SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

**OCTOBER 29, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Friedman, Acosta, Moskowitz, JJ.

13757 K-Bay Plaza, LLC, Index 105751/09
Plaintiff-Respondent-Appellant,

-against-

Kmart Corporation,
Defendant-Appellant-Respondent.

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Reed Smith, LLP, New York (Gil Feder of counsel), for appellant-respondent.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered February 5, 2014, which, to the extent appealed from, denied so much of defendant's motion for summary judgment as sought dismissal of the causes of action for breach of contract, account stated, declaratory relief and attorney's fees, declined to search the record and grant plaintiff summary judgment on those claims, and denied plaintiff's motion to amend to assert a cause of action for fraud, unanimously modified, on the law, to the extent of granting defendant's motion, and

otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Under a lease dated as of November 18, 1993, the predecessor-in-interest of plaintiff K-Bay Plaza, LLC (Landlord) agreed to lease space in the Bay Plaza shopping center in the Bronx to defendant Kmart Corporation (Tenant) for an initial term of 25 years, followed by renewal periods totaling approximately another 24 years. The parties subsequently agreed that the term of the lease would commence on November 14, 1994.

When the lease was executed, the building Tenant was to occupy had not yet been built, and the precise number of square feet of the demised premises was not known. The lease's article captioned "Annual Minimum Rental" provides as follows:

> "It is anticipated that the Initial Square Footage [of the demised premises] shall be 131,780, and all annual rent numbers set forth below are based upon said number (*assuming initial rent of $11.00 per square foot and 10% cumulative increases every five years*). Should the actual Initial Square Footage differ from 131,780 by more than 50 square feet either way, then there shall be an appropriate upward or downward adjustment of all annual rents to conform to the actual Initial Square Footage" (emphasis added).

The foregoing quotation from the lease is followed by illustrations of the annual rental during each 5-year increment of the term (hereinafter, the rent illustrations).

Notwithstanding the reference to "10% cumulative increases every five years" in the above-quoted italicized parenthetical (hereinafter, the escalation parenthetical), based on the Initial Square Footage assumed in the lease (131,780 square feet), the rent illustrations that follow reflect increases of 50 cents per square foot every fifth year during the initial 25-year term and increases of 10% every fifth year during the renewal periods.[1] Thus, the lease's rent escalation provision is internally inconsistent.

When the first rent escalation went into effect on the fifth

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[1]The rent illustrations do not expressly state the rates of increase on which they are based. For example, the first two rent illustrations read as follows:

> "Tenant shall, during the Lease term (including any renewal thereof as set forth in Article 10), from and after the Rent Commencement Date, pay to Landlord, at such place as Landlord shall designate in writing from time to time, annual rental, as follows:
>
> "For the period from and after the Rent Commencement Date through the end of the 5th Lease Year, inclusive, the sum of ONE MILLION FOUR HUNDRED FORTY NINE THOUSAND FIVE HUNDRED EIGHTY DOLLARS ($1,449,580) per annum;
>
> "For the 6th through 10th Lease Years, inclusive, the sum of ONE MILLION FIVE HUNDRED FIFTEEN THOUSAND FOUR HUNDRED SEVENTY DOLLARS ($1,515,470) per annum[.]"

Increasing the amount specified for the first five-year period by 10% would yield $1,594,538, not the lesser amount stated in the illustration for the second five-year period.

anniversary of the commencement of the lease's term, Landlord began sending Tenant rent invoices reflecting an increase of 50 cents per square foot, consistent with the rent illustrations. However, at some point between late 2001 and mid-2003, during the second five-year increment of the term, Landlord began sending Tenant rent invoices reflecting a 10% increase over the rent during the initial five years, consistent with the escalation parenthetical.[2] Notwithstanding the change in billing, Tenant (which affirmed the lease while it was in Chapter 11 bankruptcy from January 2002 to April 2003) continued to pay rent reflecting an increase of 50 cents per square foot. Landlord added the unpaid amounts to Tenant's account but accepted the rental payments without further objection (save for a one-page October 2006 letter sent in response to Tenant's inquiry) until this action was filed.

Landlord commenced this action in April 2009 to recover the

[2]Landlord's billing manager testified that, in the course of conducting an internal review of rental billings for Landlord's various properties in 2001, it was discovered that the rent for which Tenant was being invoiced had been raised by less than 10% at the end of the fifth year, contrary to Landlord's alleged understanding of the lease's escalation provision. Apparently, up to that point, Landlord's staff had been relying on the rent illustrations in preparing the bills, simply proportionately adjusting upward the amounts shown in the rent illustrations to reflect the leasehold's actual square footage.

alleged cumulative deficiency in Tenant's payment of rent since May 1, 2003, and to obtain a declaration that the lease provides for a 10% increase in rent every five years. It is Landlord's position that, although the parties had agreed (as reflected in the escalation parenthetical and in the documentation of the negotiations) on a 10% increase in rent every five years during the entire term, Tenant (whose counsel drafted the lease) substituted into the execution copy, without alerting Landlord, two pages changing the rent illustrations (but, perhaps by oversight, not the escalation parenthetical) to reflect increases of 50 cents per square foot every five years during the initial term and increases of 10% every five years during renewal terms. Tenant, on the other hand, contends that the parties agreed during the last two months of the negotiations (which extended over more than a year) that rental increases during the initial 25-year term would be reduced from the 10% figure previously settled on to 50 cents per square foot, as reflected in the rent illustrations in the executed lease. Tenant does not, however, identify any correspondence, drafts or oral communications with particular representatives of Landlord in which this change was

discussed.[3]

In the order under review, insofar as challenged on appeal, Supreme Court (1) denied Tenant's motion for summary judgment dismissing Landlord's causes of action for breach of contract, account stated, declaratory relief and attorney's fees; (2) declined to grant Landlord summary judgment upon a search of the record; and (3) denied Landlord's motion to amend the complaint to assert a cause of action for fraud. For the reasons discussed below, we modify to grant Tenant summary judgment dismissing the aforementioned causes of action, and otherwise affirm.

With regard to the breach of contract cause of action, Tenant argues, and Landlord denies, that the claim is barred by

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[3]The change is discussed in a letter dated October 29, 1993, from Frederick Synk, Tenant's "Real Estate Representative," to Bruce Kauderer, Esq., the outside counsel who represented Tenant in the negotiations and drafted the lease. The letter reads in full as follows:

> "Enclosed are eight (8) leases which have been executed on behalf of [Tenant]. As we discussed, please substitute new pages showing the compromise rental agreement of .50 increases every five (5) years during the base term, and 10% increases during the options. Afterwards, please deliver the documents to the landlord for execution."

Landlord contends that Synk, who died before this action was commenced, never had any contact with any of Landlord's representatives.

the doctrines of voluntary payment (*see Westfall v Chase Lincoln First Bank*, 258 AD2d 299, 300 [1st Dept 1999]) and waiver (*see Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 AD3d 1, 6 [1st Dept 2006], *affd* 8 NY3d 59 [2006]). In addition, each party argues that its construction of the lease's escalation provision is correct as a matter of law, contending that the ambiguity created by the apparent contradiction between the escalation parenthetical and the rent illustrations is resolved either by the application of the relevant canons of construction, by the parol evidence in the record, or by the parties' course of dealing under the lease. Finally, Tenant argues that the breach of contract claim, although it seeks relief only for alleged underpayments within the six years immediately preceding the filing of the complaint in 2009 (*see* CPLR 213[2]), is time-barred under this Court's holding in *Goldman Copeland Assoc. v Goodstein Bros. & Co.* (268 AD2d 370, 371 [1st Dept 2000], *lv dismissed* 95 NY2d 825 [2000], 96 NY2d 796 [2001]). As discussed below, Tenant's statute of limitations argument has merit and requires the dismissal of the breach of contract cause of action. We therefore need not reach the other arguments the parties raise concerning this claim.

In *Goldman Copeland*, this Court squarely held that a claim for breach of contract based on an allegedly erroneous computation of rent accrues upon the first use of that computational methodology, and the statute of limitations does not begin to run anew each time the same formula is used. We said in that case:

> "Since [the allegedly erroneous rent] statements consistently used the same formula in determining the escalation, the tenant's overcharge claim accrued upon its receipt of the first statement almost 12 years before it commenced this action. At that time it had all of the information it needed to contest the manner in which the landlord computed the escalation. The tenant's alternative argument that the yearly increase due under the porter wage escalation clause created a new cause of action each and every year is unpersuasive in the context of a dispute involving a computational methodology that remained constant over the years for which the computation is being challenged" (268 AD2d at 371).

*Goldman Copeland* was followed by the Fourth Department in *Kaufmann's Carousel, Inc. v Carousel Ctr. Co. LP* (87 AD3d 1343, 1345 [4th Dept 2011] [citing *Goldman Copeland* in support of dismissal of a tenant's claim for overpayment of its share of the landlord's payments in lieu of taxes where the landlord "submitted evidence establishing that (the parties) have used 1,238,936 square feet as the denominator in that calculation for more than 12 years and that (the tenant) never objected to the

use of that number"], *lv dismissed* 18 NY3d 975 [2012]; *see also Kramer Levin Naftalis & Frankel, LLP v Metropolitan 919 3rd Ave., LLC*, 6 Misc 3d 796, 799-801 [Sup Ct, NY County 2004]). In addition, in *J.C. Penney Corp. v Carousel Center Co., LP* (635 F Supp 2d 126 [ND NY 2008]), the Federal District Court, applying New York law, found itself "bound" by *Goldman Copeland* (*id.* at 132), although it noted that the case's holding is "susceptible to criticism" (*id.*). The *J.C. Penney* court distilled *Goldman Copeland* as holding that a challenge to rent escalation charges is time-barred where "(1) [the complaining party] does not file his complaint within six years after he obtained constructive knowledge of the method of computation and (2) the method of computation at issue was continuously applied during that time period" (*id.*).[4]

*Goldman Copeland* is a precedent of this Court, and we adhere to it as a matter of stare decisis. Its holding applies to this

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[4]The *J.C. Penney* court did not dismiss the claim in that case, however, because it found that an issue of fact existed as to whether the plaintiff had "constructive knowledge" of the method used to compute the rent escalation more than six years before the action was commenced (635 F Supp 2d at 132-133). This Court affirmed the denial of a motion to dismiss a claim for rent overcharges on similar grounds, citing *Goldman Copeland* with a "compare" signal, in *Rite Aid of N.Y., Inc. v Chalfonte Realty Corp.* (105 AD3d 470, 470 [1st Dept 2013]).

case, as Tenant consistently paid, and Landlord accepted, rent based on two successive 50-cents-per-square-foot escalations from 1999 through 2009, when this action was commenced. Further, when the first rent escalation went into effect in late 1999, Landlord could have determined, through the use of simple arithmetic, that the lease's rent illustrations for the initial 25-year term were not based on 10% increases. When Landlord subsequently discovered in 2001 that it had not been billing rent based on a 10% escalation since 1999, the discovery was not based on any information that Landlord had not possessed in 1999. While *Goldman Copeland* concerned a tenant's claim for alleged overcharges, not even Landlord suggests that the holding should not apply equally to a landlord's claims for alleged underpayments.

Landlord's attempts to distinguish *Goldman Copeland* are unavailing. In particular, contrary to Landlord's assertion, the *Goldman Copeland* decision does not base its result on the absence of a no-waiver clause from the lease in that case. In fact, the decision does not even mention whether or not the subject lease contained a no-waiver clause. Thus, the presence of no-waiver clauses in the lease before us does not render *Goldman Copeland*

inapposite.[5]

We reject Landlord's contention that an issue exists as to whether Tenant's allegedly deceptive substitution of amended pages into the execution copy of the lease equitably estops it from relying on the statute of limitations. Equitable estoppel defeats an otherwise valid statute of limitations defense only where the party invoking the doctrine has reasonably relied on the deceptive conduct alleged to have given rise to the estoppel (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]). Here, the discrepancy between the rent illustrations and the parties' alleged actual agreement on 10% increases throughout the term should have been discovered, in the exercise of reasonable diligence, no later than the end of the fifth year of the term, in late 1999, when the first rent escalation went into effect.

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[5]Also unavailing is Landlord's reliance on *Arnav Indus., Inc. v Pitari* (82 AD3d 557 [1st Dept 2011], *lv dismissed* 19 NY3d 949 [2012]). Although we held timely the *Arnav* landlord's claims for rent arrears that became due within six years before the commencement of the action (*id.* at 558), *Arnav* was a dispute over whether the absence of a permanent certificate of occupancy relieved the tenant of the obligation to pay any rent at all, not over the methodology by which rent should be computed. In any event, the briefs on which *Arnav* was decided show that neither party brought *Goldman Copeland* to the attention of the panel that heard the appeal. Accordingly, even if *Arnav* could be deemed inconsistent with *Goldman Copeland*, it could not be deemed to overrule the earlier decision.

Since the dispute over the escalation provision could have been resolved through a timely breach of contract action, Landlord's cause of action for declaratory relief is time-barred for the same reasons, and to the same extent, as the cause of action for breach of contract (*see Matter of Save the Pine Bush v City of Albany*, 70 NY2d 193, 202 [1987]; *Solnick v Whalen*, 49 NY2d 224, 229-230 [1980]; *Fucile v L.C.R. Dev., Ltd.*, 102 AD3d 915, 916-918 [2d Dept 2013]).

The account stated cause of action is deficient for lack of an agreement regarding the balance due under the lease, given the parties' dispute over the amount to be charged for rent escalations (*see Digital Ctr., S.L. v Apple Indus., Inc.*, 94 AD3d 571, 572-573 [1st Dept 2012]; *see also Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012]).

The court correctly denied Landlord's motion to amend the complaint to assert a cause of action for fraud, because the fraud claim is untimely (*see generally MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 499 [1st Dept 2010]; CPLR 213[8]). Indeed, because the claim of fraud is based on Tenant's allegedly undisclosed substitution of pages in the lease just before its execution, the limitations period began to run at the time of the execution of the lease in 1993 (*see Rogal v Wechsler*,

135 AD2d 384, 385 [1st Dept 1987]) — more than six years before Landlord sought leave to amend. Further, even if it is assumed that Landlord had no reason to be aware of the alleged fraud in 1993, it could have been discovered, in the exercise of reasonable diligence, by 2001, when Landlord's accountant discovered the discrepancy between the 10% increases to which Landlord believed itself entitled and the previous billings for escalated rent based on the lease's rent illustrations (*cf. Sargiss v Magarelli*, 12 NY3d 527, 532 [2009]). The discovery of this discrepancy in 2001 placed Landlord on inquiry notice of the alleged fraud long before the 1993 letter from Synk to Kauderer (described in footnote 3 above) was produced in this action. Accordingly, the proposed fraud claim, whether deemed to have been interposed when Landlord moved to amend the complaint in 2013 or to relate back to the commencement of this action in 2009, is time-barred.

Landlord is not entitled to attorneys' fees, as it is not the prevailing party in this litigation (*cf. Excelsior 57th Corp. v Winters*, 227 AD2d 146, 146-147 [1st Dept 1996]).

In view of the foregoing determinations, we need not address the parties' remaining arguments for affirmative relief.

The Decision and Order of this Court entered herein on December 30, 2014 has previously been recalled and vacated (*see* M-502 decided February 4, 2015).

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16007 The People of the State of New York, Ind. 3169/11
Respondent,

-against-

Andres Lopez,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Bari L. Kamlet of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered June 27, 2013, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him to a term of four years, unanimously affirmed.

Defendant's motion to suppress identification testimony was properly denied. A review of the lineup photograph reveals that height differences were sufficiently minimized by having the participants seated, and that differences in age and facial hair were not so noticeable as to create a substantial likelihood that defendant would be singled out for identification (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). In any event, the trial court properly ruled that the eyewitness had an independent source to identify defendant based upon the

significant amount of time (over four hours) she spent with him in a car and at a restaurant. Any error was harmless because identity was not at issue. Instead, the trial turned on the conflict between the inculpatory version of the incident given by the People's witnesses, and the exculpatory version given by defendant in his statement to the police and trial testimony.

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.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16008 Patricia Imperati, Index 21143/12E
Plaintiff-Respondent,

-against-

David S. Lee, M.D., et al.,
Defendants-Appellants,

"John Does 1-5", et al.,
Defendants.

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

Law Offices Of Marc S. Albert, Astoria (Marc S. Albert of counsel), for respondent.

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Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about March 14, 2014, which granted so much of plaintiff's motion as sought to amend the complaint to add a cause of action for wrongful death, unanimously reversed, on the law, without costs, and the motion denied.

The court improperly granted plaintiff's motion to amend the complaint to include a cause of action for wrongful death, as the proposed amendment is palpably insufficient. "A motion seeking leave to amend a personal injury complaint to assert a cause of action for wrongful death must be supported by competent medical proof of the causal connection between the alleged malpractice

and the death of the original plaintiff" (*McGuire v Small*, 129 AD2d 429, 429 [1st Dept 1987]; *see also Cruz v Brown*, 129 AD3d 455 [1st Dept 2015]). The record shows that plaintiff's decedent suffered from numerous serious ailments prior to the alleged malpractice, and did not die until nearly two years after the alleged malpractice, following a number of other procedures performed by nondefendants and while in the care of other nondefendants for those two years. Plaintiff's counsel's conclusory assertion of causation, contained in his affirmation in support of the motion, was insufficient to establish a causal connection between the decedent's death and the originally alleged malpractice by defendants (*see Griffin v New York City Tr. Auth.*, 1 AD3d 141 [1st Dept 2003]).

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16009 In re Jose F.,
Petitioner-Respondent,

-against-

Sylvia P.,
Respondent,

Carolyn F.,
Nonparty Appellant.

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Douglas H. Reiniger, New York, for appellant.

Jose F., respondent pro se.

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Order, Family Court, New York County (Carol J. Goldstein, Referee), entered on or about September 24, 2014, which, to the extent appealed from as limited by the briefs, granted, after a hearing, petitioner father's petition for overnight visitation with the parties' child, unanimously affirmed, without costs.

The Referee's finding that it is in the child's best interest to award the father overnight visitation with the child, is supported by a sound and substantial basis in the record (*see Victor L. v Darlene L.*, 251 AD2d 178, 178 [1st Dept 1998], *lv denied* 92 NY2d 816 [1998]; *see also Eschbach v Eschbach*, 56 NY2d 167, 173-174 [1982]). The 12-year-old child's disinclination towards overnight visits at the father's home is not

determinative (*see Eschbach*, 56 NY2d at 173), and the record supports the Referee's finding that respondent mother's negative attitude about overnight visits and her "enmeshed relationship" with the child are "major" causes of the child's anxiety and opposition (*see id.; see also Matter of Susan A. v Ibrahim A.*, 96 AD3d 439, 440 [1st Dept 2012]).

Although a court-appointed psychologist testified that he could not recommend overnight visitation at the time he wrote his forensic report, the Referee properly discounted those recommendations, especially given the passage of time since the report was made, the fact that the child was in therapy and evidence that the child has a good relationship with the father (*see Matter of Martin V. v Karen Beth G.*, 305 AD2d 305, 306 [1st Dept 2003]).

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

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16010 The People of the State of New York, Ind. 99/13
Respondent,

-against-

Garret Sloan,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered November 12, 2013, as amended December 19, 2013, convicting defendant, after a jury trial, of stalking in the first and second degrees, criminal contempt in the first degree (three counts), criminal contempt in the second degree and criminal mischief in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of seven years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no

basis for disturbing the jury's credibility determinations, and the mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]). The physical injury element of first-degree stalking was established by evidence that, when viewed as a whole, supports the conclusion that the victim sustained substantial pain. Among other things, defendant repeatedly punched the victim, causing swelling on the side of her face and other injuries, and she was treated at a hospital (*see e.g. People v Stapleton*, 33 AD3d 464 [1st Dept 2006], *lv denied* 7 NY3d 904 [2006]). The jury could have reasonably inferred that there was "more than slight or trivial pain" (*People v Chiddick*, 8 NY3d 445, 447 [2007]; *see also People v Guidice*, 83 NY2d 630, 636 [1994]). The evidence also established the charges that involved display of a dangerous instrument.

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16012 Lisette Cruz, Index 300535/11
Plaintiff-Appellant,

-against-

The City of New York,
Defendant,

MTA Bus Company, et al.,
Defendants-Respondents.

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Burns & Harris, New York (Andrea V. Borden of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

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Judgment, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered June 4, 2014, after a jury trial, in favor of defendants-respondents, unanimously affirmed, without costs.

The trial court properly permitted the testimony of a witness whose identity was not disclosed prior to trial. The witness was called to lay the foundation for the admission of a nonparty witness's statement, and he was not the type of witness whose identity was required to be disclosed during discovery (*see Sheppard v Blitman/Atlas Bldg. Corp.*, 288 AD2d 33, 35 [1st Dept 2001]; *see also* CPLR 3101). The witness's testimony was not hearsay.

The trial court also properly admitted the statement as a prior inconsistent statement. While the nonparty witness, who initially testified that the signature on the statement looked like hers, ultimately denied signing the statement, defendant was permitted to "introduce proof" to the contrary (*see* CPLR 4514; *Larkin v Nassau Elec. R.R. Co.*, 205 NY 267, 270 [1912]). Further, the statement was properly admitted, even though it was not provided in discovery, as there is no indication in the record that production of the statement was sought and refused (*compare Bivona v Trump Mar. Casino Hotel Resort*, 11 AD3d 574, 575 [2d Dept 2004] [noting that the defendants' failure to provide requested information in their possession would preclude them from later offering proof regarding that information at trial]). Nor is there any indication that plaintiff requested a jury charge that the statement was to be considered only for impeachment purposes. Thus, plaintiff failed to preserve her argument that the trial court erred in not giving that charge to the jury (*see Peguero v 601 Realty Corp.*, 58 AD3d 556, 560 [1st Dept 2009]).

Given the foregoing determination, plaintiff's arguments regarding damages testimony is academic.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16013 The People of the State of New York, Ind. 594/13
Respondent,

-against-

David Oquendo-Robinson,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about July 10, 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: OCTOBER 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16014 Sophal Aur, Index 304762/08
Plaintiff-Respondent,

-against-

Manhattan Greenpoint Ltd., et al.,
Defendants,

Cesar A. Fernandez, et al.,
Defendants-Appellants.

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Traub Lieberman Straus & Straus & Shrewsberry LLP, Hawthorne (Stephen D. Straus of counsel), for appellants.

Catafago Fini LLP, New York (Jacques Catafago of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered April 10, 2014, insofar as it denied defendants Cesar A. Fernandez and Cesar A. Fernandez, P.C.'s motion for summary judgment dismissing the complaint as against them or, in the alternative, summary judgment on their cross claim against defendants Manhattan Greenpoint Ltd. and Arman Kohanbash (seller defendants), unanimously modified, on the law, to grant the motion as to the cross claim, and otherwise affirmed, without costs.

The court erred in denying the Fernandez defendants' motion for summary judgment on the ground that they failed to submit an

affidavit by a person with personal knowledge of the facts underlying the motion (CPLR 3212[b]). Their counsel's affirmation properly served as a vehicle for the submission of evidentiary proof in admissible form, such as plaintiff's deposition testimony (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]).

Nevertheless, the Fernandez defendants failed to establish their entitlement to summary dismissal of the complaint as against them (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). "In an action to recover damages for legal malpractice, a plaintiff must demonstrate that the attorney failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer,* 8 NY3d 438, 442 [2007][internal quotation marks omitted]). However, a defendant seeking dismissal of a malpractice case against him has the burden of making a prima facie showing of entitlement to summary judgment (see *Suppiah v Kalish*, 76 AD3d 829, 832 [1st Dept 2010], *appeal withdrawn* 16 NY3d 796 [2011]). Where the motion is premised on an argument that the plaintiff could not succeed on her claim

below, it is the defendant's burden to demonstrate that the plaintiff would be unable to prove one of the essential elements of her claim (see *Velie v Ellis Law, P.C.*, 48 AD3d 674 [2d Dept 2008]). Here, the Fernandez defendants failed to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The Fernandez defendants' bare conclusory assertion that they were not negligent is insufficient.

Whether or not the complexities of this particular case involving a real estate transaction require an expert affidavit (*see Wo Yee Hing Realty Corp. v Stern*, 99 AD3d 58, 63 [1st Dept 2012]), the conclusory, self-serving assertions submitted, lacking any reference to specific industry standards and/or practices, to support the conclusion that the work at issue was done in a professionally competent manner, do not satisfy the movants' burden. Nor do the Fernandez defendants eliminate all material issues of fact on causation and/or damages. Plaintiff's expert affidavit on damages is not so deficient that it lacks probative value (*see Romano v Stanley*, 90 NY2d 444 [1997]; *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 [1991]).

The Fernandez defendants are nonetheless entitled to summary

judgment on their cross claim for indemnification by the seller defendants. The seller defendants did not comply with the discovery deadline stated in the Compliance Conference Order dated January 24, 2013. As a result, pursuant to that order, their answer was deemed stricken and the Fernandez defendants' cross claim deemed admitted (*see* CPLR 3215[a]; *Reynolds Sec. v Underwriters Bank & Trust Co.*, 44 NY2d 568 [1978]). The seller defendants never opposed the motion and have not submitted a brief in opposition in this appeal.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16015-
16015A

Medallion Financial Corp., et al.,
Plaintiffs-Respondents,

Index 653095/12

-against-

Victor Weingarten, et al.,
Defendants-Appellants.

_____

Eric Twiste, Bronx, for appellants.

Herrick, Feinstein LLP, New York (Scott E. Mollen of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 29, 2014, awarding money damages to plaintiffs against defendants, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered January 29, 2014, which granted plaintiffs' motion for summary judgment on their claims and dismissing defendants' counterclaims, unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Plaintiffs extended more than $16 million in financing to defendants in connection with the acquisition of taxicab medallions. Under the financing agreements, plaintiff Freshstart Venture Capital Corp. was entitled to a "Participation Interest" in the medallions, i.e., a percentage of any appreciation in the

medallion value during the term of the financing.

The court correctly found that New York usury law is preempted by the federal Small Business Investment Act of 1958 (SBIA). The Act provides, in pertinent part, that "[a] State law or constitutional provision shall be preempted ... with respect to any loan ... made before the date ... on which such State adopts a law or certifies that ... such State does not want the provisions of this subsection to apply with respect to loans made in such State" (15 USC § 687[i][3]). Defendants made no showing that New York has opted out of the statutory scheme. Nor do the cases they rely on support their position. The issue of preemption was not implicated in *Lloyd Capital Corp. v Pat Henchar, Inc.* (80 NY2d 124 [1992]). In *JZ Smoke Shop, Inc. v American Commercial Capital Corp.*, 709 F Supp 422, 425-427 [SD NY 1989]), the court looked to New York usury law in analyzing a claim of excessive finance charges pursuant to 15 USC § 687(i)(4), which provides a remedy in cases where the rate of interest charged "exceeds the rate which would be authorized by applicable State law if such State law were not preempted for purposes of this subsection."

The court correctly found that the Participation Interest does not render the loans usurious under the SBIA, because it is

not "interest" within the meaning of the Act but either a contingent obligation, which is excluded from the definition of "interest" (*see* 15 USC 687[i][2]), or an "equity security" (*see* 13 CFR 107.800), which is excluded from the "Cost of Money" (the interest and other consideration received from the small-business borrower) calculation (*see* 13 CFR 107.855[g][12]).

The court correctly calculated the Participation Interest in accordance with the parties' agreements.

We have considered defendants' remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16016-
16017 The People of the State of New York, Respondent,

Ind. 2474/10

-against-

Jose Jimenez,
Defendant-Appellant.

_____

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

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

_____

Judgment of resentence, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 12, 2014, resentencing defendant, as a second violent felony offender, to a term of seven years, unanimously reversed, on the law, the second violent felony offender adjudication vacated, and the matter remanded for resentencing including a new determination as to defendant's predicate felony status. Appeal from judgment (same court and Justice), rendered December 19, 2011, as amended February 22, 2012 and December 12, 2014, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, unanimously dismissed, as subsumed in the appeal from the judgment of resentence.

Defendant made a CPL 440.20 motion to set aside his sentence

of 12 years to life as a persistent violent felony offender on the grounds that his 2000 conviction could not be used as a predicate conviction because it was unconstitutionally obtained within the meaning of CPL 700.15(7)(b), and that counsel was ineffective in failing to raise that issue at the appropriate time. In response, the People did not dispute these claims, and conceded that defendant did not qualify as a persistent violent felony offender. The court granted the motion, but resentenced defendant as a second violent felony offender, without considering whether defendant's 1993 conviction fell within or without the 10-year time bar for predicate felonies. In addition, this does not preclude the People from relying on other convictions, if any. Accordingly, defendant must be resentenced.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16018 In re Mel Alfonso Andrade, Index 400833/14
Petitioner,

-against-

New York City Housing Authority,
Respondent.

_____

Mel Alfonso Andrade, petitioner pro se.

David I. Farber, New York (Seth E. Kramer of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated March 7, 2014, which, after a hearing, denied petitioner's remaining family member grievance, 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 [Michael D. Stallman, J.], entered September 16, 2014), dismissed, without costs.

Respondent's determination has a rational basis and is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). Petitioner never obtained respondent's written consent to his occupancy of his mother's apartment (*see Matter of Ortiz v Rhea*, 127 AD3d 665, 666 [1st Dept 2015]). Even if respondent was aware

that petitioner was living in the apartment to care for his mother, respondent may not be estopped from denying petitioner's grievance (*see id.*). Nor do petitioner's alleged mitigating factors provide a basis for annulling respondent's determination (*id.*). Petitioner may not "inherit" the public housing apartment (*see Matter of Dancil v New York City Hous. Auth.*, 123 AD3d 442, 442 [1st Dept 2014]).

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

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16019 Helena Ashton, Index 570721/12
Plaintiff-Appellant, 3000438/10

-against-

EQR Riverside A, LLC, et al.,
Defendants-Respondents.

_____

Powers & Santola, LLP, Albany (Michael J. Hutter of counsel), for appellant.

Molod, Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondents.

_____

Order, Supreme Court, Appellate Term, First Department, entered on or about November 14, 2013, which, inter alia, reversed an order and judgment (one paper), Civil Court, New York County (Ann E. O'Shea, J.), entered December 5, 2012, after a nonjury trial, awarding plaintiff damages, directed judgment in favor of defendants, and dismissed the complaint, unanimously affirmed, without costs.

It was undisputed that defendants did not have actual or constructive notice of the height differential between the recessed well, which was covered by carpeting, and the surrounding marble tile, which caused plaintiff's trip and fall. The only evidence that defendants affirmatively created the condition by gluing the carpet to the floor of the well, failing

to install a drainage system under the well, and improperly maintaining the carpet, causing it to become matted, was the testimony of plaintiff's expert. However, his conclusion was speculative, since he did not examine the carpet that was present on the day of the accident and there was no evidence that the replacement carpet was identical. Plaintiff's expert also failed to cite any industry standard or authoritative treatise supporting his opinion concerning proper maintenance and design of the area (*see Bucholz v Trump 767 Fifth Ave, LLC,* 5 NY3d 1, 8-9 [2005]; *Hotaling v City of New York,* 55 AD3d 396, 398 [1st Dept 2008], *affd* 12 NY3d 862 [2009]).

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16020 The People of the State of New York, Ind. 3760/12
Respondent,

-against-

Joey Graham, true name Joseline Graham,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Alan Gadlin 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 (Ronald Zweibel, J.), rendered on or about January 17, 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: OCTOBER 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16021 Maria E. Sikora, Index 112279/11
Plaintiff-Respondent,

-against-

Earth Leasing Property Limited Liability Company,
Defendant-Appellant,

_____

Weiner, Millo, Morgan & Bonanno, LLC, New York (Benjamin A. Jacobson of counsel), for appellant.

Bader, Yakaitis & Nonnenmacher, LLP, New York (Jesse M. Young of counsel), for respondent.

_____

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 15, 2014, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to establish entitlement to judgment as a matter of law in this action where plaintiff was injured when she slipped and fell on ice on the sidewalk adjacent to defendant's building. The climatological records submitted by defendant noted that the temperature was above freezing for 26 hours prior to plaintiff's fall. However, for the two weeks prior to the accident the temperature was at, or below, freezing. As such, defendant did not show that the allegedly icy condition could not

have been present at the time of plaintiff's fall (*see Ortiz v New York City Hous. Auth.*, 120 AD3d 1059 [1st Dept 2014]; *cf. Daly v Janel Tower L.P.*, 89 AD3d 408, 409 [1st Dep 2011] [affirming grant of summary judgment to defendants where "the climatological reports showed. . . that during the three-day period prior to plaintiff's fall, temperatures remained well above freezing."]). Defendant also failed to demonstrate that it did not have notice of the icy condition. Defendant did not present any evidence as to when the sidewalk was last inspected prior to plaintiff's fall, or when snow or ice was last removed (*see Rodriguez v Bronx Zoo Rest., Inc.*, 110 AD3d 412 [1st Dept 2013]). Nor did it provide any written record of snow or ice removal (*see Santiago v New York City Health & Hosps. Corp.*, 66 AD3d 435 [1st Dept 2009]).

Even were we to find that defendant met its initial burden on the motion, plaintiff's description of the ice taking up almost all of the sidewalk provided at least some indication that the condition had existed for some time, raising a triable issue

as to constructive notice (*see Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]).

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16022- Alexander Gliklad, Index 602335/09
16023- Plaintiff-Respondent,
16023A

-against-

Michael Cherney,
Defendant-Appellant.

_____

Dechert LLP, New York (James M. McGuire of counsel), for appellant.

Winston & Strawn LLP, New York (Thomas J. Quigley, and W. Gordon Dobie of the bar of the State of Illinois, admitted pro hac vic, of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered April 15, 2014, awarding plaintiff a sum of money including interest, unanimously modified, on the law, to vacate the award of prejudgment interest, calculated from August 31, 2004 until March 26, 2014, and remand the matter for the calculation of prejudgment interest from July 24, 2009, and otherwise affirmed, without costs. Appeals from order, same court and Justice, entered April 11, 2014, which granted plaintiff's motion for summary judgment in lieu of complaint, and denied defendant's cross motion to lift the stay of discovery, and order, same court and Justice, entered August 26, 2014, which denied defendant's motion for leave to renew plaintiff's motion,

unanimously dismissed, without costs, as subsumed in the appeal from the aforesaid judgment.

Plaintiff submitted proof of the incomplete executed promissory note containing an obligation to repay and the subsequent documentation (an attachment and an addendum) that completed the note, and evidence that defendant did not pay, and defendant failed to raise a triable issue with respect to a bona fide defense (*see Quadrant Mgt. Inc. v Hecker*, 102 AD3d 410 [1st Dept 2013]). No issues of material fact exist as to the defense under UCC 3-115(a) and 3-407 that plaintiff was not properly authorized to fill in the blanks in the note by identifying himself as the lender and defendant as the borrower. Plaintiff was authorized to fill in the blanks in this manner pursuant to the addendum signed by defendant. No ambiguity exists as to the scope of the authorization so as to require a review of extrinsic evidence of the parties' intent (*see DDS Partners v Celenza*, 6 AD3d 347, 349 [1st Dept 2004]).

In an action on a promissory note, CPLR 5001 permits a creditor to recover prejudgment interest from the date on which each payment of principal or interest became due under the terms of the note until the date on which liability is established (*Spodek v Park Prop. Dev. Assoc.*, 96 NY2d 577 [2001]). If a

promissory note does not contain an interest provision but is payable on demand, then interest accrues from the date of the demand, at the statutory rate for a judgment (*see Hestnar v Schetter*, 284 AD2d 499 [2d Dept 2001], citing *Van Vliet v Kanter*, 139 App Div 603 [1st Dept 1910]; *Paully v Harrison*, 35 AD2d 543 [2d Dept 1970], *appeal dismissed* 27 NY2d 745 [1970]). The only record evidence as to a demand for payment by plaintiff under the note is a demand letter dated July 24, 2009. Thus, July 24, 2009 is the date from which the prejudgment interest should be calculated.

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16024 The People of the State of New York, Ind. 5231/12
Respondent,

-against-

Roger Barksdale,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J., at plea; Rene White J., at sentence), rendered on or about July 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: OCTOBER 29, 2015

CLERK

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

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16025 In re Leon T.,
Petitioner-Respondent,

-against-

Marie J.,
Respondent-Appellant.

_____

Bruce A. Young, New York, for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Leslie S. Lowenstein, Woodmere, attorney for the child.

_____

Order, Family Court, New York County (Marva A. Burnett, Referee), entered on or about June 16, 2014, which, after a hearing, granted the petition for modification of an order of visitation to provide for expanded and overnight visitation, unanimously affirmed, without costs.

The determination that it is in the child's best interest to modify the prior visitation order and award petitioner father increased visitation has a sound and substantial basis in the record (*see Matter of Michael B. v Dolores C.*, 113 AD3d 517 [1st Dept 2014]). The record demonstrates a change of circumstances after the prior visitation order was entered into based on the parties' stipulation (*see Matter of Luis F. v Dayhana D.*, 109 AD3d 731 [1st Dept 2013]). Respondent mother failed to comply

with the agreed schedule for visitation, petitioner moved to a home in Pennsylvania, and the teenaged child expressed a strong desire to spend more time with her father and to stay at his new home overnight (*see Matter of Miguel Angel N. v Tanya Lynn A.*, 131 AD3d 425 [1st Dept 2015]; *Tirschwell v Beiter*, 295 AD2d 266 [1st Dept 2002]). At the court's direction, petitioner's home was inspected by a social worker, who found it to be safe and appropriate for overnight visitation.

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: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16026 William Davis, Index 301806/14
Plaintiff-Appellant,

-against-

Shana Turner,
Defendant-Respondent,

EAN Holdings, LLC, et al.,
Defendants.

_____

Wingate, Russotti, Shapiro & Halperin, LLP, New York (Joseph P. Stoduto of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (Vassilios F. Proussalis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered October 14, 2014, which denied plaintiff's motion for partial summary judgment on the issue of liability against defendant Shana Turner and for dismissal of defendants' affirmative defenses alleging comparative negligence, contributory negligence, and culpable conduct on the part of plaintiff, unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

Plaintiff made a prima facie showing of entitlement to partial summary judgment by submitting his affidavit indicating that the subject motor vehicle accident occurred when Shana

Turner pulled out of a parked position and into a lane of moving traffic (*see* Vehicle and Traffic Law [VTL] §§ 1128[a] and 1162; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]; *Zummo v Holmes*, 57 AD3d 366 [1st Dept 2008]). In opposition, Turner failed to raise a triable issue of fact as to the absence of her negligence.

Coming from a parked position, Turner was prohibited from moving "until such movement [could] be made with reasonable safety" (VTL § 1162). Turner also had a duty not to enter a lane of moving traffic until it was safe to do so (*see* VTL § 1128[a]). Turner's act of entering traffic before it was safe to do so violates the VTL provisions cited above and thus constitutes negligence per se. Any potential issue of comparative negligence between Turner and Nicole Adolphus, the driver of the vehicle in which plaintiff was a passenger, does not restrict plaintiff's right to partial summary judgment against Turner (*see Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1999]). The assertion of a seat belt defense goes to the determination of damages, as a potentially mitigating factor, and not to liability (*see Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]).

Finally, the court properly rejected Turner's claim that the motion was premature. The mere hope that evidence sufficient to

defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion (*see Flores*, 66 AD3d at 600).

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

ENTERED: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16027 The People of the State of New York, Respondent,

Ind. 3810/12

-against-

Ali Moulhem,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered on or about February 21, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: OCTOBER 29, 2015

CLERK

Gonzalez, P.J., Friedman, Gische, Kapnick, JJ.

16028N United States Fidelity & Guaranty Company, et al., Plaintiffs-Respondents, Index 604517/02

-against-

American Re-Insurance Company, et al., Defendants-Appellants,

Excess Casualty Reinsurance Association, et al., Defendants.

_____

Patterson Belknap Webb & Tyler LLP, New York (Stephen P. Younger of counsel), for American Re-Insurance Company, appellant.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (John F. Baughman of counsel), for ACE Property & Casualty Insurance Company and Century Indemnity Company, appellants.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about June 3, 2015, which denied defendants American Re-Insurance Company, Ace Property & Casualty Insurance Company and Century Indemnity Company's motion for a ruling that the reasonableness of plaintiff United Stated Fidelity & Guaranty Company's (USF&G) allocation of all settlement dollars to asbestos-insurance claims is properly the subject of evidence at trial, unanimously affirmed, with costs.

While plaintiffs are correct that evidentiary rulings made

before trial are ordinarily reviewable only on appeal from the posttrial judgment, the ruling on appeal is an exception, since the trial court did not merely determine the admissibility of evidence but also limited the issues to be tried (*see Rivera v New York Health & Hosps. Corp. [Bellevue Hosp. Ctr. & Gouverneur Diagnostic & Treatment Ctr.]*, 38 AD3d 476 [1st Dept 2008]).

Plaintiff USF&G, an insurer, seeks to recover from defendants, its reinsurers, a share of the nearly billion dollars it paid in settling asbestos claims. The reinsurers' obligation to USF&G is determined by USF&G's allocation of the settlement payment, i.e., the amounts it attributed to each claim and to each policy under which the claims were made. In a prior appeal in this case, the Court of Appeals denied USF&G's motion for summary judgment, in part, finding issues of fact as to whether "USF&G, in allocating the settlement amount, reasonably attributed nothing to the so called 'bad faith' claims made against it," and whether "certain claims were given unreasonable values for settlement purposes" (20 NY3d 407, 415 [2013], *modfg* 93 AD3d 14 [1st Dept 2012]). Bad faith claims are the insured's claims of bad faith denial of coverage; these are not covered by reinsurance (*id.* at 422). Certain claims that might have been given unreasonable values are claims for lung cancer, asbestosis,

pleural thickening and "other cancer," the value of which a factfinder could find was inflated by USF&G to include value that should have been attributed to bad faith claims (*id.* at 424, 425-426).

The trial court correctly found that defendants' motion for a ruling allowing evidence on the reasonableness of USF&G's allocation of the entire settlement amount to the asbestos-insurance claims is "contrary to the Court of Appeals decision," which limits the triable issues to the two identified above.

We have considered defendants' remaining arguments and find them unavailing.

**M-3954 -** ***United States Fidelity & Guaranty Company v American Re-Insurance Company***

Motion to dismiss appeal denied.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15985 The People of the State of New York, Ind. 2171/13
Respondent,

-against-

Willy A.,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (H. Junie Chang of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Michael A. Gross, J.), rendered on or about May 19, 2014,

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: OCTOBER 29, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15987 In re Cedric M.,

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

_____

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.

_____

Order of disposition, Family Court, Bronx County (Gayle P. Roberts, J.), entered on or about August 26, 2014, which adjudicated appellant a juvenile delinquent upon his admission that he committed the act of unlawful possession of a weapon by persons under 16, and placed him with the Administration for Children's Services for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. There is no basis for disturbing the court's credibility determinations. At the time that an officer saw what he recognized as the grip of a pistol protruding from appellant's waistband, the police had engaged in nothing but surveillance and had not interfered with appellant in any way (*see People v*

*Thornton*, 238 AD2d 33, 36 [1st Dept 1998]). This observation provided reasonable suspicion that appellant was armed (*see People v Prochilo*, 41 NY2d 759, 762 [1977]), which justified police pursuit when appellant fled upon the officers' approach. In any event, appellant's pattern of suspicious behavior before the officer saw what appeared to be a pistol, which included, among other things, appellant's repeated fidgeting with his waistband and nervously looking over his shoulder as he walked away, provided a founded suspicion of criminality that would have justified a common-law inquiry (*see e.g. People v Rodriguez*, 207 AD2d 669 [1st Dept 1994], *lv denied* 84 NY2d 939 [1994]).

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15988 The People of the State of New York, Ind. 494/76
Respondent,

-against-

Leon Hutchinson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Abraham L. Clott, J.), entered on or about May 28, 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 assessed 10 points under the risk factor for failure to accept responsibility. In the underlying 1976 crime, defendant robbed a woman in an elevator and forced her to the roof of the building, where he beat her and committed sex crimes. In his statement to the probation department, defendant accused his rape victim of lying about the incident, and contended that he had engaged in prior sexual contact with her. Defendant's first expression of anything resembling remorse came

37 years later, in connection with the sex offender proceedings. The court properly found that defendant had not genuinely accepted responsibility for the 1976 offense (*see People v Smith*, 78 AD3d 917 [2d Dept 2010], *lv denied* 16 NY3d 707 [2011]).

In any event, the record supports the court's determination that, regardless of whether defendant's correct point score should be 100 or 110, an upward departure to level three is warranted (*see generally People v Gillotti*, 23 NY3d 841 [2014]). The risk assessment instrument did not adequately take into account the seriousness of defendant's criminal history and misconduct while under parole supervision. In particular, defendant committed a murder, under extremely egregious circumstances, within eight months of his release from incarceration on the 1976 rape conviction. Moreover, defendant has been incarcerated for most of his life, and his claim of a diminished risk of reoffense is unpersuasive.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15989 In re OTR Media Group, Inc., et al., Index 101534/13
Petitioners-Appellants,

-against-

Board of Standards and Appeals
of the City of New York, et al.,
Respondents-Respondents.

_____

Smith, Buss & Jacobs, LLP, Yonkers (Jeffrey D. Buss of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Susan P. Greenberg of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 24, 2014, which, in a proceeding seeking to annul a determination of respondent Board of Standards and Appeals (BSA), dated October 22, 2013, affirming the denial of petitioners' application for a permit for an advertising sign, denied the petition insofar as it claimed that the definition of "within view" employed by respondents was arbitrary and capricious, and transferred the question of substantial evidence to this Court, pursuant to CPLR 7804(g), unanimously vacated, on the law, without costs, the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, BSA's determination unanimously

confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed, without costs.

The "arbitrary and capricious" issue raised by petitioners and disposed of by the court is not an objection that could have terminated the proceeding within the meaning of CPLR 7804(g), and thus we review the matter de novo (*see Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405, 405 [1st Dept 1993]). Upon such review, we find that BSA's interpretation of New York City Zoning Resolution § 42-55 to mean that an advertising sign is "within view" of an arterial highway if it is discernible, using a 360 degree perspective, by a person located on the highway, is not affected by an error of law or arbitrary and capricious (*see* CPLR 7803[3]). Further, substantial evidence supports BSA's determination that, upon application of the "360 degree standard," the sign at issue was within view of the arterial highway (*see* CPLR 7803[4]; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-182 [1978]). Petitioners failed to preserve their retroactivity argument, as they never

raised it at the administrative level (*see Matter of Nelson v New York State Div. of Hous. & Community Renewal*, 95 AD3d 733, 734 [1st Dept 2012]).

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

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15991 The People of the State of New York, Ind. 4025/10
Respondent,

-against-

Walter Williams also known
as Tatiana Williams,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about March 15, 2012,

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

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

ENTERED: OCTOBER 29, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15992 Gabriele Ciavarella, etc., et al., Plaintiffs-Appellants, Index 650776/10

-against-

Luca Zagaglia, etc., Defendant-Respondent,

RLK Ventures LLC, doing business as Manhattan Stone and Tile LLC, et al., Defendants,

Manhattan Stone Imports LLC, Nominal Defendant,

_____

Wuersch & Gering LLP, New York (Craig M. Flanders of counsel), for appellants.

Cardillo & Keyser, New York (Christopher Cardillo of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 27, 2013, which denied plaintiffs' motion for partial summary judgment to pierce the corporate veil of defendants RLK Ventures LLC (RLK) and Manhattan Stone Imports LLC (MSI LLC) to impose liability on defendant Luca Zagaglia, unanimously affirmed, without costs.

"[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation

in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). The motion court found that plaintiffs had satisfied the first prong but not the second.

Plaintiffs' contention that they satisfied the second prong of the *Morris* test by showing fraudulent conveyances is unavailing. The default judgment establishes only that there were fraudulent conveyances from MSI LLC to RLK; it did not establish that there were fraudulent conveyances to *Zagaglia.* The mere fact that Zagaglia took funds out of MSI LLC and RLK, when he was apparently working for them for no salary, does not warrant piercing the corporate veil (*see Ravens Metal Prods. v McGann*, 267 AD2d 527, 529 [3d Dept 1999]). It is true that there is no evidence of consideration for the transfers from MSI LLC and RLK to Zagaglia's wife. However, those transfers were so small that we cannot conclude that they rendered the companies insolvent (*see WorldCom, Inc. v Prepay USA Telecom Corp.*, 294 AD2d 157 [1st Dept 2002]).

It is true that undercapitalization of a corporation and the corporation's owner's personal use of corporate funds, which results in the corporation's being unable to pay a judgment,

constitute wrongdoing and injury sufficient to satisfy the second prong of *Morris* (*see e.g. Austin Powder Co. v McCullough*, 216 AD2d 825, 827-828 [3d Dept 1995]). Plaintiffs have obtained a default judgment against RLK and MSI LLC. RLK's only assets are some furniture, and MSI LLC has no assets; the logical inference is that they will not be able to pay the judgment. Plaintiffs also established that Zagaglia (a member of both RLK and MSI LLC) used corporate funds for personal purposes.

However, plaintiffs did not establish, as a matter of law, that RLK and MSI LLC were undercapitalized. Even plaintiffs admit that Zagaglia contributed at least $207,969.67 of his personal funds to RLK, and Zagaglia claims he invested more than $300,000. In addition, Zagaglia testified that the other two members of RLK contributed $110,000 to $150,000. Unlike *Kittay v Flutie N.Y. Corp. (In re Flutie N.Y. Corp.)* (310 BR 31, 41, 58 [Bankr SD NY 2004]), plaintiffs did not submit testimony from an expert witness that RLK was undercapitalized.

MSI LLC is a closer case. Again, however, plaintiffs submitted no expert testimony that MSI LLC was undercapitalized (*cf. Flutie*).

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15993 APF 286 Mad LLC, et al., Index 156980/12
Plaintiffs-Respondents,

-against-

Chittur & Associates P.C., et al.,
Defendants-Appellants.

_____

Andrey Strutinskiy, Ossining, for Chittur & Associates, P.C., appellant.

Law Offices of H. W. Burns, New York (Howard W. Burns of counsel), for Krishnan Chittur, appellant.

Klein & Solomon, LLP, New York (Jay B. Solomon of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 8, 2015, which granted plaintiffs summary judgment in the amount of $157,603.04 plus interest and attorneys' fees against defendant Krishnan Chittur (Chittur) as the personal guarantor on a lease between tenant Chittur & Associates, P.C. (Associates) and landlord APF, unanimously affirmed, with costs.

Contrary to Chittur's arguments, APF's suit against Chittur pursuant to his unconditional personal guarantee was not merged into APF's judgment in a summary holdover proceeding against Associates pursuant to its lease with APF. The lease and guarantee are two separate contracts, and the holdover proceeding

under the terms of the lease did not extinguish APF's claims under the guarantee (*Davimos v Halle*, 35 AD3d 270, 272 [1st Dept 2006]). This action also does not amount to claim-splitting, as the holdover proceeding was brought only against Associates, and not against Chittur.

With respect to the merits of APF's instant action, the record demonstrates the existence of the guarantee, the underlying debt of unpaid rent, attorneys' fees, and costs, and Chittur's failure to perform under the guarantee (*id.*). Chittur does not dispute that he signed the guarantee, nor does he suggest that it was obtained by fraud, duress, or other wrongful act (*National Westminster Bank USA v Sardi's, Inc.*, 174 AD2d 470, 471 [1st Dept 1991] [internal citations omitted]).

As the guarantee plainly states that it is an unconditional guarantee of payment, APF was not obligated to wait and attempt to receive payment from Associates, and APF was entitled to proceed directly against Chittur (*Milliken & Co. v Stewart*, 182 AD2d 385, 386, [1st Dept 1992]). Moreover, the amount due to APF, as determined in the landlord-tenant action between APF and Associates, may be applied to Chittur under the doctrines of res judicata and collateral estoppel, and because he is in privity with Associates (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 665

[1990]; *Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). We have considered defendants' remaining contentions and find them unavailing.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15994 In re Stephanie F., and Another,

Children Under Eighteen Years of Age, etc.,

Francy Javier A.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack of counsel), for respondent.

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

_____

Order, Family Court, Bronx County (Robert Hettleman, J.), entered on or about November 20, 2014, which denied respondent's motion to vacate an order of fact-finding and disposition entered upon his default, unanimously affirmed, without costs.

Even if the Family Court should have considered respondent's motion under Family Court Act § 1042, as opposed to CPLR 5015(a)(1), it properly denied the motion because respondent failed to present a meritorious defense to the abuse petition (*see* Family Ct Act § 1042; *see also Matter of Rodney W. v Josephine F.*, 126 AD3d 605, 606 [1st Dept 2015], *lv dismissed* 25 NY3d 1187 [2015]). The findings of abuse and derivative abuse

were supported by, among other things, the teenage child's detailed testimony of multiple instances of sexual abuse, which was corroborated by medical records showing that she gave consistent reports to a social worker and that she suffered symptoms of trauma. In support of the motion to vacate, respondent submitted a conclusory affidavit denying the allegations of abuse and vaguely asserting that he has information that could be used during cross-examination to discredit the child's testimony. This is insufficient to establish a meritorious defense (*see Matter of Cain Keel L. [Derzerina L.]*, 78 AD3d 541, 542 [1st Dept 2010], *lv dismissed* 16 NY3d 818 [2011]; *Matter of Gloria Marie S.*, 55 AD3d 320, 321 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]).

Although the absence of a meritorious defense is alone sufficient to deny the motion to vacate, the record also supports a finding that respondent willfully failed to appear at the hearing (*see* Family Ct Act § 1042). His claim that he failed to

appear because his attorney never informed him of the hearing date is not credible and is inconsistent with the record.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15995 The People of the State of New York, Ind. 1966/13
Respondent,

-against-

Ramel Pettiway,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard Weinberg, J. at plea and violation of probation proceedings; Abraham Clott, J. At sentencing), rendered on or about August 27, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15996 Rogan LLC, et al., Index 651168/13
Plaintiffs-Respondents,

-against-

YHD Bowery Commercial Unit LLC,
Defendant-Appellant.

_____

Kishner & Miller, New York (Ryan O. Miller of counsel), for appellant.

Storzer & Greene, P.L.L.C., New York (Robert L. Greene, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered July 8, 2014, which denied defendant's motion for summary judgment on its counterclaims, and granted plaintiffs' cross motion for summary judgment declaring that they are not obligated under the parties' agreements to pay any part of the facade restoration assessment levied against defendant was charged, unanimously affirmed, with costs.

The unambiguous language of the lease agreement between plaintiff Rogan, as tenant, and defendant landlord does not require Rogan to pay any part of the façade assessment levied against defendant (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Paragraph 41(B)(2) of the lease provides that after the condominium conversion, "and in lieu of CAM [common area maintenance] Costs described in paragraph (B)(1) above," "Tenant

shall pay ... [its] Proportionate Share of [the] monthly Common Charges levied against the Commercial Unit; and other special or regular assessments against the Commercial Unit." However, Paragraph 41(B)(1)(c) provides that "costs for capital improvements, to the extent that same are not in furtherance of reasonable or necessary maintenance of the building," "shall not be included as CAM Costs." We reject defendant's argument, without regard to any other provision of the lease, that the obligation set forth in Paragraph 41(B)(2) to pay "other special or regular assessments against the Commercial Unit" requires Rogan to pay a proportionate share of the facade assessment.

Defendant's reliance on a sole provision in support of imposing this payment obligation on plaintiffs renders meaningless other provisions of the lease that require all tenants to comply with documents relating to the condominium conversion and that make clear that the tenant's monetary obligations under the lease will not increase as a result of this compliance (*see 112 W. 34th St. Assoc., LLC v 112-1400 Trade Props. LLC*, 95 AD3d 529 [1st Dept 2012], *lv denied* 20 NY3d 854 [2012]).

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

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15997-
15998-
15998A Index 309025/09

Santa Roman,
Plaintiff-Appellant,

-against-

Sullivan Paramedicine, Inc., et al.,
Defendant,

Arie Nudel,
Defendant-Respondent.

_____

Edelman & Edelman, P.C., New York (David M. Schuller of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 17, 2014, insofar as appealed from, dismissing the complaint as against defendant Arie Nudel, unanimously reversed, on the law and the facts, without costs, and the complaint and jury verdict reinstated as against Nudel. Appeals from orders, same court and Justice, entered February 11, 2014 and March 11, 2014, which granted Nudel's motion to vacate the jury verdict finding him 20% liable for the motor vehicle accident and for judgment in his favor, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The testimony of the third driver in this three-vehicle chain

collision and of the responding state trooper to the effect that the second vehicle, driven by defendant Nudel, struck the vehicle in front of it before being struck from behind constituted legally sufficient evidence from which a jury could conclude that the accident occurred in such a manner, and the trial court erred in disregarding such testimony as a matter of law (*see generally Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]). Moreover, the jury was free to accept or reject, in whole or in part, the testimony of both plaintiff's and Nudel's experts (PJI 1:90).

Also, because there was evidence from which the jury could reasonably infer that Nudel "created a foreseeable danger that vehicles would have to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear-end collisions" (*Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]), the verdict finding him liable was not against the weight of the evidence and should be reinstated.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

15999 The People of the State of New York, Ind. 4979/10
Respondent,

-against-

Ronny Tineo Martinez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Manu K. Balachandran 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 (Jill Konviser, J.), rendered on or about May 10, 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: OCTOBER 29, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

16000 New York City Department of Transportation, et al., Plaintiffs-Appellants, Index 590382/13

-against-

Petric & Associates, Inc., Defendant-Respondent.

_____

Litchfield Cavo LLP, New York (Kevin Donnelly of counsel), for appellants.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Richard Imbrogno of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 21, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, solely, to declare that plaintiffs cannot recover on their complaint until after the policy limits of the Endurance policy issued to defendant have been exhausted by the payment of judgments or settlements, and otherwise affirmed, without costs.

Pursuant to the common-law antisubrogation rule, an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). In light of this rule, plaintiffs' argument that this action does not violate the antisubrogation rule because it involves two

different policies and two different insurers is unavailing, based on the "insured contract" exception to the employer's liability exclusion of the subject general liability policy. Based on the foregoing exception to the employer's liability exclusion, the Endurance policy provides coverage to the City and Conti for the Labor Law causes of action asserted against them by the plaintiff in the underlying action. The Endurance policy also provides coverage to Petric for its contractual indemnification obligation to the City and Conti. Thus, the conflict of interest is readily apparent, since any effort by the City and Conti to seek reimbursement from Petric's insurer, Endurance, is essentially a subrogation action by Endurance against its own insured, which is barred by the antisubrogation rule (*see Washington v New York City Indus. Dev. Agency*, 215 AD2d 297, 298 [1st Dept 1995]).

Although the third-party action against Petric asserts only causes of action based on common law indemnification and contribution, "New York law does not distinguish, for purposes of the antisubrogation rule, between subrogation claims brought directly against an insured and claims brought against a common insurer" (*Ohio Cas. Ins. Co. v Transcontinental Ins. Co.*, 372 Fed Appx 107, 112 [2d Cir 2010], citing *Washington v New York City Indus. Dev. Agency*, 215 AD2d at 299; *see also Maksymowicz v New York City Bd. of Educ.*, 232 AD2d 223, 223-224 [1st Dept 1996]).

Accordingly, the antisubrogation rule applies to bar the City and Conti's claims against Petric until the $1 million limit of liability of the Endurance policy is exhausted.

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

16001 The People of the State of New York, Ind. 3629/09
Respondent,

-against-

Jorge Barrios,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Steven L. Barrett, J.), rendered on or about January 28, 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: OCTOBER 29, 2015

CLERK

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

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

16003 John Kehagias, et al., Index 306869/10
Plaintiffs-Respondents,

-against-

Waldo Avenue Building, et al.,
Defendants-Appellants.

_____

Carrol, McNulty & Kull L.L.C., New York (Frank J. Wenick of counsel), for appellants.

Law Offices of Peter J. Koulikourdis, Bronx (Peter J. Koulikourdis of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about March 19, 2014, which denied defendants' motion to dismiss as time-barred plaintiffs' claims arising prior to August 18, 2007, unanimously reversed, on the law, without costs, and the motion granted.

Although plaintiffs' causes of action — alleging that a defective catch basin located on defendants' property caused flooding on their property — first accrued in 2006 when the damage became visible and apparent to plaintiff (*see Public Serv. Mut. Ins. Co. v 341-347 Broadway, LLC*, 96 AD3d 473, 473-474 [1st Dept 2012]), the flooding nevertheless constituted a "continuous wrong" that gave rise to successive causes of action that accrued each time the wrong was committed (*Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013]; *see also Congregation B'nai Jehuda v Hiyee Realty*

*Corp.*, 35 AD3d 311, 313 [1st Dept 2006]). Accordingly, to the extent plaintiffs claim damages for flooding that occurred before August 18, 2007 (three years prior to the filing of the complaint), those claims are time-barred (*see Lucchesi v Perfetto*, 72 AD3d 909, 912 [2d Dept 2010]; *see also* CPLR 214[4]).

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

ENTERED: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

16004 The People of the State of New York, Respondent, Ind. 111/13

-against-

Lamont Jones, Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Raymond L. Bruce, J.), rendered on or about March 6, 2013, unanimously affirmed.

Application by defendant'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 defendant'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: OCTOBER 29, 2015

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, JJ.

16005-
16006N Index 652471/14

SNI/SI Networks LLC,
Plaintiff-Appellant,

-against-

DIRECTV, LLC,
Defendant-Respondent.

_____

Jenner & Block LLP, New York (Stephen L. Ascher of counsel), for appellant.

Kirkland & Ellis LLP, California (Robyn E. Bladow of the bar of the State of California, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered April 29, 2015, which denied plaintiff's motion for a protective order under CPLR 3103, and directed plaintiff to produce the agreements it has with its other clients, subject to a confidentiality agreement, unanimously affirmed, with costs. Order, same court and Justice, entered May 27, 2015, which, to the extent appealed from, permits defendant's in-house counsel to review the aforesaid agreements, unanimously affirmed, with costs.

The agreements that plaintiff has with its other distributors are "material and necessary" to defendant's defense of antecedent breach (*see* CPLR 3101[a]; *Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 407 [1968]; *Twenty Four Hour Fuel Oil Corp. v Hunter Ambulance*, 226 AD2d 175 [1st Dept 1996]). Defendant demonstrated a factual

basis for its defense and that the "'discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the [defense]'" (*see Abrams v Pecile*, 83 AD3d 527, 528 [1st Dept 2011]).

As to plaintiff's request to designate the sought information for "outside counsel eyes only," the parties are not business competitors (*see Matter of Bernstein v On-Line Software Intl.*, 232 AD2d 336, 337 [1st Dept 1996], *lv denied* 89 NY2d 810 [1997]), and plaintiff's claim that permitting an in-house counsel of defendant to view the information "would visit needless competitive harm on [plaintiff]" is conclusory. To the extent plaintiff is concerned about exposing competitive confidential information belonging to its other distributors, who may be defendant's competitors, this concern is alleviated by the confidentiality order (*see Twenty Four Hour Fuel Oil Corp.*, 226 AD2d at 176).

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

ENTERED: OCTOBER 29, 2015

CLERK

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

15709 Public Adjustment Bureau, Inc., Index 601202/05
Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Co.,
Defendant,

Seward Park Housing Corp.,
Defendant-Respondent.

_____

Weg and Myers, P.C., New York (Dennis T. D'Antonio of counsel), for appellant.

Weber Law Group LLP, Melville (Jason A. Stern of counsel), for respondent.

_____

Order and judgment (one paper) Supreme Court, New York County (Louis B. York, J.), entered January 24, 2014, reversed, on the law, without costs, defendant Seward Park Housing Corp.'s motion for judgment notwithstanding the verdict and to set aside the verdict denied, and the complaint and the verdict reinstated.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Richard T. Andrias
David B. Saxe
Judith J. Gische
Barbara R. Kapnick, JJ.

15709
Index 601202/05

_____x

Public Adjustment Bureau, Inc.,
Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Co.,
Defendant,

Seward Park Housing Corp.,
Defendant-Respondent.

_____x

Plaintiff appeals from the order and judgment (one paper) of the Supreme Court, New York County (Louis B. York, J.), entered January 24, 2014, granting defendant Seward Park Housing Corp.'s motion for judgment notwithstanding the verdict and to set aside the verdict, and dismissing the complaint.

Weg and Myers, P.C., New York (Dennis T. D'Antonio, Joshua L. Mallin and Rita Y. Wang of counsel), for appellant.

Weber Law Group LLP, Melville (Jason A. Stern of counsel), for respondent.

SAXE, J.

This appeal raises issues regarding the work of public adjusters — those who, under the Insurance Law, may be retained to advocate on behalf of an insured against an insurer to obtain an optimal settlement of the insured's claim — and how and when they earn their fees.

Following a partial collapse of a garage at the Seward Park Housing Complex on January 15, 1999, defendant Seward Park Housing Corp. made a claim against its insurer, defendant Greater New York Mutual Insurance Company, for its rebuilding costs. To help it make its insurance claim, Seward Park retained plaintiff, Public Adjustment Bureau, Inc. (PAB), a licensed public adjuster. Seward Park's retainer agreement with PAB stated that PAB would "perform valuable services, to include preparation and submission of claim detail and to advise and assist in the adjustment of the loss," and would be paid "seven percent of the amount of loss and salvage . . . when adjusted or otherwise recovered."

PAB's efforts to settle the claim were unsuccessful, and the matter proceeded to trial without any further direct involvement on its part. Ultimately, after a jury verdict in Seward Park's favor and against Greater New York Mutual was vacated in part and the matter remanded for another trial (*Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 43 AD3d 23 [1st Dept 2007]), and

after further litigation (*Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 63 AD3d 525 [1st Dept 2009]; *Seward Park Hous. Corp. v Greater N.Y. Mut. Ins. Co.*, 70 AD3d 468 [1st Dept 2010]), Seward Park's claim against Greater New York Mutual was settled in May 2010.

PAB then sued Seward Park, claiming that Seward Park breached their retainer agreement by failing to pay PAB seven percent of the eventual settlement. After this Court reversed a grant of summary judgment dismissing PAB's claim (*Public Adj. Bur., Inc. v Greater N.Y. Mut. Ins. Co.*, 98 AD3d 894 [1st Dept 2012]), a trial was held on the issue of whether PAB performed valuable services in connection with Seward Park's recovery against Greater New York Mutual. The jury found in favor of PAB.

The trial court then granted Seward Park's motion for a judgment notwithstanding the verdict and dismissed the complaint, reasoning that PAB's services were limited to a futile initial attempt to settle with Greater New York Mutual and that none of its work was used in the trial against the insurer or to obtain the ultimate settlement. The court expressed the view that "valuable services" "must consist of continuous input that contributed to the settlement or adjustment of the claim," and

concluded that PAB made no such continuous input. We disagree.[1]

The work of public adjusters is not widely known about. "[M]any consumers, and even a few insurance analysts, are generally unaware of their existence because most public adjusters do not advertise" (Julie Edelson Halpert, "Personal Business; In the Insurance Maze, Adjusters are Selling a Map," New York Times, Business Day, June 24, 2001, available at http://www.nytimes.com/2001/06/24/business/personal-business-in-the-insurance-maze-adjusters-are-selling-a-map.html).

The profession of public adjusting has come a long way from its earliest stages, at least as far back as the 1890s in this State. Public adjusters then handled fire damage insurance claims on behalf of insured property owners, and it appears that the profession was unregulated at that time (*see Milch v Westchester Fire Ins. Co.*, 13 Misc 231 [NY Common Pleas Court 1895]). Indeed, in a commentary published in 1890, in a weekly journal of the insurance industry called The Chronicle, the attitude of the insurance industry toward public adjusters is illustrated. The writer characterized public adjusting -- perhaps hyperbolically -- as "disreputable" (*see* The Chronicle, A

[1] However, we reject PAB's argument that the trial court's ruling was precluded by the law of the case or any previous rulings.

Weekly Insurance Journal, vol XLVI no 26, Thursday Dec. 25, 1890, pp 370-371, available at https://books.google.com/books?id=RIAoAAAAYAAJ&pg=PA193&dq=The+Chronicle+journal+1890+%22public+adjusters%22&hl=en&sa=X&ved=0CC8Q6AEwAGoVChMI98CSybaSyAIVwVw-Ch0ylgYu#v=onepage&q=The%20Chronicle%20journal%201890%20%22public%20adjusters%22&f=false [accessed September 25, 2015]).

With increased statutory regulation, that perception has been altered. The profession became regulated by the enactment of former Insurance Law § 138-a, which prohibited working as a public adjuster without a certificate of authority to act as such issued by the superintendent of insurance (L 1913 ch 522, amending ch 221); the lack of a certificate absolutely precluded a public adjuster from recovering for services it rendered on behalf of an insured (*see William Stake & Co., Inc. v Roth*, 91 Misc 45 [App Term, 1st Dept 1915], *affd* 171 App Div 914 [1st Dept 1915]).

Current law more fully defines and regulates public adjusters in New York. A public adjuster is defined by statute as one who, "for money, commission or any other thing of value, acts or aids in any manner on behalf of an insured in negotiating for, or effecting, the settlement of a claim or claims for loss or damage to property of the insured" (Insurance Law §

2101[g][2]). Insurance regulations not only require a compensation agreement for a public adjuster to be entitled to payment (11 NYCRR 25.6), but also prescribe the form of such an agreement (11 NYCRR 25.13[a], form 1), and limit a public adjuster's right to a fee to circumstances in which "valuable services" were performed: "If a public adjuster performs no valuable services, and another public adjuster, insurance broker ... or attorney subsequently successfully adjusts such loss, then the first public adjuster shall not be entitled to any compensation whatsoever" (11 NYCRR 25.10[b]). However, there is no clear definition of "valuable services," or what portion of the ultimate settlement must be attributable to the services of the public adjuster for its services to be deemed "valuable" (*see GS Adj. Co., Inc. v Roth & Roth, L.L.P.*, 85 AD3d 467, 468 [1st Dept 2011]). This Court therefore concluded in the prior appeal in this case that the question of whether PAB provided valuable services should be decided by a jury (98 AD3d at 894).

The jury made a finding that PAB provided valuable services to Seward Park in connection with Seward Park's ultimate recovery of its claim against the insurer. Judgment notwithstanding the verdict would be appropriate only if, viewing the evidence in the light most favorable to the plaintiff, there was no valid line of reasoning or permissible inference that could lead rational

persons to make that finding (*see Fritz v White Consol. Indus.*, 306 AD2d 896 [4th Dept 2003]).

The evidence supporting the verdict consisted of the testimony of Gerald Scheer, the senior PAB employee who handled Seward Park's claim, who established the nature and extent of the services performed by PAB. Scheer testified that on January 18, 1999, PAB sent Greater New York Mutual a notice of claim, in satisfaction of the notice requirement in the policy. It also cooperated and assisted with document requests from Greater New York Mutual, which were sent directly to PAB. On February 12, 1999, PAB sent Greater New York Mutual a written request for a $100,000 advance, with supporting documentation, on Seward Park's behalf; Greater New York Mutual denied the request.

PAB then prepared two proofs of loss: the first, filed in July 1999 -- within 60 days of Greater New York Mutual's request as required by the policy to avoid forfeiture of the claim -- provided a preliminary estimate of $3.8 million for repairs; the second, filed in November 1999, estimated repairs at $9.6 million, after the City deemed the standing portion of the garage unsafe and ordered it demolished. For both proofs of loss, PAB hired and met with Robert M. Strongwater Int'l Inc., which conducted inspections of the garage and provided estimates of the cost of repairs. PAB paid Strongwater $29,015 for the first

estimate.

During this period, Scheer also conferred with John Doyle at Anderson Kill, Seward Park's then counsel, regarding preparation of the proof of loss. Doyle relied on Strongwater's estimate to calculate the proof of loss amounts. While Scheer did not directly take part in the preparations of the third proof of loss, filed by Anderson Kill on December 21, 2000, which estimated the loss at $21 million, Allan Wollman, a property manager at Seward Park, confirmed that as of December 2000, PAB was still working on Seward Park's behalf and communicating with Greater New York Mutual.

Scheer also attended meetings with forensic engineers and others to discuss the cause of the garage collapse, and reviewed and commented on claim documents at the request of Seward Park's insurance agent, Frenkel & Company, Inc.

Viewing the foregoing evidence in the light most favorable to plaintiff, we conclude that there are valid lines of reasoning that could lead rational jurors to find that although PAB was not directly involved in the trial against the insurance company, it had provided "valuable services" in connection with the ultimate settlement of Seward Park's insurance claim. These services could have included the preparation of the initial claim forms, the retention of a firm to investigate the damage and repairs,

meeting with that firm and with architects, engineers, and counsel to discuss the claim, communicating with the insurance company regarding those repairs, and making Scheer — who was deposed — available to testify at the trial. From this, the jury could have rationally concluded that PAB's work before trial constituted a valuable contribution to the trial and to the ultimate settlement, if only by preserving Seward Park's claims and aiding in the damages assessment and investigation.

Seward Park argues that PAB's work may not be deemed valuable because it did not directly procure or contribute to the lawsuit or the ultimate settlement, and because Seward Park could have settled its claim without PAB's input. However, PAB was undisputedly involved in Seward Park's substantial compliance with all policy requirements, which is a prerequisite for an insurer's obligation to pay under the policy (*see Raymond v Allstate Ins. Co.*, 94 AD2d 301, 305 [1st Dept 1983], *appeal dismissed* 60 NY2d 612 [1983]).

Seward Park also argues that PAB failed to establish that but for PAB's conduct, Seward Park would not have recovered against its insurer. However, neither the Insurance Law nor the retainer agreement requires a "direct and proximate link," or the actual procurement of a settlement. Each requires merely that the public adjuster provide "valuable services" in connection

with a settlement.

We find no basis in the Insurance Law or the related regulations for the trial court's imposition of the requirement that a public adjuster provide "continuous input" in the settlement process to be entitled to its fee.

Nor do the Insurance Law or regulations justify applying to this dispute the law relating to real estate brokers' claims for commissions. It is true that a real estate broker's commission is owed only when the broker is the "procuring cause" of the sale, i.e., when there is a "direct and proximate link" between the broker's introduction of the buyer and seller and the "consummation of the transaction" (*SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 95 [1st Dept 2014]), and that a real estate broker is entitled to no commission if its contract terminates before the transaction is negotiated (*see Douglas Real Estate Mgt. Corp. v Montgomery Ward & Co.*, 4 NY2d 33, 37 [1958]; *Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564 [1st Dept 2013]). However, the retainer agreement at issue here contemplates that if the public adjuster performed "valuable services, to include preparation and submission of claim detail and to advise and assist in the adjustment of the loss," it would be paid when the loss was "adjusted or otherwise recovered." Notably, nothing about an award of compensation where the public adjuster

performed valuable services transgresses the insurance regulation precluding compensation for a public adjuster that "performs no valuable services, and another public adjuster, insurance broker ... or attorney subsequently successfully adjusts such loss."

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Louis B. York, J.), entered January 24, 2014, granting defendant Seward Park Housing Corp.'s motion for judgment notwithstanding the verdict and to set aside the verdict, and dismissing the complaint, should be reversed, on the law, without costs, defendant Seward Park Housing Corp.'s motion should be denied, and the complaint and the verdict should be reinstated.

All concur.

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

ENTERED: OCTOBER 29, 2015

CLERK