "[t]he record did not establish that the victim refused to testify, but rather, at the time of the trial, he no longer remembered the details of the shooting," and his grand jury

testimony was received "to supplement his in-court testimony" (*id.* at 910). Significantly, the *Linton* decision does not mention CPL 670.10; nor does it cite any authority that would support the admission of grand jury testimony under a common-law exception to the hearsay rule. In the alternative, the Second Department held that any error "was harmless beyond a reasonable doubt" in view of "the uncontradicted testimony of the two eyewitnesses" (*id.*). In *People v Holmes* (291 AD2d 247, 248 [2002], *lv denied* 98 NY2d 676 [2002]), this Court likewise endorsed the receipt of grand jury testimony as past recollection recorded.[2] We similarly found, in the alternative, that "this evidence could not have caused the defendant any prejudice because it was entirely cumulative to the testimony of other witnesses" (*id.* at 248). The conclusion reached in these cases in regard to admissibility fails to distinguish between the non-testimonial nature of the evidence admitted in such cases as *People v Taylor* (80 NY2d 1 [1992], *supra* [telephone message taken by a detective]), cited in *Linton*, and *People v Lewis* (232 AD2d 239 [1st Dept 1996], *lv denied* 89 NY2d 865 [1996] [undercover police officer's buy report]), cited in *Holmes*, and the testimonial evidence before the Appellate Division in each matter

[2] The decision does not disclose the circumstances under which the prior testimony was admitted.

(*see also People v Turner*, 21 AD2d 445 [2d Dept 1994] [citing *Taylor*], *lv denied* 85 NY2d 915 [1995]).

With respect to past recollection recorded generally, the Court of Appeals has made plain that the rationale underpinning the doctrine is that the recorded information is essential and that "when the conditions for admission have been met, there is sufficient assurance of the accuracy of the recordation and its trustworthiness" (*Taylor*, 80 NY2d at 8-9). It is apparent that the testimony improperly received by the trial court fails to meet the requirement of trustworthiness and should not have been admitted. As reflected by both governing statutory and case law, grand jury testimony is regarded as inherently unreliable – precisely due to the lack of opportunity to confront the witness (*Geraci*, 85 NY2d at 368). Thus, it is unnecessary to reach the issue of whether Woods's recollection of events possesses the requisite assurance of reliability. Although the passage of time between an event and its recordation is certainly one factor bearing upon reliability, memory is highly idiosyncratic. While some people cannot remember what they ate for breakfast, others can recall what they had for a given meal on a given date a decade in the past, along with who was present, what was discussed and what transpired before and afterwards (an ability clinically known as hyperthymesia or highly superior

autobiographical memory). Reliability should be the touchstone of a court's evaluation of trustworthiness predicated on such factors as the witness's ability to recall events, the notoriety of the events at issue and their significance to the witness. Here, given Kerik's well known status, his constant visibility in the media throughout the years from when the renovation work began up to the time of Woods's grand jury testimony and the publicity storm generated when Kerik's apartment renovations came to light, the events of the Kerik renovations should have been fairly fresh in Woods's mind during his grand jury testimony, even though the work was performed six years earlier. The factual circumstances tend to support the finding of the trial court that Woods was feigning an inability to recall the events in issue. Thus, I do not favor the imposition of an arbitrary limit on the time at which the memorandum is recorded, as alluded to by the majority, but rather consideration of all of the relevant circumstances in the assessment of its reliability.

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

ENTERED: FEBRUARY 24, 2015

CLERK