SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 26, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Renwick, DeGrasse, Manzanet-Daniels, Gische, JJ.

14015N In re Pedro Luis Sosa, Index 300415/13
Petitioner-Respondent,

-against-

The City of New York,
Respondent-Appellant.

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Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered March 19, 2013, which granted petitioner Pedro Luis Sosa's motion for leave to serve a late notice of claim, unanimously affirmed, without costs.

In this action for personal injuries allegedly suffered by petitioner when he was involved in a multi-vehicle accident, although petitioner failed to proffer a reasonable excuse for his delay in timely serving a notice of claim, he has demonstrated

that respondent had actual notice of the essential facts constituting his claim (*see Thomas v City of New York*, 118 AD3d 537 [1st Dept 2014]; *Porcaro v City of New York*, 20 AD3d 357, 358 [1st Dept 2005]). The accident reports of the police department and the records from its Accident Investigations Squad, which include a witness statement from a Department of Sanitation supervisor, sufficiently connected the accident to the City's negligence in maintaining the road. The reports, which show that the incident was caused by an icy condition on the roadway, sufficiently apprised the City of petitioner's negligence claim against it (*see Matter of Strauss v New York City Tr. Auth.*, 195 AD2d 322, 322-323 [1st Dept 1993]; *Matter of Gerzel v City of New York*, 117 AD2d 549, 551 [2d Dept 1986]; *Matter of Annis v New York City Tr. Auth.*, 108 AD2d 643, 644-645 [1st Dept 1985]).

Further, any alleged prejudice is undermined by the police department's contemporaneous investigation, which included interviewing witnesses and taking photographs of the location as it existed at the time of the accident (*Matter of Caridi v New York Convention Ctr. Operating Corp.*, 47 AD3d 526 [1st Dept 2008]). Although the City might be prejudiced by a delay in seeking witnesses who are knowledgeable about the road maintenance procedures at the time of the accident, road

inspection and maintenance records from the Department of Sanitation are available (*see Matter of Connaughton v New York City Tr. Auth.*, 301 AD2d 389 [1st Dept 2003]).

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Mazzarelli, Friedman, Richter, Manzanet-Daniels, JJ.

5707-5708 [M-6240 & 6241]

The People of the State of New York,
Respondent,

-against-

Vincent Barone,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

V. Reddy Kancharla,
Defendant-Appellant.

Ind. 5248/08

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Baker Botts LLP, New York (Andrew M. Lankler of counsel), for Vincent Barone, appellant.

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

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

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On remittitur from the Court of Appeals (23 NY3d 294 [2014]), judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 26, 2010, convicting defendant Vincent Barone, after a jury trial, of enterprise corruption, attempted grand larceny in the third degree, two counts of scheme to defraud in the first degree and nine counts of offering a false instrument for filing in the first degree, and sentencing him to an aggregate term of 5 1/3 to 16 years, as previously

modified (101 AD3d 585 [1st Dept 2012]) to the extent of directing that certain sentences be served concurrently, unanimously modified further, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the enterprise corruption conviction to a term of 1 1/3 to 4 years, resulting in a new aggregate term of 1 1/3 to 4 years, and otherwise affirmed. Judgment, same court and Justice, rendered April 7, 2010, convicting defendant V. Reddy Kancharla, after a jury trial, of enterprise corruption, two counts of scheme to defraud in the first degree, nine counts of offering a false instrument for filing in the first degree and three counts of falsifying business records in the first degree, and sentencing him to an aggregate term of 7 to 21 years, as previously modified (*id.*) to the extent of vacating certain convictions of offering a false instrument for filing and directing that certain sentences be served concurrently, unanimously modified further, as a matter of discretion in the interest of justice, to the extent of reducing the sentence on the enterprise corruption conviction to a term of 1 1/3 to 4 years, resulting in a new aggregate term of 1 1/3 to 4 years, and otherwise affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50 (5) as to both defendants and proceedings in accordance with the stipulation of the parties regarding financial liability.

Defendants concede that the verdict is not against the weight of the evidence.

M-6240 &
M-6241 - People v Barone & Kancharla,

Motions to withdraw appeal denied as academic.

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

ENTERED: JANUARY 26, 2015

CLERK

Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12797 CIFG Assurance North America, Inc., Index 654028/12
Plaintiff-Appellant-Respondent,

-against-

Bank of America, N.A., et al.,
Defendant-Respondent-Appellant.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about October 1, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 5, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13385 The People of the State of New York, Ind. 424/10
Respondent,

-against-

Jorge Beato,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), and DLA Piper LLP (US), New York (Robert W. Ferguson of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered January 24, 2011, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree (two counts) and criminal possession of a controlled substance in the third degree, and sentencing him to an aggregate term of one year, affirmed.

The Confrontation Clauses of the United States and New York Constitutions (US Const 6th, 14th Amends; NY Const, Art I, §6) prohibit testimonial evidence of statements made by an out of court declarant, unless the witness is unavailable to testify at trial and the defendant had a prior opportunity for cross-examination (*Crawford v Washington*, 541 US 36, 59 n 9 [2004]). Where, however, the testimonial statements are being used for

purposes other than establishing the truth of the matter asserted, they may be admitted. This includes hearsay statements that are admitted for the purpose of completing a narrative and explaining police actions to prevent jury speculation (*Tennessee v Street*, 471 US 409, 415 [1985]; *People v. DeJesus*, 105 AD3d 476, 476 [1st Dept 2013], *lv granted* 22 NY3d 1198 [2014]).

In this observation sale case, an officer testified that two of the persons who made apparent drug purchases from defendant and his alleged accomplices told the officer that they had, in fact, purchased drugs but had swallowed and thereby disposed of them. These claimed purchasers were never identified by name. Although the court instructed the jury that the statements of the otherwise unidentified buyers were not being received in evidence for their truth, but only to explain police actions, the facts of the case did not warrant any such explanation (*compare e.g. People v Rivera*, 96 NY2d 749, 759 [2001]). We reject the People's argument that this evidence tended to explain why the police arrested defendant and his codefendants at a particular point in time. The jury was well aware that the police made the arrests after observing a series of apparent drug sales. The timing of the arrests was not at issue, and there was nothing mysterious about the unfolding events that could have led to speculation by the jury. Thus, the nonhearsay purpose of the

evidence was barely relevant, and any probative value was plainly outweighed by the danger that, regardless of the court's limiting instruction, the jury would treat the nontestifying buyers' statements as proof that drug selling had, in fact, occurred (*see United States v Reyes*, 18 F3d 65, 70-71 [2d Cir 1994]).

We likewise reject the People's argument that the statements were not testimonial for Confrontation Clause purposes. The circumstances objectively indicated that the primary purpose of the police interrogation of the two alleged buyers was "to establish or prove past events potentially relevant to later criminal prosecution" (*Davis v Washington*, 547 US 813, 822 [2006]), and there was nothing that even remotely resembled an "ongoing emergency" that would qualify the buyers' statements as nontestimonial (*id.*).

Nevertheless, we find that the error was harmless beyond a reasonable doubt. Confrontation Clause violations are subject to a constitutional harmless error analysis (*People v Hardy*, 4 NY3d 192, 198 [2005]), and a review of the entire record demonstrates that the that there is no reasonable possibility that the error might have contributed to the conviction (*People v Crimmins*, 36 NY2d 230, 237 [1975]).

Even without the hearsay statements, there was overwhelming evidence that defendant acted in concert with his codefendants to

commit the crimes for which he was convicted. The information leading to defendant's arrest was obtained by an investigatory team of seven police officers that surveilled defendant's and codefendants' activities over the course of several hours. Officers observed defendant crouched down as he placed something inside a fence. A Ziploc bag containing drugs was later recovered from the approximate location by the fence where defendant had been seen. The evidence also showed defendant speaking with codefendants, Guny Nunez and Edgar Blanco, for approximately twenty minutes as the three men huddled around a backpack, later found to contain 2.479 grams of crack. Defendant was observed speaking with individuals who approached him and then directing them by nodding and pointing towards Blanco. Blanco was then observed retrieving an item from the spot in the fence where defendant had previously concealed something, handing it to the suspected buyers and receiving something in exchange. Based on their observations, the officers stopped suspected purchasers. One person was found to have a Ziploc containing crack on the roof of his mouth. Another man was found with drug paraphernalia, still warm from recent use. The last suspected buyer was stopped after the police observed him hand Blanco something in exchange for something Blanco removed from the fence. The suspected buyer was found carrying six Ziploc bags

containing crack cocaine. As the events were ongoing, defendant approached Blanco several times and was observed alerting the codefendants as officers converged on the scene. In addition, while we do not believe the court should have admitted the out of court declarations made by two other alleged buyers into evidence at all, the court instructed the jury that their statements could not be considered for their truth. Under these circumstances, there is no reasonable possibility that the improperly admitted hearsay statements contributed to the conviction.

We also find that the verdict was based on legally sufficient evidence and was not against the weight of the evidence. We have examined defendant's other arguments and find them unavailing.

All concur except Tom, J.P. who concurs in a separate memorandum as follows:

TOM, J.P. (concurring)

It is beyond dispute that the evidence against defendant was sufficient to support his conviction and that the verdict was not against the weight of the evidence. The only question is whether defendant's rights under the Confrontation Clause were infringed by the introduction of hearsay testimony. Because the hearsay testimony was received to avoid misleading the jury and to complete the narrative in order to deter jury speculation, it does not implicate the right of confrontation. In any event, the evidence was merely cumulative, and any error in its admission was harmless.

Testimony was received from eight police officers and their sergeant, all of whom were members of the 30th Precinct Conditions Team assigned to monitor activity in the vicinity of 147th Street between Amsterdam Avenue and Broadway in Manhattan. On the date of his arrest, defendant was observed, at approximately 4:40 A.M., exiting a building and walking to a nearby chainlink fence, where he lifted up some mesh material, bent down, and placed something inside the fence. Defendant was then observed on the corner of 147th Street and Amsterdam Avenue in the company of codefendant Edgar Blanco when a third man, codefendant Guny Nunez, drove up. The three were seen standing over a backpack placed on the pavement.

After the three men separated, members of the team saw defendant direct five or more persons toward the location of the chainlink fence, where Blanco reached into the fence and retrieved something very small and gave one to each person, who in turn gave something to Blanco. Over a six-hour period, officers stopped a number of apparent buyers but found no drugs in their possession. Sergeant Nicholson testified that when he learned from two such persons that they had purchased drugs and swallowed them before police could intervene, he directed the team to move in right away on the next buy, before the individuals got a chance to discard the narcotics. When the next buyer, Jose Gomez, was observed making a purchase, the team surrounded the three suspects and Gomez, placing them under arrest. Gomez was found to be in possession of five small Ziploc bags containing what was later identified as crack cocaine. Also arrested was Ronald White, who was found to be carrying a crack pipe and a metal push rod (used to insert the crack into the pipe). The arresting officer believed the pipe had just been smoked; however, no drugs were recovered from White's person.

The team recovered $80 from Blanco, as well as $551 from Nunez and the backpack in which a bag containing just under 2.5 grams of unprocessed crack cocaine was found. After everyone was placed under arrest, Nicholson and Valerio searched the fence in

the vicinity of where defendant initially placed something and recovered a Ziploc bag containing crack.

The sergeant's testimony was followed by that of Officer Valerio, who assisted the sergeant in intercepting suspected buyers. The officer explained that no drugs were recovered from several individuals who were stopped. The officer stated that when he directed one of the individuals to open his mouth, a Ziploc bag could be seen "on the roof of his mouth." The individual then immediately closed his mouth and swallowed it.

Defendant contends that his right to confront witnesses was abridged when the police sergeant was permitted to testify that two persons suspected of buying drugs told him that "they had purchased narcotics" and "they had swallowed the drugs." The People assert that the sergeant's testimony merely completed the narrative by explaining why, when team members stopped and searched persons observed to be interacting with defendant and engaging in transactions with Blanco, no drugs were found, and why the police then decided to converge on the suspected sellers immediately after they engaged in the transaction with Gomez.

It is settled that even evidence that is testimonial in nature may be used "for purposes other than establishing the truth of the matter asserted" (*Crawford v Washington*, 541 US 36, 59 n 9 [2004]), such as completing the narrative, explaining

police actions, and preventing jury speculation (*see Tennessee v Street*, 471 US 409 [1985] [accomplice's confession properly received in rebuttal]; *People v DeJesus*, 105 AD3d 476 [1st Dept 2013], *lv granted* 22 NY3d 1198 [2014] [evidence concerning course of police investigation]). Here, the sergeant's testimony regarding what he learned from suspected purchasers served to explain why the police decided to immediately effect the arrest of the sellers when Gomez made his purchase, and not earlier when prior suspects were stopped, thus deterring speculation that the surveillance team was merely harassing innocent passersby and bystanders. In any event, the identical explanation for the lack of drugs found on persons apparently engaging in drug transactions was adduced from Officer Valerio. His account of observing a Ziploc bag being swallowed by a suspected purchaser is subject to only one interpretation – that the suspect was disposing of recently acquired narcotics. Thus, the hearsay testimony received from the sergeant – that two persons he intercepted said that "they had purchased narcotics" and "they had swallowed the drugs – which the majority finds so prejudicial, did no more than give expression to the obvious conclusion to be deduced from Officer Valerio's first-hand account – that the purchasers were disposing of the Ziploc bags in some expedient manner before police could intercept them,

thereby prompting the surveillance team to immediately apprehend the sellers in the course of the next transaction.

The sergeant's testimony is not rendered prejudicial merely because it does not support defendant's theory that there were no drug sales taking place. The worst that may be said is that given Officer Valerio's testimony, the sergeant's testimony was cumulative; thus, any error in its admission was harmless (*see People v Rawlins*, 37 AD3d 183, 184-485 [1st Dept 2007], *affd* 10 NY3d 136 [2008], *cert denied* 557 US 934 [2009]). The sergeant's testimony was "coupled with proper limiting instructions" (*People v Resek*, 3 NY3d 385, 389 [2004]) and served to complete the narrative. It was relevant to both the offense (*cf. People v Green*, 35 NY2d 437 [1974] [evidence of previous unrelated drug complaint irrelevant and prejudicial]) and a contested issue in the case (*see People v Alvino*, 71 NY2d 233, 241 [1987] [previous drug crimes admissible to establish intent]), and was not prejudicial (*cf. People v Cook*, 42 NY2d 204, 208 [1977] [error to

allow testimony regarding uncharged rape irrelevant to burglary charge but error was harmless]).

Accordingly, the judgment should be affirmed.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Clark, Kapnick, JJ.

13630 Mark C. Denison, as Executor and Beneficiary of the Estate of Erika Pozsonyi, Deceased,
Plaintiff-Appellant,

-against-

Anthony Pozsonyi,
Defendant-Respondent,

107 West 86th Street Owners Corporation, et al.,
Defendants.

Index 156362/12

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Gail M. Blasie, PC, Garden City (Gail M. Blasie of counsel), for appellant.

Cooperman Lester Miller LLP, Manhasset (Lynda J. Goldfarb of counsel), for respondent.

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Amended order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 13, 2013, which, to the extent appealed from as limited by the briefs, granted so much of defendant Anthony Pozsonyi's cross motion for summary judgment as sought a declaration on plaintiff's claims and defendant's first counterclaim, and declared that defendant Pozsonyi is the sole owner of the subject cooperative apartment and that plaintiff has no interest in the apartment, unanimously affirmed, with costs.

Plaintiff, the widower of decedent, seeks a declaration that, pursuant to EPTL 5-1.4(c), the shares of the cooperative apartment in which he resided with decedent for nearly 20 years

were owned by decedent and her former husband, defendant Pozsonyi, as tenants in common, so that decedent's estate is entitled to a 50% interest in the shares. Prior to their divorce, decedent and Pozsonyi entered into a Separation Agreement in which they agreed, among other things, that decedent had the exclusive right to live in the apartment during her lifetime and that Pozsonyi would transfer the shares to be held by them as joint tenants with right of survivorship. The Separation Agreement further provided that the shares could be sold only upon the other party's consent, and that Pozsonyi would be entitled to the net proceeds of any sale during decedent's lifetime. The shares were issued to both of them with right of survivorship, and the Separation Agreement survived and was not merged into the subsequent judgment of divorce.

The court properly determined that, given the express terms of the Separation Agreement, EPTL 5-1.4(c), as amended in 2008, did not operate to convert the ownership of the subject cooperative apartment shares from joint tenancy with rights of survivorship to a tenancy in common. The record evidence failed to raise an issue of fact as to whether the right of survivorship in the ownership of the property was terminated (*cf. Estate of Menon v Menon*, 303 AD2d 622, 622-623 [2d Dept 2003]).

Plaintiff belatedly makes an application for relief with respect to an order to show cause dated February 3, 2013, and we decline to consider it.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Andrias, Manzanet-Daniels, Gische, JJ.

13792 Akira Nakasato, Index 103045/09
Plaintiff-Respondent,

-against-

331 W. 51st Corp, et al.,
Defendants-Appellants.

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Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas P. Hurzeler of counsel), for 331 W 51st Corp, appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Jennifer Lewkowski of counsel), for Eleben Yau-Mei Wong, appellant.

Kramer & Dunleavy, LLP, New York (Lenore Kramer of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered March 19, 2014, which, after a jury trial, granted plaintiff's motion to set aside the verdict as an impermissible compromise and ordered a new trial on all issues, denied defendants' motions for a directed verdict, and denied defendant 331 W. 51st Corp's cross motion for a judgment notwithstanding the verdict dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was severely injured in a restaurant and bar when he fell down a staircase. The staircase had no upper landing and was separated from the public space only by a door that opened inwardly. The restaurant and bar was operated by defendant-

tenant, 331 W. 51st Corp, in a building owned by codefendant Wong. There were no eyewitnesses to the accident and plaintiff, who suffered extensive brain and spinal injuries as a result, testified that he had no memory of the incident. Consequently, plaintiff relied on other evidence to establish his case.

After plaintiff rested, both defendants moved for a directed verdict. The court reserved decision. At the conclusion of trial, the jury commenced deliberations, during which time it submitted two notes to the court. The first note requested clarification on the definition of negligence. The second note informed the court that the jury was deadlocked 3-3 as to question #1 on the jury sheet, which asked whether 331 W. 51st Corp was negligent. It also stated that the jury was unable to apportion fault "attributable to both defendant or plaintiff." In response, the court defined negligence for the jury and directed that deliberations resume in an effort to reach a verdict. Approximately 90 minutes later, the jury returned with its verdict. The jury found that 331 W. 51st Corp was negligent and that its negligence was a substantial factor in causing the accident. The jury found that codefendant Wong was not negligent. Nevertheless, in disregard of the instructions on the jury verdict sheet, it went on to also find that Wong's actions were not a substantial factor in causing plaintiff's injuries.

The jury further determined that plaintiff was negligent and that his conduct was a proximate cause of the accident. Liability was then apportioned 75% as to plaintiff and 25% as to 331 W. 51st Corp. Plaintiff was awarded $88,797.27 for past medical expenses, as stipulated by the parties prior to trial. No other damages were awarded to plaintiff for either past or future economic or non-economic loss.

Plaintiff made a motion to set aside the verdict pursuant to CPLR 4404(a), seeking a new trial on all issues, arguing that the verdict was the product of an impermissible jury compromise. Defendants opposed the motion and 331 W. 51st Corp cross-moved for a judgment notwithstanding the verdict, arguing that no rational jury could find that 31 W. 51st Corp's actions caused plaintiff's accident. The court granted plaintiff's motion to set aside the jury verdict as a compromise and ordered a new trial as to all issues and all parties, but denied defendants' motions for a directed verdict, and denied defendant 331 W. 51st Corp's cross motion for a judgment notwithstanding the verdict. Both defendants appealed.

The trial court properly denied defendants' motions for a directed verdict and 331 W. 51st Corp's cross motion to set aside the verdict. A motion for a directed verdict should only be granted when there is no rational process by which a finder of

fact could find in favor of the non-moving party (*Sorrentino v Fireman*, 13 AD3d 122, 125 [1st Dept 2004]). A jury verdict should not be set aside unless it could not have been reached by any fair interpretation of the evidence (*McDermott v Coffee Beanery Ltd.*, 9 AD3d 195, 206 [1st Dept 2004]). Here, the evidence adduced at trial, both direct and circumstantial, was sufficient to support a finding that 331 W. 51st Corp's negligence proximately caused plaintiff's injuries (*see Schneider v Kings Hwy Hosp. Ctr.*, 67 NY2d 743, 744 [1986)]; *Reed v Piran Realty Corp.*, 30 AD3d 319 [1st Dept 2006], *lv denied* 8 NY3d 801 [2007]). There was evidence presented at trial that the stairway was dangerous because it had no landing and the door opened inward. The proprietors and employees of 331 W. 51st Corp testified that it was the lounge's policy to keep the cellar door locked at all times to prevent patrons from entering the cellar. Employees had keys for the door and were instructed to unlock and re-lock it whenever they went down to the cellar. The evidence further supported a finding that the door was unlocked at the time of the incident. In addition, there was evidence in the record that no appropriate warning sign was placed on or adjacent to the cellar door. The bartender's testimony that he heard a loud series of thumps apparently coinciding with plaintiff's fall down the staircase, and that plaintiff was found lying at the

bottom of the stairwell immediately thereafter, was proper evidence relied upon by the jury in reaching its conclusion.

Plaintiff was not required to exclude every other possible cause of the accident in order to meet his burden (*Cisse v SFJ Realty Corp.*, 256 AD2d 257, 258 [1st Dept 1998]). 331 W. 51st Corp's argument that plaintiff's intoxication was the cause of the accident discounts that there may be more than one proximate cause of an accident (see *Hagensen v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, 108 AD3d 410 [1st Dept 2013]) and that the jury appropriately accounted for plaintiff's comparative negligence by attributing 75% of the fault to him.

Notwithstanding our conclusion that the jury finding of liability against 331 W. 51st Corp has support in the record, we also believe the trial court correctly set aside that verdict and ordered a new trial. The failure of the jury to award damages beyond reimbursement of medical expenses, despite the severity and permanency of plaintiff's injuries, supported the trial court's conclusion that the jury rendered an impermissible compromise verdict (*Rivera v City of New York*, 253 AD2d 597, 600 [1st Dept 1998]). In cases involving seriously injured plaintiffs, where issues of liability are sharply contested, and the damages awarded are inexplicably low, the verdict is most likely the product of a jury compromise (*Farmer v A & T Bus Co.*,

Inc., 96 AD2d 783, 783-784 [1st Dept 1983], appeal dismissed 61 NY2d 670 [1983]). The crux of the prohibited trade off is that, "in addition to finding plaintiff partially responsible for the accident, the jury also compromised on liability and damages by finding the total amount for plaintiff's injuries much too low" (*Woods v J.R. Liqs.*, 86 AD2d 546, 547 [1st Dept 1982]; see *Figliomeni v Board of Educ. of City School Dist. of Syracuse*, 38 NY2d 178 ,182 [1975]).

The issues of liability in this case were hotly contested at trial. Before rendering its verdict, the jury sent the court a note stating that it was deadlocked on the question of whether 331 W. 51st Corp was negligent. An hour and a half later, the jury emerged with a verdict finding that 331 W. 51st Corp was negligent and attributing 25% fault to that defendant. While the jury imputed some level of fault to 331 W. 51st Corp, the plaintiff was inexplicably awarded no damages for either past or future pain and suffering or economic loss, even though the severity and permanency of plaintiff's injuries was well-documented. Since the extensiveness of plaintiff's injuries cannot be reconciled with the absence of a damages award, the verdict reached by the jury was likely the outgrowth of a compromise, and a retrial is required (*Lamanna v Jankowski*, 52 AD3d 340, 341 [1st Dept 2008]). Contrary to the alternate

argument that any retrial should at most be limited to damages, we simply cannot know whether the compromise entailed the issue of liability, attribution of fault, the calculating of damages, or any combination thereof. The jury notes suggest that the compromise may have included the answer to question 1 on the verdict sheet. When there is a strong likelihood that the jury verdict resulted from some type of a trade off, retrial on all issues is mandated (*Moreno v Thaler*, 255 AD2d 195 [1st Dept 1998]).

We also reject codefendant Wong's argument that there was no compromise as to him because he was found non-negligent. It is unclear at what point in the deliberations the compromise occurred and the jury notes suggest it may have even preceded consideration of Wong's negligence.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14018 The People of the State of New York, Respondent, Ind. 3137/09

-against-

Santiago Gonzalez,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Samantha L. Stern of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered April 6, 2010, convicting defendant, after a jury trial, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations.

Although the victim could provide only limited information, the jury properly credited an officer's testimony that he had a full opportunity to observe this pickpocketing incident.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14019-
14019A-
14019B

Index 19704/88

In re Emma Torres, etc.,

- - - - -

Emma Torres,
Co-Conservator-Appellant,

-against-

Dara Freed, Executrix of the
Estate of Bernard Cohen,
Respondent,

Fidelity and Deposit Company of Maryland,
Respondent-Respondent.

- - - - -

Joel B. Mayer, Esq.,
Nonparty Respondent.

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Lisa Ayn Padilla, New York, for appellant.

Mait Wang & Simmons, New York (William R. Mait of counsel), for Fidelity and Deposit Company of Maryland, respondent.

Pollack, Pollack, Isaac & De Cicco LLP, New York (Brian J. Isaac of counsel), for Joel B. Mayer, respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about June 21, 2012, which, insofar as appealed from as limited by the briefs, confirmed a referee's report and ordered that the amount surcharged against the estate of former co-conservator Bernard Cohen not accrue interest until the date of entry of the order, unanimously modified, on the facts and in the exercise of discretion, to make interest run from October 3,

2008, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered on or about February 16, 2010, unanimously dismissed, without costs, as untimely. Appeal from decision, same court and Justice, entered on or about October 16, 2009, unanimously dismissed, without costs, as taken from a nonappealable paper.

"An appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry" (CPLR 5513[a]). Neither the record nor the supplemental record contains a final judgment (*see* CPLR 5501[a][1]); the June 2012 order does not bring up the earlier papers for review (*see Kleinser v Astarita*, 92 AD3d 518 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013]). The 2009 decision, which concludes, "Settle order," is a nonappealable paper (*Plastic Surgery Group of Rochester, LLC v Evangelisti*, 39 AD3d 1265, 1265-1266 [4th Dept 2007]).

The instant action is "of an equitable nature" (CPLR 5001[a]). It sought an accounting and led to the surcharge of a fiduciary, *viz.*, Cohen (*see Matter of Janes*, 90 NY2d 41, 55 [1997]; *Eighteen Holding Corp. v Drizin*, 268 AD2d 371 [1st Dept 2000]). Hence, the referee and the court had discretion to set the date from which interest shall be computed (*see* CPLR

5001[a]).

However, in the exercise of our independent discretion, which is as broad as Supreme Court's, we find that interest should run from October 3, 2008. The referee was concerned that no party made efforts to enforce the July 1999 and December 2005 orders against Cohen until this proceeding was commenced. Appellant filed her petition on October 3, 2008.

Even in an equitable action, we should consider whether "defendants wrongly withheld plaintiff's money" (*Eighteen Holding Corp.*, 268 AD2d at 372) and when a beneficiary suffered a loss (*see Matter of Gourary v Gourary*, 94 AD3d 672, 673-674 [1st Dept 2012]). Cohen wrongfully withheld Jose Torres, Jr.'s (Jose Jr.'s) money by taking excess commissions in the amount of $23,357.78 in 1994, causing $16,502.22 to disappear from the accounts of the conservatorship at some point between December 31, 1995 and November 12, 1999, and disobeying court orders with respect to those sums; similarly, Jose Jr. suffered a loss in 1994 and at some point between 1995 and 1999. If interest did not start to run until June 2012, Cohen's estate and his surety would enjoy a windfall (*see Love v State of New York*, 78 NY2d 540, 545 [1991]).

Appellant asks us to remand to Supreme Court for a hearing on the commissions and legal fees taken by Cohen and to order

that all such commissions and fees (as opposed to the $39,864 awarded by the court) be paid to Jose Jr.'s estate. However, when she moved to confirm the referee's report in part and reject it in part, appellant did not argue that the referee should have awarded commissions and fees beyond the amount that he actually awarded. She may not raise this argument for the first time on appeal.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14020 Enidia Perez De Sanchez, Index 310658/11
Plaintiff-Respondent,

-against-

Trevz Trucking LLC, et al.,
Defendants-Appellants,

Francisco A. Sanchez,
Defendant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellants.

Reardon & Sclafani, P.C., Tarrytown (Michael V. Sclafani of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered October 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendants-appellants' motion for an order compelling plaintiff to submit to an independent neurological examination after the note of issue was filed, unanimously affirmed, without costs.

Defendants failed to demonstrate that they conferred with plaintiff's counsel in a good faith effort to resolve the disclosure issues raised by the motion, or that there was "good cause why no such conferral ... was held" (Uniform Rules for Trial Cts [22 NYCRR] § 202.7[a][2], [c]; see *241 Fifth Ave. Hotel, LLC v GSY Corp.*, 110 AD3d 470, 471-472 [1st Dept 2013];

Martinez v 1261 Realty Co., LLC, 121 AD3d 955, 956-957 [2d Dept 2014]). Under the circumstances, including that defendants' orthopedic expert addressed all of plaintiff's claimed injuries in his report and examination, and the fact that plaintiff appeared twice for the scheduled examination but the defendants' expert refused to conduct the exam due to defendants' failure to have an interpreter present, the court providently exercised its discretion in determining that defendants waived their right to conduct a neurological examination by failing to make arrangements necessary to perform the exam within the extended deadline set by the compliance conference order (*see Colon v Yen Ru Jin*, 45 AD3d 359 [1st Dept 2007]; *Rosenberg & Estis, P.C. v Bergos*, 18 AD3d 218 [1st Dept 2005]).

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14021-
14022 Index 155762/12

Allstate Indemnity Company as subrogee of Corey Wecler, Cara Ottilio-Cooper, and Sherrie Fried,
Plaintiff-Appellant,

-against-

Virfra Holdings, LLC,
Defendant-Respondent,

Evans Relocation, doing business as Evans Real Estate,
Defendant.

Feldman & Feldman, LLP, Smithtown (Leonard B. Feldman of counsel), for appellant.

Cinotti LLP, New York (Scott Stone of counsel), for respondent.

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered July 11, 2013, which, insofar as appealed from, granted the motion of defendant Virfra Holdings to dismiss the complaint as against it, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 13, 2014, which, inter alia, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic.

The motion court correctly determined that the waiver of subrogation clause contained in the insurance policies and bylaws of the condominium association precluded this action. The nature of the loss that occurred herein was of the exact nature

contemplated by the waiver of subrogation provision (*see e.g. Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]).

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

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14023 The People of the State of New York, Respondent, Ind. 4112/12

-against-

Rodrigo Arocho, 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 (Laura A. Ward, J.), rendered on or about April 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: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14025 James B. Buckley, Index 117843/05
Plaintiff, 112249/06
590712/08
-against- 590093/10
590650/11
The City of New York, et al., 590651/11
Defendants.

[And Third-Party Actions]
- - - - -
The City of New York, et al.,
Third Third-Party
Plaintiffs-Appellants,

-against-

W&W Glass Systems, Inc.,
Third Third-Party
Defendant-Respondent.
- - - - -
W&W Glass Systems, Inc.,
Plaintiff-Respondent-Appellant,

The City of New York, et al.,
Plaintiffs-Appellants-Respondents,

-against-

Metal Sales Co., Inc.,
Defendant-Respondent.

[And Another Third-Party Action]

_____

O'Connor, O'Connor Hintz & Deveney, Melville (Brian Deveney of counsel), for appellants-respondents.

Fabiani Cohen & Hall, LLP, New York (Anthony Lugara of counsel), for respondent-appellant.

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

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered July 23, 2013, which to the extent appealed from as limited by the briefs, denied the motion of defendants the City of New York, New York City Health and Hospital Corp., New York State Dormitory Authority and TDX/Gilbane (City defendants) to the extent it sought conditional contractual indemnification from plaintiff W&W Glass Systems, Inc., and granted defendant Metal Sales Co., Inc.'s motion to dismiss W&W Glass's cross claim against it for contractual indemnification, unanimously reversed, on the law, without costs, the portion of the City defendants' motion seeking contractual indemnification granted to the extent that they incur damages not covered by the insurance procured by W&W Glass in their favor and the portion of Metal Sales Co., Inc.'s motion to dismiss W&W Glass's October 3, 2011 cross claim for contractual indemnification denied.

In this action for personal injuries allegedly suffered by plaintiff while he was working at a construction site owned and operated by the City defendants, the contract between the defendant Dormitory Authority and W&W Glass required W&W to indemnify the City defendants for any liability they incur arising out of the work contracted to W&W Glass and subcontracted to Metal Sales (plaintiff's employer). Accordingly, W&W is liable to the City defendants for any damages incurred by them

that are not covered by the insurance procured by W&W Glass in the City defendants' favor (*see Lennard v Mendik Realty Corp.*, 43 AD3d 279 [1st Dept 2007]).

Moreover, contrary to Metal Sales's assertion, W&W Glass's October 3, 2011 cross claim against it for contractual indemnification is not identical to the claim in W&W Glass's 2006 complaint for contractual indemnification that was previously dismissed in Supreme Court's February 3, 2012 order on renewal. The February 3, 2012 order dismissed W&W Glass's 2006 claim for contractual indemnification on the ground that, because the City defendants were being defended and indemnified as additional insureds, W&W Glass's obligation to indemnify them was not implicated. While the renewal motion was pending, however, the City defendants commenced third-party actions against W&W Glass for contractual indemnification for any liability they incur in excess of the insurance available to them, and W&W Glass asserted a cross claim against Metal Sales for any such liability it may incur. In other words, the only liability to the City defendants that W&W Glass may incur, for which its October 3, 2011 cross claim seeks contractual indemnification against Metal Sales, are damages in excess of the insurance provided to the City defendants. The February 3, 2012 order on renewal did not preclude or deny any such claim but rather dismissed W&W Glass's

claim in the 2006 complaint for contractual indemnification "without prejudice to other proceedings by W&W, if so advised, for contractual indemnification from Metal Sales for defense costs and other damages exceeding the primary and excess policies." Accordingly, the motion to dismiss the cross claim should have been denied.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14026 In re Debra Curry, Petitioner, Index 400521/13

-against-

New York City Housing Authority, Respondent.

_____

Debra Curry, petitioner pro se.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated December 19, 2012, which, after a hearing, denied petitioner succession rights as a remaining family member to the tenancy of her late mother, 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 [Shlomo Hagler, J.], entered December 3, 2013), dismissed, without costs.

Respondent's determination is supported by substantial evidence (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Petitioner conceded that her mother, the tenant of record, had never obtained respondent's written consent for petitioner's occupancy (*see Matter of King v New York City Hous. Auth.*, 118 AD3d 636, 636 [1st Dept 2014]).

The doctrine of estoppel cannot be invoked against respondent (*see Matter of New York State Med. Transporters Assn. v Perales*, 77 NY2d 126, 130 [1990]; *see also King*, 118 AD3d at 637). Nor do petitioner's mitigating factors provide a basis for annulling respondent's determination (*see King*, 118 AD3d at 637).

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14027 The People of the State of New York, Respondent, Ind. 1670/12

-against-

Junior Castillo, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J.), rendered on or about January 22, 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: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14028 In re Christine P.,
Petitioner-Appellant,

-against-

Machiste Q.,
Respondent-Respondent.

Aleza Ross, Patchogue, for appellant.

Daniel R. Katz, New York, for respondent.

Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about September 11, 2012, which granted respondent's motion for summary judgment dismissing the family offense petition brought pursuant to article 8 of the Family Court Act, unanimously affirmed, without costs.

Although the petition and bill of particulars allege an "intimate relationship" between the parties which could provide a basis for the Family Court's exercise of jurisdiction over these proceedings (Family Ct Act § 812 [1][e]), the motion to dismiss the petition was properly granted on the alternate ground that the factual allegations set forth in the petition, as amplified by the bill of particulars, were insufficient to support a finding that respondent engaged in conduct constituting the family offenses of harassment in the second degree or disorderly conduct. Accepting as true petitioner's allegations that

respondent threatened to have her evicted and emotionally abused her through threats and rituals, and according them the benefit of every reasonable inference, there is no basis for finding that his conduct constituted harassment (*see* Penal Law §§ 240.26; *Matter of Rafael F. v Pedro Pablo N.*, 106 AD3d 635 [1st Dept 2013]), or that he intended to cause public inconvenience, annoyance or alarm or that his conduct in the private residence recklessly created such a risk (Penal Law § 240.20).

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14032 The People of the State of New York, Respondent, Ind. 868/00

-against-

Robert Johnson, Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Jill Konviser, J.), rendered May 7, 2012, resentencing defendant to an aggregate term of 20 years, with 4 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]). We perceive no

basis for reducing the term of postrelease supervision.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14033 Shane Akeroyd, Index 103925/10
Plaintiff-Respondent,

-against-

Soho 311 Development, Inc.,
Defendant-Appellant.

_____

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

Wrobel Schatz & Fox LLP, New York (David C. Wrobel of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffery K. Oing, J.), entered February 11, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs and the motion granted. The Clerk is directed to enter judgment accordingly.

Given that plaintiff entered into an additional agreement with defendant whereby defendant performed further renovation work for plaintiff on the units at issue, plaintiff waived his right to rescind the purchase agreement based on a previously disclosed error in the description of the condominium's real property (*see New York Tel. Co. v Jamestown Tel. Corp.*, 282 NY 365, 372 [1940]). This is particularly so where the new

agreement expressly reaffirmed the validity of the purchase agreement (*cf. Navillus Tile v Turner Constr. Co.*, 2 AD3d 209, 211 [1st Dept 2003]). Although plaintiff is correct that there are issues of fact as to whether the offering plan's erroneous inclusion of a 2,000-square-foot adjacent lot in the description of the condominium's real property was material (*see Weiner v Memphis Uptown Assoc.*, 168 AD2d 353 [1st Dept 1990]), that issue is irrelevant in light of plaintiff's waiver.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14038 The People of the State of New York, Ind. 3942/06
Respondent,

-against-

Eloy Andrade,
Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, New York County (Daniel P. FitzGerald, J.), entered on or about December 14, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors bearing a sufficient total point score to support a level two sex offender adjudication. Initially, we note that defendant concedes that 70 points were correctly assessed. Therefore, the addition of any one of the three point assessments contested on appeal would be sufficient to qualify defendant as a level two offender.

The court properly assessed 10 points for use of violence, because the victim's grand jury testimony clearly established

that, during one of numerous incidents of sexual misconduct, defendant ignored her plea for him to stop and restrained her by holding her down by her wrists. The court properly assessed 30 points for the victim's age, because the victim distinctly recalled that the first sexual offense occurred on a particular Christmas Day when she was under 11 years old. The court properly assessed 15 points for alcohol abuse, because the victim testified that defendant was drunk at the time of two specific sexual offenses.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). We do not find any overassessment of points. There were no mitigating factors that were not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure.

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14039- Index 203/10
14040-
14041 In re Jacquelin M.,
Petitioner-Appellant,

-against-

Joseph M.,
Respondent-Respondent.

_____

Bruce A. Young, New York, for appellant.

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

_____

Order, Supreme Court, Bronx County (Diane Kiesel, J.), entered on or about October 5, 2012, which, after a fact-finding hearing, dismissed with prejudice the family offense petition, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about November 20, 2013, which ordered that a court-appointed forensic evaluator be paid pursuant to Judiciary Law § 35, unanimously dismissed, without costs, as abandoned. Appeal from order, same court and Justice, entered on or about December 6, 2013, which awarded temporary custody of the children to respondent father until January 13, 2014, unanimously dismissed, without costs, as moot.

There is ample support in the record for Supreme Court's determination that petitioner failed to prove by a fair

preponderance of the evidence any of the family offenses alleged in the petition, including menacing in the third degree and harassment in the second degree (Family Court Act § 832). We find no basis for disturbing the court's determination crediting respondent's more candid and consistent version of events over petitioner's vague and somewhat inconsistent version.

The court properly allowed respondent to withdraw his petition; thus, counsel for petitioner did not provide ineffective assistance by failing to object to the withdrawal of the petition (*see e.g. Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543 [1st Dept 2014]).

In view of petitioner's own admissions regarding her mental health and her many months of attempting to represent herself after several attorneys had been relieved, the court properly appointed a guardian ad litem pursuant to CPLR 1202 (*see e.g. Shad v Shad*, 167 AD2d 532 [2d Dept 1990]). Contrary to petitioner's assertions, she was not appointed a guardian pursuant to article 81 of the Mental Hygiene Law; the guardian ad litem was appointed only to assist her in prosecuting these proceedings, and not for any broader purpose.

Contrary to her characterization of the record, petitioner was represented by counsel, her fourth attorney, throughout the rehearing of the family offense proceedings; the court granted a

mistrial after she attempted to represent herself at the first hearing.

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: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14042 In re Melissa T. Mitchner, Index 402099/12
Petitioner,

-against-

New York City Housing
Authority, Mitchell Houses,
Respondent.

_____

Melissa T. Mitchner, petitioner pro se.

David I. Farber, New York (Andrew M. Lupin of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority (NYCHA), dated July 25, 2012, which denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of her late grandmother, 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 [Alexander W. Hunter, Jr., J.], entered February 11, 2013), dismissed, without costs.

Substantial evidence supports respondent's determination that petitioner is not entitled to succession rights as a remaining family member (*see generally 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). Petitioner's occupancy during the relevant period was not pursuant to NYCHA's written authority and was not reflected in

the affidavits of income (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept 2012], *lv denied* 20 NY3d 1053 [2013]). Petitioner's claimed lack of awareness that her income had not been reported does not warrant a different result (*see Johnson v State of New York Div. of Hous. & Community Renewal*, 213 AD2d 345 [1st Dept 1995]).

Petitioner's prior, authorized occupancy was terminated in 2005 upon her grandmother's submission of a Notice of Intent to Vacate and supporting notarized letter which reflected that petitioner had left the household. As the head of the household and tenant of record, petitioner's grandmother was authorized to remove members of her household (*see e.g. Abdil v Martinez*, 307 AD2d 238, 242 [1st Dept 2003]).

Petitioner's payment of rent did not confer legitimacy on her occupancy (*see Perez v New York City Hous. Auth.*, 99 AD3d 624, 625 [1st Dept 2012]) and her mitigating circumstances do not provide a basis for annulling NYCHA's determination (*see Firpi v New York City Hous. Auth.*, 107 AD3d 523, 524 [1st Dept 2013]). Additionally, petitioner may not invoke estoppel against a

governmental agency, such as respondent (*see Parkview Assocs. v City of New York*, 71 NY2d 274, 282 [1988], *cert denied, appeal dismissed*, 488 US 801 [1988]; *Adler v New York City Hous. Auth.*, *supra*).

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: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14043 The People of the State of New York, Respondent, Ind. 1411/99

-against-

Nelson Flores, Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Barbara F. Newman, J.), entered on or about April 5, 2010, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated the denial of resentencing (*see e.g. People v Rodriguez*, 116 AD3d 639 [1st Dept 2014], *lv denied* 23 NY3d 1042 [2014]). Among other things, defendant absconded and remained a fugitive for many years, during which time he trafficked in drugs in various states, and engaged in such activity even while he was in federal custody. Contrary to defendant's assertion, the court expressly considered evidence of defendant's rehabilitation during his most recent period of

incarceration, and concluded that it was outweighed by the factors militating against resentencing (*see People v Marte*, 44 AD3d 442 [1st Dept 2007], *appeal dismissed* 9 NY3d 991 [2007]).

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

ENTERED: JANUARY 26, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14044N Angelina Maiorano, Index 304752/11
Plaintiff-Respondent,

-against-

JPMorgan Chase & Co.,
Defendant-Appellant.

_____

White Fleischner & Fino, LLP, New York (Jennifer L. Coviello of counsel), for appellant.

Ruta, Soulios & Stratis LLP, New York (Joseph A. Ruta of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered July 9, 2013, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for sanctions for spoliation of a surveillance video recording, unanimously affirmed, without costs.

Plaintiff established that defendant's failure to take affirmative steps to preserve the surveillance video recorded on the day she tripped and fell in its bank constituted spoliation of evidence (*see Malouf v Equinox Holdings, Inc.*, 113 AD3d 422 [1st Dept 2014]). The record demonstrates that, although this

action was not commenced until more than a year after the accident, defendant was on notice on the day of the accident that the surveillance video footage might be needed for future litigation.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14045 The People of the State of New York, Ind. 4903/12
Respondent,

-against-

Desmond Dent,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Hope Korenstein 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 (Edward J. McLaughlin, J.), rendered on or about June 11, 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: JANUARY 26, 2015

CLERK

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

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14048 The People of the State of New York, Ind. 4217/10
Respondent,

-against-

Aaron Espinoza,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered November 28, 2012, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to a term of 45 days and a $500 fine, unanimously affirmed.

The record establishes that defendant's plea was entered knowingly, intelligently and voluntarily (*see People v Harris*, 61

NY2d 9, 16-19 [1983]; *compare People v Tyrell*, 22 NY3d 359 [2013])). The alleged deficiency in the plea allocution did not constitute a mode of proceedings error or call into question the voluntariness of the plea.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14049 Gregory Williamson, Index 304892/08
Plaintiff-Respondent,

-against-

Ogden Cap Properties, LLC, et al.,
Defendants-Appellants.

_____

Law Office of Gerard A. Falco, Harrison (Gerard A. Falco of counsel), for appellants.

Pollack Pollack Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered July 3, 2013, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants failed to make a prima facie showing that they lacked constructive notice of the alleged defective mailbox panel, because it is undisputed that they never inspected the panel prior to plaintiff postal worker's accident. Defendants' alleged lack of a key to open the panel is not determinative, as they failed to show that a cursory inspection would not have disclosed the loose condition of the panel observed by plaintiff and the notice witness in the months prior to the accident.

Accordingly, the record presents an issue of fact as to whether defendants exercised reasonable care in maintaining the mailbox panel, and whether constructive notice may be imputed (*see Stubbs v 350 E. Fordham Rd., LLC*, 117 AD3d 642, 643-644 [1st Dept 2014]; *see also Cohen v Interlaken Owners*, 275 AD2d 235 [1st Dept 2000]). *Soto v New Frontiers 2 Hope Hous. Dev. Fund Co., Inc.* (118 AD3d 471 [1st Dept 2014]) is distinguishable because there, the defendants demonstrated that a reasonable inspection would not have revealed the defect. Defendants also failed to make a prima facie showing that their negligence was not a proximate cause of the accident (*see Del Carmen Cuaya Coyotl v 2504 BPE Realty LLC*, 114 AD3d 620 [1st Dept 2014]).

Even if defendants had met their prima facie burden, plaintiff's testimony, coupled with the notice witness's statement, raised an issue of fact as to whether the screws on the right side of the mailbox panel were missing or loose and

whether the alleged defect existed for a sufficient period of time before the accident to enable defendants to discover and repair it (*see Picaso v 345 E. 73 Owners Corp.*, 101 AD3d 511, 512 [1st Dept 2012]).

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14050-
14051 The People of the State of New York,
Respondent,

-against-

Robert Ingram,
Defendant-Appellant.

Ind. 6656/99

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

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered on or about November 30, 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: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14052-
14053 Index 654033/12

Basis Pac-Rim Opportunity Fund (Master), et al.,
Plaintiffs-Appellants,

-against-

TCW Asset Management Company,
Defendant-Respondent.

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Lewis Baach PLLC, New York (Bruce R. Grace of counsel), for appellants.

Gibson Dunn and Crutcher LLP, New York (Christopher M. Joralemon and Peter M. Wade of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about September 10, 2013, which, to the extent appealed from, granted defendant's motion to dismiss the cause of action for negligent misrepresentation, unanimously affirmed, with costs. Order, same court and Justice, entered on or about December 3, 2013, which, to the extent appealed from, denied plaintiffs' motion to renew, unanimously affirmed, with costs.

The motion court properly dismissed the negligent misrepresentation cause of action since plaintiffs failed to establish the existence of a special relationship of trust or confidence between the parties required to support such a cause of action (*see Zohar CDO 2003-1 Ltd. v Xinhua Sports &*

Entertainment Ltd., 111 AD3d 578, 579 [1st Dept 2013]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 [1st Dept 2011]). Contrary to plaintiffs' assertions, the involvement of a collateral manager in an arm's length transaction does not establish a special relationship as a matter of law (*see Zohar CDO 2003-1 Ltd.*, 111 AD3d at 579). Here, the sophisticated parties entered into an arm's length transaction which precludes a finding of a special relationship.

In addition, the motion court properly denied plaintiffs' motion to renew since it was not "based upon new facts not offered on the prior motion" and did not "demonstrate that there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]).

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14054 Helen Sogoloff, Index 350040/10
Plaintiff-Respondent-Appellant,

-against-

Dimitri Sogoloff,
Defendant-Appellant-Respondent.

_____

Garr Silpe, P.C., New York (Steven M. Silpe of counsel), for appellant-respondent.

Cohen Clair Lans Greifer & Thorpe LLP, New York (Bernard E. Clair of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Louis Crespo, Special Referee), entered September 26, 2013, among other things, awarding plaintiff wife an equal share of the proceeds from the sale of the parties' stock investment in Paladyne Systems, Inc., valuing defendant husband's enhanced earnings capacity at $962,800, imputing income to defendant of $675,000, valuing defendant's ownership interest in Horton Point at $539,000, reducing by $250,000 the value of the parties' marital investment in the Gallery QMS Fund, and valuing plaintiff's enhanced earnings capacity at $909,000, unanimously modified, on the law, to increase the value of the parties' investment in the Gallery QMS Fund upward by $250,000, and otherwise affirmed, without costs.

The Special Referee properly found that the Gallery QMS Fund

was an "active" asset to be valued as of the date of the commencement of this action (*see Greenwald v Greenwald*, 164 AD2d 706, 716 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]), since Horton Point, an entity owned and controlled by defendant, made all of the investment decisions regarding the fund (*see Ferraioli v Ferraioli*, 295 AD2d 268, 270 [1st Dept 2002]).

The Special Referee, however, improperly adjusted downward the value of the parties' investment in the Gallery QMS Fund, based on a misapprehension of defendant's trial testimony. Approximately six months after the commencement of the divorce action, defendant transferred $250,000 of marital funds to an ordinary brokerage account at Cantor Fitzgerald. The Special Referee stated that it credited defendant's testimony that the $250,000 was owed to Cantor Fitzgerald. However, there is no such testimony in the record. Therefore, the value of the parties' investment in the Gallery QMS Fund as of the date of the commencement of this action should be increased by $250,000, resulting in an additional $100,000 credit to plaintiff.

Even if defendant's service on the board of directors of Paladyne constitutes "active" involvement that contributed to the appreciation of Paladyne's stock (*see Hartog v Hartog*, 85 NY2d 36, 49 [1995]), the award to plaintiff of a 50% share of defendant's interest in Paladyne was nevertheless appropriate,

given the 25-year duration of, and plaintiff's contributions to, the marriage (*see e.g. Williams v Williams*, 245 AD2d 49 [1st Dept 1997]).

There is no basis to disturb the Special Referee's findings as to defendant's enhanced earning capacity. Defendant's challenges to the methodology used by plaintiff's expert are unsupported. There is also no basis for disturbing the Special Referee's imputation of income to defendant of $675,000, given defendant's status as an experienced investment professional (*see Silverman v Silverman*, 304 AD2d 41, 50 [1st Dept 2003]), and given his past reported income and demonstrated earning potential (*see Viscardi v Viscardi*, 303 AD2d 401, 401 [2d Dept 2003]; *see also Pezzullo v Palmisano*, 261 AD2d 173, 174 [1st Dept 1999]). Nor is there any basis to disturb the Special Referee's valuation of defendant's interest in Horton Point (*see Burns v Burns*, 84 NY2d 369, 375 [1994]).

The Special Referee properly directed the parties to pay their pro rata share of the tax consequences on the distribution of the Paladyne stock and AIM settlement proceeds (*Teitler v Teitler*, 156 AD2d 314, 316 [1st Dept 1989], *appeal dismissed* 75 NY2d 963 [1990]).

The Special Referee properly adopted the valuation of plaintiff's enhanced earning capacity based upon her potential

full-time earnings, rather than her actual part-time earnings, given plaintiff's testimony that she is able to work full-time, but chooses not to do so (*see Spreitzer v Spreitzer*, 40 AD3d 840, 841 [2d Dept 2007]).

We have considered all other claims and find them unavailing.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14055 Yeremia Maroutian, Index 400882/12
Plaintiff-Appellant,

-against-

Jacob Fuchs,
Defendant,

Games and Economic Behavior,
Defendant-Respondent.

_____

Yeremia Maroutian, appellant pro se.

Sills Cummis & Gross P.C., New York (Mark E. Duckstein of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered June 12, 2013, which granted defendant Games and Economic Behavior's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint as against it, unanimously affirmed, without costs.

The complaint fails to identify any work published by defendant Games and Economic Behavior which allegedly derived

from plaintiff's work. Accordingly, even read liberally and accepting the facts alleged as true, the complaint fails to state a cause of action (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14056 The People of the State of New York, Respondent, Ind. 3924/12

-against-

Evelyn Santiago,
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 (Rena K. Uviller, J.), rendered on or about January 30, 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: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14057 In re Esmeldyn P.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.

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Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Francis F. Caputo of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about November 20, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, criminal possession of a weapon in the fourth degree (two counts) and assault in the third degree, and also committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 14 months, unanimously modified, on the law, to the extent of vacating the finding as to assault in the third degree and dismissing that count of the petition, and otherwise affirmed, without costs.

The court's fact-finding determination was based on legally sufficient evidence and was not against the weight of the

evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The evidence, including testimony that defendant stabbed an unarmed person who was walking away from an altercation, disproved appellant's justification defense beyond a reasonable doubt.

To the extent that appellant is challenging an evidentiary ruling made by the court, we find that claim to be unavailing, and that it would not, in any event, warrant a different result regarding the sufficiency and weight of the evidence.

As the presentment agency concedes, appellant is entitled to dismissal of the third-degree assault count as a lesser included offense of second-degree assault.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14058 Charles Johnson, Index 112553/09
Plaintiff-Respondent,

-against-

Chelsea Grand East, LLC doing business as Hampton Inn Manhattan Chelsea,
Defendant-Appellant,

Chelsea Grand East Manager, LLC doing business as Hampton Inn Manhattan Chelsea,
Defendant,

Mikesam Construction Corporation,
Defendant-Respondent.

_____

Barry, McTiernan & Moore LLC, New York (David H. Schultz of counsel), for appellant.

Wingate Russotti Shapiro & Halperin, LLP, New York (Michael J. Fitzpatrick of counsel), for Charles Johnson, respondent.

Kevin Kerveng Tung, P.C., Flushing (Ge Li of counsel), for Mikesam Construction Corporation, respondent.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered on or about January 30, 2014, which, to the extent appealed from as limited by the briefs, denied defendant Chelsea Grand East, LLC's motion for conditional summary judgment on its cross claims against defendant Mikesam Construction Corporation for contractual indemnification, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff seeks damages for injuries he sustained when he

stepped down onto the floor from the bottom step of a stairway constructed by Mikesam's subcontractors on Chelsea's property. Pursuant to contract, Mikesam agreed to indemnify Chelsea, "[t]o the fullest extent permitted by law," for claims, damages, losses and expenses arising out of Mikesam's work under its contract only to the extent caused by its negligence or that of its subcontractors. Although, as the motion court observed, there has been no determination as to Mikesam's or its subcontractors' negligence in connection with the stairway, Chelsea may be granted conditional summary judgment on its cross claim against Mikesam for indemnification (*see e.g. DeSimone v City of New York*, 121 AD3d 420, 422-423 [1st Dept 2014]; *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649 [1st Dept 2014]; *Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548 [1st Dept 2013]). Contrary to Mikesam's contention, the conditional nature of Chelsea's motion for summary judgment was plain from its motion papers.

Nor does the subject indemnification provision violate the prohibition against exempting owners and contractors from liability for negligence (General Obligations Law § 5-322.1) since it is limited by the phrases, "[t]o the fullest extent permitted by law," and "regardless of whether or not such claim, damage, loss or expense is caused *in part* by [Chelsea]" (*see*

Dutton v Pankow Bldrs., 296 AD2d 321 [1st Dept 2002] [emphasis added], *lv denied* 99 NY2d 511 [2003]).

Although plaintiff neither moved for summary judgment on the issue of Chelsea's notice of the uneven risers in the stairway nor appealed the motion court's denial of his informal request for summary judgment upon a search of the record, we note that there was no basis for a search of the record to grant him summary judgment since his informally raised claim was unrelated to the subject of Chelsea's motion (*New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463, 467 [1st Dept 2013]).

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14059 Paul Dominguez, Index 651924/13
Plaintiff-Appellant,

-against-

Ian Reisner,
Defendant-Respondent.

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An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about May 20, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated December 30, 2014,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14061 The People of the State of New York Ind. 6507/01
Respondent,

-against-

Thomas Frazier,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

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Order, Supreme Court, New York County (Charles H. Solomon, J.), entered on or about October 30, 2013, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in declining to grant a downward departure (*see People v Gillotti*, 23 NY3d 841, 861 [2014]). The mitigating factors cited by defendant did not

warrant a departure when viewed in light of defendant's criminal history and the seriousness of the underlying crime.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14063 Rafael Angeles, Index 308421/10
Plaintiff-Appellant,

-against-

Versace Inc., et al.,
Defendants-Respondents.

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Ferro Kuba Mangano Sklyar, P.C., New York (Kenneth Mangano of counsel), for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered October 2, 2013, which granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury pursuant to Insurance Law § 5102(d), and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not sustain an injury involving a "significant" or "permanent consequential" limitation of use of his lumbar spine.

However, plaintiff's submissions do not create an issue of fact. Plaintiff's expert, while opining that the accident caused an injury, failed to address defendants' evidence of degeneration in the x-ray reports of the lumbar spine, which was found in his own records (*see Alvarez v NYLL Mgt. Ltd.*, 120 AD3d 1043, 1044

[1st Dept 2014]; *Rosa v Mejia*, 95 AD3d 402, 405 [1st Dept 2012]).

Since there was no evidence of causation, plaintiff cannot establish his 90/180-day injury claim (*see Linton v Gonzales*, 110 AD3d 534, 535 [1st Dept 2013]; *Barry v Arias*, 94 AD3d 499, 500 [1st Dept 2012]).

Given the lack of serious injury, the issue of liability is academic (*see Hernandez v Adelango Trucking*, 89 AD3d 407, 408 [1st Dept 2011]).

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14065 In re Daniel C.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
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Presentment Agency

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

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for presentment agency.

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Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 12, 2013, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in adjudicating appellant a juvenile delinquent and placing him on probation rather than ordering an adjournment in contemplation of dismissal. Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]).

Appellant was in need of the supervision that would be provided by way of a 12-month term of probation, given the seriousness of the underlying conduct.

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

ENTERED: JANUARY 26, 2015

CLERK

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

14067N Artcorp Inc., Index 653878/13
Plaintiff-Appellant,

-against-

Citirich Realty Corp.,
Defendant-Respondent.

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Moulinos & Associates LLC, New York (Peter Moulinos of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

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Order, Supreme Court, New York County (Nancy Bannon, J.), entered June 20, 2014, which denied plaintiff's motion for a *Yellowstone* injunction, unanimously reversed, on the law and the facts, with costs, and the motion granted.

To obtain *Yellowstone* relief a tenant need not show a likelihood of success on the merits (*WPA/Partners LLC v Port Imperial Ferry Corp.*, 307 AD2d 234, 237 [1st Dept 2003]). It can simply deny the alleged breach of its lease (*see Boi To Go, Inc. v Second 800 No. 2 LLC*, 58 AD3d 482 [1st Dept 2009]). Contrary to defendant landlord's contention, plaintiff tenant clearly asserted its willingness to cure the allegedly improper assignment of its shares, and had the ability to do so either by transferring its shares back to the deceased owner's estate (*see East Best Food Corp. v NY 46th LLC*, 56 AD3d 302 [1st Dept 2008])

or by seeking consent from the landlord (*see Gettinger Assoc., LLC v Abraham Kamber & Co. LLC*, 103 AD3d 535 [1st Dept 2013]). Further, consent may be obtained after the assignment and even in the absence of a lease provision authorizing this post-assignment cure (*see Empire State Bldg. Assoc. v Trump Empire State Partners*, 245 AD2d 225, 229 [1st Dept 1997]). *Zona, Inc. v Soho Centrale* (270 AD2d 12 [1st Dept 2000]) is distinguishable because the tenant there failed to assert that it had the ability to cure its default.

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

ENTERED: JANUARY 26, 2015

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Richter, Clark, JJ.

14068N In re Pedro Sosa, etc., Index 260056/13
Petitioner-Respondent,

-against-

The City of New York,
Respondent-Appellant.

_____

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for appellant.

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

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Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 11, 2013, which granted petitioner's application for leave to file a late notice of claim asserting causes of action for personal injury and conscious pain and suffering, unanimously affirmed, without costs.

The court providently exercised its discretion by granting petitioner's motion for leave to file a late notice of claim (*see Rosario v New York City Health & Hosps. Corp.*, 119 AD3d 490 [1st Dept 2014]; General Municipal Law § 50-e[5]). We note that petitioner timely filed a notice of claim for wrongful death arising from the multi-vehicle accident allegedly caused by the respondent's failure to prevent or remedy the icy accumulation upon a public roadway (*see* GML § 50-e[1][a]). Moreover, with respect to the pain and suffering and conscious pain and

suffering claims, "death is a statutory ground for granting leave to file a late notice of claim provided there is no substantial prejudice to the public corporation" (*Matter of Morton v New York City Health & Hosps. Corp.*, 24 AD3d 229, 230 [1st Dept 2005], citing GML § 50-e[5]). Here, the record indicates that respondent's police department's accident investigation squad conducted a comprehensive investigation at the accident scene, including the taking of multiple witness statements and color photographs, and preparing several accident reports, wherein each of the witnesses attributed the cause of the accident to the icy conditions of the roadway. Under these circumstances, we conclude that respondent acquired knowledge of the facts underlying the claim, and has not established that it has been substantially prejudiced (*see e.g. Matter of Caridi v New York Convention Ctr. Operating Corp.*, 47 AD3d 526 [1st Dept 2008]; *Gamoneda v New York City Bd. of Educ.*, 259 AD2d 348 [1st Dept 1999]; *Matter of Franco v Town of Cairo*, 87 AD3d 799, 800-801 [3d Dept 2011]).

We further find that petitioner reasonably relied on his first law firm to act to protect the estate's interests, and upon learning that it had not done so, fired the firm and moved promptly to secure present counsel, which timely filed a notice of claim as to wrongful death, and commenced the instant

proceeding immediately thereafter. Even if petitioner had not proffered a reasonable excuse for the delay, such a failure alone is not fatal to his application (*see Rosario*, 119 AD3d at 490; *Matter of Thomas v City of New York*, 118 AD3d 537, 537-538 [1st Dept 2014]).

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

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

ENTERED: JANUARY 26, 2015

CLERK