SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 18, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

15085 Michael Somereve, et al., Index 150136/12
Plaintiffs-Respondents,

-against-

Plaza Construction Corp.,
Defendant-Appellant.

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Rafter and Associates PLLC, New York (Howard K. Fishman of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, New York (Brian J. Isaac of counsel), for respondents.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered January 16, 2014, which granted plaintiffs' motion for partial summary judgment on the Labor Law § 240(1) cause of action, affirmed, without costs.

The injured plaintiff testified that on the day of the alleged accident, he was operating a prime mover, which resembles a mini-forklift, to hoist a load of bricks onto a scaffold 5½ to 6 feet high. Plaintiff testified that the forks had to be about four to six inches away from the edge of the scaffold as he raised them to place the load on the scaffold; if the forks were

too close, plaintiff would not be able to lift the load because the forks would hit the scaffold. Once the forks had cleared the top of the planks, plaintiff would drive forward and rest the load on the scaffold.

On the day of the alleged accident, two of plaintiff's colleagues were standing on top of the scaffold, with one of them watching to assure that the forks were properly placed in relation to the height of the scaffold. The colleague verbally or through hand signals informed plaintiff that the forks were clear of the scaffold; thus, plaintiff understood that he would be able to safely raise the load and deposit the bricks on the scaffold. However, when the load was approximately five feet off the ground, the prime mover flipped forward and plaintiff was ejected off the back of the machine and onto the concrete floor.

Defendant's project superintendent, Charles J. Krammer, whom defendant produced for deposition, did not actually see the alleged accident occur, but rather, arrived at the scene soon afterward. According to Krammer's testimony, plaintiff stated that the prime mover threw him and that he "flew over the handlebars" of the machine. Further, Krammer testified that although he saw two laborers standing at the site of plaintiff's alleged accident, neither one of them informed Krammer that they had witnessed the events. Nor did anyone else at the site so

inform Krammer.

Defendant subpoenaed two other people who had been at the site – Luis Caratini, a laborer who plaintiff said had witnessed the alleged accident, and Michael Catalano, a supervisor – intending to take their depositions. But before those depositions could proceed, plaintiffs moved for partial summary judgement on the issue of liability on the Labor Law § 240(1) claim.

We agree with the motion court that plaintiff is entitled to summary judgment on his Labor Law § 240 claim. Plaintiff was using the prime mover to hoist a load; if the prime mover pitched forward due to the force of gravity, it failed to offer adequate protection and Labor Law § 240(1) applies (*see Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565, 1566-1567 [4th Dept 2010]*; see also Runner v New York Stock Exch.,* Inc., 13 NY3d 599, 603-604 [2009*; Penaranda v 4933 Realty, LLC*, 118 AD3d 596, 597 [1st Dept 2014]). Similarly, if the accident occurred because either the prime mover or scaffold could not support the weight of the brick load, the accident also resulted from the application of the force of gravity to the load during the hoisting operation, and Labor Law § 240(1) applies (*see Runner*, 13 NY3d at 603-604; *Bilderback v Agway Petroleum Corp.*, 185 AD2d 372, 373 [3d Dept 1992], *lv dismissed* 80 NY2d 971 [1992]).

Furthermore, despite defendant's (and the dissent's) contention otherwise, no further discovery or depositions are necessary on the Labor Law § 240(1) issue; on the contrary, under any version of the events surrounding the accident, plaintiff is entitled to summary judgment on that claim. Defendant advances two theories in opposition to plaintiff's summary judgment motion: first, that the prime mover, which plaintiff himself loaded, may have been carrying too much weight; and second, that the bricks on the prime mover may have come into contact with the scaffold as plaintiff was raising the load, thus causing the prime mover to tip forward. But even were we to accept the arguments that defendant advances, our decision would be no different.

Even assuming for the sake of argument that the outstanding depositions shed light on either one of these theories, the testimony would at most touch on the issue of comparative negligence, which is not a defense to a Labor Law § 240(1) claim (*see Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 523 [1985]; *Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]). Accordingly, given plaintiff's account of the events surrounding the alleged accident, further testimony would not change the outcome of the decision on plaintiffs' motion.

At any rate, defendants have never made any showing that

Caratini was available to testify; defendant apparently served the subpoena and the deposition was noticed for July 2013, but it never took place. Even if Caratini were available, defendant offered nothing more than speculation about what his testimony might prove. However, a mere hope that further discovery will provide evidence to defeat summary judgment is insufficient to defeat a summary judgment motion (*Flores v City of New York*, 66 AD3d 599, 600 [1st Dept 2009]). As for Catalano, he not only provided an affidavit supporting defendant, but also made clear in that affidavit that he did not witness the alleged accident, but arrived on the scene only afterward; thus, further testimony from him would shed no light on the matter.

The dissent also fails to properly characterize the nature of plaintiff's alleged accident. Plaintiff did not simply "f[a]ll from the platform of the prime mover situated eight inches off the floor," as the dissent states. Similarly, plaintiff was not simply "alighting" from the prime mover. The testimony in the record shows instead that the prime mover tipped forward, with a resulting "catapult-type effect" on plaintiff. The prime mover then ejected plaintiff upward, causing him to hit the ductwork or the ceiling before he was "slammed" onto the concrete floor of the site. Certainly, it is appropriate to characterize this sequence of events as a gravity-related

accident (*see Potter*, 71 AD3d at 1566).

Likewise, despite our dissenting colleague's suggestion otherwise, there is no viable argument that plaintiff was the sole proximate cause of this accident. The record presents no evidence that plaintiff failed or refused to use an available safety device or that he disregarded a supervisor's instructions regarding use of the prime mover, nor does the dissent point to any. Rather, the record establishes simply that the prime mover pitched forward when plaintiff raised the forks (*see Amante v Pavarini McGovern, Inc.*, 127 AD3d 516 [1st Dept 2015]; *Nacewicz v Roman Catholic Church of the Holy Cross*, 105 AD3d 402, 402-403 [1st Dept 2013]; *see also Vasquez-Roldan v Two Little Red Hens, Ltd.*, 129 AD3d 828, 830 [2d Dept 2015]).

What is more, "the Labor Law does not require a plaintiff to have acted in a manner that is completely free from negligence" (*Kielar v Metropolitan Museum of Art*, 55 AD3d 456, 458 [1st Dept 2008] [internal quotation marks omitted]). On the contrary, that plaintiff may have negligently lowered the pallet, as the dissent posits, makes no possible difference to the outcome here, as "[n]egligence, if any, of the injured worker is of no consequence" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Rather, the law is clear that "if a statutory violation is a proximate cause of an injury, the plaintiff cannot

be solely to blame for it" (*Kielar*, 55 AD3d at 458 [internal quotation marks omitted]); *see Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]). Here, the failure to provide a proper hoisting device to protect plaintiff violated Labor Law § 240(1).

All concur except Tom, J.P. and Andrias, J. who dissent in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting)

The majority awards summary judgment to plaintiff by employing the conclusory reasoning that because the accident involved the use of a safety device enumerated under Labor Law § 240(1), and the worker was injured while operating the device, the worker is entitled to recover for his injuries. In this case, no defect in the machine he used to lift a pallet of bricks onto a scaffold is identified. Nor was the platform of the machine from which the worker fell a type of elevation risk requiring protection against the hazard represented by the force of gravity. More significantly, the evidence raises a factual issue as to whether plaintiff's injuries were caused solely by his own negligent operation of the machine. Finally, plaintiff could not give an explanation as to how the incident occurred and there are at least two identified witnesses to the occurrence who were subpoenaed but have not yet been deposed and are in a position to shed light on how it occurred. Thus, summary judgment was prematurely awarded.

According to plaintiff Michael Somereve, Louis Caratini, a laborer working on the fourth floor at a school construction

project was at the controls of a prime mover[1] loaded with about 1,500 pounds of bricks. After plaintiff observed that Caratini appeared to be highly anxious, plaintiff took over the operation of the machine. The prime mover was a piece of equipment owned by plaintiff's employer. After lowering the load to the floor, he first backed out the fork from the pallet on which the bricks, wrapped in plastic sheeting and further secured by plastic bands, had been previously deposited. He reinserted the tines to make sure they protruded through the pallet to the maximum extent and verified that the load was properly balanced. He then raised the load a few inches off the floor and approached a scaffold that was six feet in height. The next step would be to raise the pallet of bricks and place them on top of the scaffold. As plaintiff relates, he had to be some four to six inches away from the edge or front of the scaffold before lifting the bricks to the top of the scaffold. If he was too close to the scaffold, "[t]he forks would hit the scaffold." After the skid of bricks was raised past the height of the scaffold he would drive forward

[1] A prime mover is similar to a forklift in both design and operation, the difference being that instead of sitting on a seat in the middle of the machine, the operator of the mover is able to stand on a platform at the back of the device or fold up the platform and walk behind it. The platform, which was being used in this instance, is elevated about eight inches above floor level.

and rest the pallet on the scaffold where the bricks could be unwrapped and manually transferred by laborers to where masons would use them to face the exterior cinder block wall.

When one of two persons on the scaffold told him that he could begin to raise the fork, plaintiff began to raise the pallet of bricks. As it reached a height of about five feet, for reasons plaintiff alleged to be unable to explain, the load "flipped forward and [plaintiff] was ejected off the back of the machine." Plaintiff stated that Caratini witnessed the accident, but he did not know if the two laborers on the scaffold, one named Mike, saw what happened.

The majority opines that because the force of gravity operated on either the prime mover or the scaffold and plaintiff sustained injury, he is entitled to recover under Labor Law § 240(1). However, the Court of Appeals has made clear that injury from a fall at a construction site does not automatically bring a worker within the ambit of the protection afforded by the statute. "Among other prerequisites, a worker must demonstrate the existence of an elevation-related hazard contemplated by the statute and a failure to provide the worker with an adequate safety device" (*Berg v Albany Ladder Co., Inc.*, 10 NY3d 902, 904 [2008]), as well as a nexus between the violation and the resulting injury (*Blake v Neighborhood Hous. Servs. of N.Y. City*,

1 NY3d 280, 289 [2003]). Here, plaintiff's mere statement that the mover "flipped forward," without more, is insufficient for the majority to grant summary judgment in light of evidence showing his injuries were proximately caused by his own negligent operation of the machine.

In contrast with the majority's conclusion that the prime mover simply "pitched forward" when plaintiff raised the fork, the evidence, ignored by the majority, supports finding that the prime mover was caused to come into contact with the scaffold by plaintiff while he was raising the pallet of bricks or while he was negligently lowering the pallet onto the scaffold when the fork of the mover had not yet cleared the top of the scaffold. Hence, the evidence raises a factual issue as to whether this incident was caused solely by plaintiff's negligent operation of the mover, thus precluding the grant of summary judgment to plaintiff on the Labor Law § 240(1) claim. Supreme Court thus erred when it granted plaintiff partial summary judgment on his Labor Law § 240(1) claim since a "reasonable jury could have concluded that plaintiff's actions were the sole proximate cause of his injuries, and consequently that liability under [section] 240(1) did not attach" (*Weininger v Hagedorn & Co.*, 91 NY2d 958, 960 [1998]).

First, there is no proof offered by plaintiff that the

device, the prime mover, provided was defective or that it proximately caused plaintiff's injuries. Rather, the evidence suggests that plaintiff's injuries were caused solely by his negligent operation of the prime mover. The incident caused extensive damage to the scaffold, but the prime mover was found not to be defective nor did it malfunction. In fact, the mover continued to be used after the accident without any operational problems or repairs whatsoever. Charles J. Krammer, the project superintendent for Plaza Construction Corp., the general contractor, who was at the site shortly after the accident, stated that the prime mover had no apparent physical damage and was immediately put back into service "because the equipment looked fine and he claimed to have fallen off of it." Michael Catalano, supervisor for Town Masonry, plaintiff's employer, also avers in his affidavit that he observed no damage to the prime mover after the incident and confirmed that it was placed back into operation without any problems.

Nor has the scaffold been shown to have been inadequate to afford the requisite statutory protection. It prevented two workers (who, Krammer testified, were supposed to be present on the scaffold just in case an incident such as this occurred) from falling, and it prevented the bricks dropped onto it from causing injury to workers below. Thus, "there is no evidence that the

scaffolding was defective or otherwise failed to perform its function of elevating the workers and their material," and plaintiff is not entitled to summary judgment on the issue of liability (*Beesimer v Albany Ave./Rte. 9 Realty*, 216 AD2d 853, 855 [3d Dept 1998]).

Krammer examined the site and observed that the pallet had been dropped onto the scaffold flooring, a platform made up of five 2 by 10 or 2 by 12 planks, with such force so as to dislodge the two planks closest to the outer wall of the scaffold, causing the front edge of the pallet to penetrate the platform and protrude a couple of feet beneath the planking. The support and cross-brace bars of the scaffold were bent from the impact. The fact that the front cross-brace bar of the scaffold was bent indicates something heavy (the prime mover) striking it directly with force. Based on plaintiff's testimony, the accident occurred when he raised the skid of bricks about five feet, from which it can be reasonably inferred that at the time of the impact the pallet of bricks had not cleared the top of the scaffold which was six feet in height and the pallet of bricks were dropped onto the scaffold flooring. Indeed, shortly after the incident, plaintiff informed Krammer that he believed that "the forks caught and it threw him." Krammer testified that from the damages he observed, "It looked like he was backing out, the

forks caught and the load shifted and ejected him off the machine."

The majority suggests that the accident occurred, because "either the prime mover or scaffold could not support the weight of the brick load." There is no evidence presented to support this contention. Catalano testified, and it was undisputed, that the prime mover was well suited to lifting a 1,500-pound pallet of bricks and had been routinely lifting and placing this capacity of bricks on the scaffold for weeks before the incident and continued to do so after the incident without any problems (*cf. Penaranda v 4933 Realty, LLC*, 118 AD3d 596 [1st Dept 2014] [Bobcat overloaded with plywood requiring injured employee to ride on the back to act as a counterweight]; *Potter v Jay E. Potter Lbr. Co., Inc.*, 71 AD3d 1565 [4th Dept 2010] [forklift with operating capacity of 1,500 pounds insufficient to hoist 2,780-pound load]; *Bilderback v Agway Petroleum Corp.*, 185 AD2d 372, 373 [3d Dept 1992], *lv dismissed* 80 NY2d 971 [1992] [the plaintiff injured while riding forklift to provide counterweight because it "appeared wobbly and unstable"]). Further, plaintiff personally ascertained that the load was properly positioned and secured before proceeding to the scaffold. The fact that the prime mover was equipped to handle a 1,500 pound pallet of bricks has been conceded by plaintiff.

In *Runner v New York Stock Exch., Inc.* (13 NY3d 599, 602 [2009]), on which the majority purports to rely, liability was predicated on the failure to supply a pulley or hoist. The Court of Appeals went on to note:

> "it is generally agreed that the purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction work site elevation differentials, and, accordingly, that there will be no liability under the statute unless the injury producing accident is attributable to the latter sort of risk" (citing *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]).

Plaintiff's fall from the platform of the prime mover situated eight inches off the floor hardly represents "a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d at 603), let alone one of the "extraordinary elevation risks envisioned by Labor Law § 240(1)" (*Rodriguez v Margaret Tietz Ctr. for Nursing Care*, 84 NY2d 841, 843 [1994]). As this Court has recognized, such a fall "did not result from the kind of gravity-related hazard that called for any protective devices of the type listed in Labor Law § 240 (1)" (*Bond v York Hunter Constr.*, 270 AD2d 112, 112 [1st Dept 2000], *affd* 95 NY2d 883 [2000] [fall while alighting from a tracked vehicle]; *Hargobin v K.A.F.C.I. Corp.*, 282 AD2d 31 [1st Dept 2001] [no protective device required to protect crane

operator thrown from seat when boom snapped]).

Further, defendant's theory that plaintiff caused the accident by negligently raising the prime mover into the scaffolding is supported by the evidence presented, and does not address the issue of comparative negligence, as urged by the majority, but rather raises a question of fact as to whether plaintiff was the sole proximate cause of the accident. Indeed, unlike the cases relied on by the majority (*see e.g. Stankey v Tishman Constr. Corp. of N.Y.*, 131 AD3d 430 [1st Dept 2015]), here plaintiff was provided with all necessary safety devices and the devices were not defective.

While the majority would like to make comparative negligence the issue so as to avoid any consequences from plaintiff's actions, we are not dealing with comparative fault here. Rather, the evidence raises an issue as to whether plaintiff was the sole proximate cause of the accident which would preclude liability under Labor Law § 240(1) (*see Weininger v Hagedorn & Co.*, 91 NY2d at 960; *Blake v Neighborhood Hous. Servs. Of N.Y. City*, 1 NY3d at 289-90). This Court has held that "[t]he 'sole proximate cause' exception precludes claims under section 240(1) where the injured party is solely responsible for the accident" (*Perrone v Tishman Speyer Props, L.P.* 13 AD3d 146, 147 [1st Dept 2004]). Further, the majority appears to assume a statutory violation simply

because plaintiff was injured when he was allegedly "ejected" from the prime mover without considering proximate causation. From that stance, the majority then views any evidence of plaintiff's negligence as irrelevant and "of no consequence." However, contrary to the majority's assumption, there is no evidence of a statutory violation presented in this case. As detailed above, there was no proof that either the prime mover or the scaffolding were defective or inadequate to handle the work at issue. In fact, the evidence presented in this case appears to show that plaintiff's injuries were caused solely by his own negligence in the operation of the device. Nor does plaintiff argue that a hoisting device should have been provided to him, as the majority suggests. No evidence was offered to show that a hoisting device was even a proper equipment for plaintiff to perform his work at the time of his injuries.

The majority's reliance on *Penaranda v 4933 Realty, LLC* (118 AD3d at 596) and *Potter v Jay E. Potter Lbr. Co.* (71 AD3d at 1565) is inapposite since in those cases the forklift and bobcat provided were improperly overloaded whereas the undisputed evidence here established that the prime mover was capable of lifting the 1,500-pound pallet of bricks, a task for which it was routinely employed.

Moreover, the record reflects that there were witnesses to

the accident including Louis Caratini, whom plaintiff specifically testified witnessed the accident, who may supply evidence to establish how the accident occurred, especially when plaintiff supplied no explanation as to how this incident occurred; thus, they should have been examined prior to entertaining and granting the motion (CPLR 3212[f]). There is nothing in the record to support the majority's implication that Caratini was not available to testify. Rather, the record establishes that Caratini was subpoenaed for a deposition and the deposition could not proceed because, pursuant to the motion court's rules, discovery was stayed upon the filing of the summary judgment motion. Further, it is not mere "speculation" to suggest that testimony from an eyewitness could aid in establishing how the accident occurred, especially when plaintiff could not provide an explanation of the occurrence, and where his purported negligence may be the sole proximate cause of the episode.

Finally, in reaching its conclusion that the accident was "gravity-related" and thus summary judgment to plaintiff was warranted, the majority stresses that plaintiff was "ejected" from the prime mover by a "catapult-type effect" and was then "slammed" onto the concrete floor of the site. However, this aspect of the accident is not dispositive and a focus on it

evades the more relevant issues concerning whether plaintiff was the sole proximate cause of the accident. Instead, the proper focus should be on the evidence of *how* the accident occurred, which, at the very least, raises the possibility that plaintiff was ejected from the prime mover solely because he negligently raised the mover's forks into the scaffold, causing the mover to pitch forward.

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

16513 The People of the State of New York, Respondent, Ind. 5073/96

-against-

Manuel Martinez, Defendant-Appellant.

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Lawrence J. Sheehan, Bronx (Larry Sheehan of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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Judgment, Supreme Court, Supreme Court, New York County (Michael J. Obus, J.), rendered May 9, 2008, convicting defendant, after a jury trial, of murder in the second degree and criminal solicitation in the second degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

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

The court properly exercised its discretion in admitting limited evidence of uncharged crimes that provided background information explaining the testimony of several witnesses and was directly relevant to refute defendant's defense (*see generally People v Alvino*, 71 NY2d 233, 241-242 [1987]). The probative value of this evidence outweighed any prejudicial effect, which

was minimized by the court's appropriate limiting instructions.

The court properly exercised its discretion in denying defendant's mistrial motion made after a witness's improper comments. The court gave curative instructions that were sufficient to prevent any prejudice (*see People v Santiago*, 52 NY2d 865 [1981]), and that the jury is presumed to have followed (*see People v Davis*, 58 NY2d 1102, 1104 [1983]).

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Although defendant made an unsuccessful CPL 440.10 motion, he failed to obtain permission to appeal to this Court, and that motion is thus not before us. Accordingly, we are limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]), which is inadequate to permit review of defendant's claims. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

Defendant's remaining claims, including those relating to the prosecutor's summation and the circumstances of defendant's

return to the United States for trial, are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits.

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

ENTERED: FEBRUARY 18, 2016

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

16725-
16726 In re San Diego Gas & Electric Company,
Petitioner-Respondent,

-against-

Morgan Stanley Senior Funding, Inc.,
Respondent-Appellant.

Index 150017/15

Davis Polk & Wardwell LLP, New York (Edmund Polubinski III of counsel), for appellant.

McKool Smith P.C. Redwood Shores, CA (Courtland L. Reichman of the bar of the State of California and the State of Georgia, admitted pro hac vice, of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Paul Wooten, J.), entered September 22, 2015, granting the petition by directing production of the documents and communications sought, and denying respondent's cross motion to dismiss, unanimously modified, on the law and in the exercise of discretion, to the extent of directing an in camera inspection of the documents and communications withheld, and otherwise affirmed, without costs. Appeal from order and purported judgment (one paper), same court and Justice entered on or about September 18, 2015 and denominated an order and judgment, unanimously dismissed, without costs, as superseded by the appeal from the September 22, 2015 order and judgment.

Petitioner seeks to enforce compliance with a subpoena seeking documents for use in a pending California litigation between petitioner and a nonparty energy company called NaturEner. Respondent, Morgan Stanley Senior Funding, Inc., has withheld certain documents, identified in a privilege log, based upon the common interest doctrine. Petitioner, a California utility, entered into two contracts with nonparty NaturEner related to the development of Rim Rock, a wind farm project in Montana. One contract obligated petitioner to purchase renewable energy credits from NaturEner and the other required petitioner to make an equity capital contribution in Rim Rock. Petitioner claims that based upon NaturEner's failure to fulfill certain terms of the agreements, its performance under the two contracts is excused. At about the same time, Morgan Stanley entered into a construction loan agreement with NaturEner to finance building Rim Rock. It also entered into an agreement with NaturEner to purchase power generated by Rim Rock and another agreement with petitioner to sell it the power generated by Rim Rock. The agreements to purchase and sell power were linked to petitioner's obligation to fulfill its equity commitment to NaturEner (*see San Diego Gas & Elec. v NaturEner USA LLC*, Oct. 29, 2015, Meyer J. case No. 37-2013-00080682 Cal Super Ct, San Diego County). In 2013, when concerns arose regarding petitioner's performance

under the Rim Rock agreements, NaturEner and Morgan Stanley claimed they were working together to develop a common legal strategy in response.

NaturEner defaulted on its loans to Morgan Stanley, which Morgan Stanley claims was caused by petitioner's failure to capitalize Rim Rock. In July 2014, Morgan Stanley, through an affiliate, acquired a majority equity interest in NaturEner. Petitioner is only seeking documents generated before the 2014 acquisition.

The common interest privilege is an exception to the rule that the presence of a third party will waive a claim that a communication is confidential. It requires that the communication otherwise qualify for protection under the attorney-client privilege and that it be made for the purpose of furthering a legal interest or strategy common to the parties asserting it (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 124 AD3d 129, 180 [1st Dept 2014]).

We find that Morgan Stanley and NaturEner shared a common interest in their desire to have plaintiff comply with its contractual obligations under the Rim Rock agreements. The fact that respondent and defendant were in a debtor-creditor relationship did not make their interests adverse in all matters and at all times (*see 330 Acquisition Co., LLC v Regency Sav.*

Bank, F.S.B., 12 AD3d 214 [1st Dept 2004]). Under the circumstances, the court should have ordered an in camera inspection, the limited relief requested in the petition (*see Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 381 [1991]; *see also Clair v Fitzgerald*, 63 AD3d 979 [2d Dept 2009]).

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

260 The People of the State of New York, Ind. 40/12
Respondent,

-against-

Luis Rodriguez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at hearing; Patricia Nunez, J. at plea and sentencing), rendered May 23, 2013, convicting defendant of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

Even if there were any ambiguity in the sentencing court's colloquy, defendant executed a detailed written waiver and indicated his assent to the appeal waiver. Thus, defendant made a valid waiver of his right to appeal (*People v Lopez*, 6 NY3d 248, 256-257 [2006]), which forecloses review of his suppression and excessive sentence claims.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied his suppression motion. The record fails to support defendant's

claim that the voluntariness of his statement was affected by intoxication. Defendant's claim that a detective obtained the statement by means of misleading remarks is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We similarly reject defendant's excessive sentence claim.

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

262 In re Lesliana L.,

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

Ana M., etc.,
Respondent-Appellant,

Sheltering Arms Children and
Family Services (previously know
as Episcopal Social Services),
Petitioner-Respondent.

_____

Patricia W. Jellen, Eastchester, for appellant.

Marion C. Perry, New York, for respondent.

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

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about January 9, 2015, which, to the extent appealed from as limited by the briefs, upon respondent mother's admission that she permanently neglected her daughter, terminated her parental rights to the child, and transferred custody and guardianship of the child to petitioner and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The court's finding that the child's best interests would be best served by terminating respondent's parental rights is supported by a preponderance of the evidence (*see Matter of Star*

Leslie W., 63 NY2d 136, 147-148 [1984]). The child has bonded with her foster mother, who wishes to adopt her, and respondent has not shown that she has ameliorated the living conditions that led to the child's placement (*see Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529, 530 [1st Dept 2013], *lv denied* 22 NY3d 858 [2014]; *Matter of Kristian-Isaiah William M. [Jessenica Terri-Monica B.]*, 109 AD3d 759, 760-761 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]).

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

266 The People of the State of New York, Respondent, Ind. 4710/06

-against-

Warren Thomas, Defendant-Appellant.

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Office of the Appellate Defender, New York (Richard M. Greenberg of counsel) and Orrick, Herrington & Sutcliffe LLP, New York (Christopher J. Cariello of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Peter J. Benitez, J. at dismissal motion; Michael R. Sonberg, J. at hearings; Lester B. Adler, J. at jury trial and sentencing), rendered January 29, 2010, convicting defendant of criminal possession of a weapon in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 20 years to life, unanimously affirmed.

The court properly denied defendant's motion to suppress physical evidence. When defendant discarded a pistol, this was not the product of any unlawful police activity. The officers, who were investigating a report of recent, nearby gunfire, had an objective, credible reason to approach defendant and ask if he had any information, and the officer's testimony, viewed as a whole, does not demonstrate that there was a seizure, even if the

officer used the word "stop" in addressing defendant (*see e.g. People v Giles*, 223 AD2d 39 [1st Dept 1996], *lv denied* 89 NY2d 864 [1996]).

The hearing court, which suppressed defendant's initial oral statements as the product of a custodial interrogation, properly denied suppression of efendant's subsequent written statement, made after *Miranda* warnings following a pronounced break of at least four hours. Based on the totality of the relevant factors, we find that the written statement was sufficiently attenuated from the suppressed statements (*see People v Davis*, 106 AD3d 144 1st Dept 2013], *lv denied* 21 NY3d 1073 [2013]).

Given the exacting standard that must be satisfied before the extraordinary remedy of dismissal of an indictment is warranted (*see People v Darby*, 75 NY2d 449, 455 [1990]), we find that although some of the prosecutor's questions and comments were inappropriate, they did not rise to the level of impairment of the integrity of the grand jury proceeding.

The challenged portions of the prosecutor's summation do not warrant reversal. The court's curative actions were sufficient to prevent the improper portions of the summation from causing

prejudice, and the court properly exercised its discretion in denying defendant's mistrial motion.

We find no reason to reduce the sentence.

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

267 Patrick H. Barclay, also known as Independent Anchor,
Plaintiff-Appellant,

-against-

Citibank, N.A.,
Defendant-Respondent.

Index 401104/12

H. Patrick Barclay, appellant pro se.

Zeichner Ellman & Krause LLP, New York (Greg M. Bernhard of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered July 8, 2014, which denied plaintiff pro se's motion to correct a stipulation, settlement and release, unanimously affirmed, without costs.

The stipulation of settlement, signed by the parties, and so-ordered in open court, explicitly stated that Citibank agreed to pay $6,500 in satisfaction of the action, comprised of $5,000 plus $1,500 interest calculated at 6% for five years. The interest formula was specified as: "5000 x 0.006 x 5 = 1500. A notation was made next to the interest formula which stated: "subject to court's approval." Under these circumstances, the stipulation of settlement, "definite and complete upon its face, and spread upon the record in open court, constituted a valid and binding contract between plaintiff and [defendant]" and should

stand as written (*Term Indus. v Essbee Estates*, 88 AD2d 823, 825 [1st Dept 1982]). Plaintiff in open court "acknowledged he understood its terms" (*Rivera v State of New York*, 115 AD2d 431, 432 [1st Dept 1985]; *Sun v Cintron*, 11 Misc 3d 129[A], 2006 NY Slip Op 50281[U] [Sup Ct, App Term, 1st Dept 2006]). The motion court properly found no fraud, overreaching, mistake, or any other good cause to set aside plaintiff's consent, and an open court stipulation may not be set aside on the basis of afterthought or change of mind (*see Term Indus.*, 88 AD2d at 825).

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

268 In re Hereford Insurance Co., as subrogee of Asim Bordan, Petitioner-Respondent, Index 654224/13

-against-

American Independent Insurance, Respondent-Appellant.

_____

Freiberg, Peck & Kang, LLP, Armonk (Yilo J. Kang of counsel), for appellant.

Jones Jones LLC, New York (Jacqueline R. Mancino of counsel), for respondent.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered May 23, 2014, which granted petitioner's motion to confirm an arbitration award in favor of petitioner and against respondent, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 75 dismissed. The Clerk is directed to enter judgment accordingly.

The motion court erred in concluding that it had personal jurisdiction over respondent simply because the arbitration occurred in New York and respondent never contested the arbitrator's jurisdiction. Respondent, a Pennsylvania corporation that had insured the offending vehicle, has no contacts with New York, and the offending vehicle was neither

registered in New York nor owned by a New York resident (*see Matter of American Tr. Ins. Co. v Hoque*, 45 AD3d 329, 329 [1st Dept 2007]; *Matter of Government Empls. Ins. Co. v Basedow*, 28 AD3d 766, 767 [2d Dept 2006]). Accordingly, the motion court lacked personal jurisdiction over respondent.

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

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

271 In re Jamel W.,
Petitioner-Appellant,

-against-

Stacey J.,
Respondent-Respondent.

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Leslie S. Lowenstein, Woodmere, for appellant.

Robert Schnapp, New York, for respondent.

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

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Order, Family Court, New York County (George L. Jurow, JHO), entered on or about July 25, 2014, which denied petitioner father's petition for joint custody of the parties' child, granted respondent mother's cross petition for sole legal and residential custody, and required the father to undergo monthly psychiatric monitoring as a component of unsupervised visitation, unanimously affirmed, without costs.

There is a sound and substantial basis in the record for the court's determination that the best interests of the child are served by awarding sole legal and physical custody to the mother (*see Eschbach v Eschbach*, 56 NY2d 167, 173 [1982]). The record establishes that joint custody was not appropriate due to the acrimonious nature of the parties' relationship; the father's

inability to co-parent, shown by his disdain for the mother, his confrontational style, his refusal to listen to her, and his criticism of her parenting skills (*see Braiman v Braiman*, 44 NY2d 584, 587 [1978], *Lubit v Lubit*, 65 AD3d 954 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010]).

The record establishes that the mother has displayed good judgment where the child is concerned and is excellent at meeting his developmental and educational needs. As his primary caretaker, she has taken care to secure him speech therapy, when she suspected that the child was suffering from a speech delay, even at her own expense. She also researched and enrolled him in a school that has the resources to support his special needs (*see Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). On the other hand, the father has failed to demonstrate his ability to place the child's needs above his own. The mother is also able to provide greater stability for the child, since she has resided in the same apartment for ten years, and has been in her current employment for at least seven years, and maintained the job prior to that for a period of eight years (*see Matter of Castro v Santiago*, 176 AD2d 520, 521 [1st Dept 1991]). The mother has also demonstrated that she is a very good primary caretaker, within whose custody the child has been from the time of his birth (*see Obey v*

Degling, 37 NY2d 768, 770 [1975]; *Russo v Maier*, 196 AD2d 720 [1st Dept 1993]).

"Family Court Act § 656 provides for the imposition of an order of probation with mandatory participation in programs of treatment, counseling and rehabilitation" (*Matter of John A. v Bridget M.*, 16 AD3d 324, 331 [1st Dept 2005], *lv denied* 5 NY3d 710 [2005]). Requiring the father to undergo monthly psychiatric monitoring as a component of visitation was not inappropriate (*Matter of Mongiardo v Mongiardo*, 232 AD2d 741, 743 [3d Dept 1996]), in light of the recommendation of the forensic evaluator and other clinicians. The forensic evaluator's conclusion that the father's failure to disclose his extensive mental health history indicates his denial about his need for treatment, which might significantly limit his ability to parent a five-year-old, is amply supported by the record.

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

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

272 In re Dr. Ivan O. Subervi, M.D., Index 101326/13
Petitioner-Appellant,

-against-

Federation of State Medical Boards, et al.,
Respondents-Respondents.

_____

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

Norton Rose Fulbright US LLP, New York (Peter Guirguis of counsel), for respondents.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 25, 2014, granting respondents' cross motion to deny the petition seeking to annul respondents' determination that petitioner was not eligible to take the "Step 3" test for certification of foreign medical students, and dismissing the proceeding brought pursuant to CPLR article 78, based on the statute of limitations, unanimously affirmed, without costs.

There are "two requirements for fixing the time when agency action is 'final and binding upon the petitioner'": the agency must have reached a definitive position on the issue that inflicts actual, concrete injury on petitioner and the injury may not be prevented or significantly ameliorated by further administrative action or steps available to the complaining party

(*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

The court properly determined that this proceeding was untimely. Petitioner admits that in 2005 he was made aware that his application to take the Step 3 examination for medical licensing in the United States was denied. He asserts that he did not know the reason for the denial, but nevertheless attempted several times to pass the Step 2CS examination, the precondition to taking the Step 3 examination that he had not satisfied and which was cited by respondents.

Petitioner was aggrieved in 2005, when he was denied eligibility to take the Step 3 examination, and his 2013 application to take that test did not extend the statute of limitations, which had already expired (*see Matter of Kelly v New York City Police Dept.*, 286 AD2d 581 [1st Dept 2001]; *Matter of Lombard v New York City Dept. of Educ.*, 125 AD3d 483 [1st Dept 2015]).

In any event, respondents' imposition of the revised eligibility requirements on petitioner was not arbitrary or capricious or a violation of an implied contract with petitioner.

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

274 Shahar Kenan, Index 111880/11
Plaintiff-Appellant,

-against-

Levine & Blit, PLLC,
Defendant-Respondent.

_____

Gary Voskresensky, Ridgewood, for appellant.

Levine & Blitt, PLLC, New York (Justin S. Clark of counsel), for respondent.

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Appeal from order, Supreme Court, New York County (Donna M. Mills, J.), entered April 14, 2014, which, to the extent appealed from as limited by the briefs, granted defendant Levine & Blit, PLLC's motion to dismiss the complaint as against individual defendants Matthew J. Blit, Esq. and Les J. Levine, Esq., denied plaintiff's motion for a default judgment, and directed corporate defendant Levine & Blit, PLLC to serve an answer to the complaint within twenty days of service of the order with notice of entry, unanimously dismissed, without costs, for failure to perfect the appeal in accordance with the CPLR and the rules of this Court.

The appendix submitted on this appeal is patently insufficient for the purpose of passing on the contentions raised in the respective briefs, because plaintiff failed to submit the underlying papers including his motion for default judgement,

defendant's cross motion and J.H.O. Gammerman's report issued after the February 3, 2014 traverse hearing (*see Feigelson v Allstate Ins. Co.*, 36 AD2d 929 [1st Dept 1971]; 22 NYCRR 670.10.2 [c] [1]; CPLR 5528[a]).

Although respondent states in its brief that the appendix was inadequate and it would seek printing costs, plaintiff did not supplement his appendix, even though he is represented by appellate counsel. However, respondent is not entitled to its costs for supplementing the appendix, the supplement failed to cure the deficiencies in the appendix since it did not include J.H.O. Gammerman's report, which was considered by the motion court prior to issuing the order appealed.

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

275-
275A The People of the State of New York, Respondent,

Ind. 5190/12
2986/12

-against-

Jacqueline Yorro,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about June 11, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: FEBRUARY 18, 2016

CLERK

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

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

280 The People of the State of New York, Ind. 806/12
Respondent,

-against-

Duane J. Dilley,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 28, 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: FEBRUARY 18, 2016

CLERK

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

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

281 Luz Garcia, Index 306129/10
Plaintiff-Appellant,

-against-

549 Inwood Associates, LLC, et al.,
Defendants-Respondents.

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Melcer Newman PLLC, New York (Jeffrey B. Melcer of counsel), for appellant.

Fiden & Norris, LLP, New York (Charles B. Norris of counsel), for 549 Inwood Associates, LLC, respondent.

Paganini, Cioci, Pinter, Cusumano & Farole, Melville (Richard Geffen of counsel), for Academy Row Associates, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 9, 2014, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law, in this action where plaintiff alleges that she was injured when she tripped and fell on a long crack between pavement flags in a walkway that was between two buildings owned by defendants. Defendants submitted evidence, including deposition testimony, an affidavit of an inspector who measured the crack as 1/4" deep, and photographs, demonstrating that the subject defect was trivial and thus, not actionable (*see*

Hutchinson v Sheridan Hill House Corp., 26 NY3d 66 [2015]; *Stylianou v Ansonia Condominium*, 49 AD3d 399 [1st Dept 2008]). The photographs show that the crack was in the middle of the walkway, in a well-illuminated location, and was not hidden or covered in any way so as to make it difficult to see and identify as a hazard (*see e.g. Hutchinson* at 78-80).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the crack in the walkway constituted a dangerous condition under the circumstances. She provided no affidavit of a person who had measured the crack, but only her own and her daughter's estimates of its depth.

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

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

282 1424 Millstone Road, LLC, Index 156438/14
Plaintiff-Respondent,

-against-

James B. Fairchild, LLC, et al.,
Defendants-Appellants,

Christine Borelli, etc.,
Defendant.

_____

Lieb at Law, P.C., Center Moriches (Dennis C. Valet of counsel), for appellants.

Rosenberg Feldman Smith, LLP, New York (Stephen J. Sassoon of counsel), for respondent.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 10, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability as against defendants James B. Fairchild, LLC and James B. Fairchild and dismissing the Fairchild defendants' affirmative defenses of illegality and forgery, unanimously affirmed, without costs.

Defendant Fairchild contends that, in opposition to plaintiff's prima facie showing that he signed the lease extension, he raised an issue of fact through his affidavit in which he denied that he signed the extension, implied that codefendant Borelli had procured his signature improperly, and

pointed to distinctions between his real signature and the signature on the extension. While this affidavit may be sufficient to raise an issue of fact (*see Diplacidi v Gruder*, 135 AD2d 395 [1st Dept 1987]), it was contradicted by emails in which Fairchild acknowledged that he was aware of and a party to the lease extension. These emails constitute "essentially undeniable" evidence refuting Fairchild's forgery claim (*see Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431 [1st Dept 2014] [internal quotation marks omitted]). In any event, Fairchild's guaranty provided that it applied to any lease extensions, even if he was not a party thereto.

As for illegality, plaintiff does not dispute that it failed to comply with the provisions of the Town of Southampton Code that, as enacted in 2008, require an owner to obtain a $200 biennial rental permit before the rental period commences or within 30 days after receiving actual notice from the Town of the failure to comply (*see* §§ 270-5[A][1]; 270-8[A]; 270-13). However, under the circumstances, the Town Code does not provide a defense to plaintiff's claims against the Fairchild defendants, because it "does not provide expressly that its violation will deprive the parties of their right to sue on the contract, and the denial of relief is wholly out of proportion to the requirements of public policy or appropriate individual

punishment" (*Rosasco Creameries, Inc. v Cohen*, 276 NY 274, 278 [1937]; *see also Benjamin v Koeppel*, 85 NY2d 549 [1995]). While the Town Code addresses matters affecting public welfare, it does not expressly preclude an owner from bringing a lawsuit to collect rent, it imposes relatively minor sanctions to redress violations, and it allows the owner to cure a default after receiving actual notice of a violation (Town Code §§ 270-5; 270-13; 270-19). We conclude that the Fairchild defendants, having occupied the premises and raised a patently inadequate forgery defense, should not be permitted to rely on the provisions of the Town Code "as a sword for personal gain rather than a shield for the public good," i.e., to avoid payment of rent due under the lease (*see Charlebois v Weller Assoc.*, 72 NY2d 587, 595 [1988]) or enforcement of the absolute and unconditional guaranty given by Fairchild to induce plaintiff to enter into the lease (*see Specialty Rests. Corp. v Barry*, 262 AD2d 926, 927-928 [3d Dept 1999]).

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

ENTERED: FEBRUARY 18, 2016

CLERK

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

283N Frank DeLeonardis, Index 309080/10
Plaintiff-Appellant,

-against-

Jack Hara, et al.,
Defendants-Respondents.

_____

Montgomery McCracken Walker & Rhoads LLP, New York (Charles Palella of counsel), for appellant.

Mishaan Dayon & Lieblich, New York (Matthew A. Bondy of counsel), for respondents.

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Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered October 15, 2014, which granted defendants' motion for a protective order and to quash the subpoenas served upon the nonparty accounting firms, unanimously affirmed, without costs.

In this action sounding in alter ego liability and fraudulent conveyance, the IAS Court providently exercised its discretion in determining that the documents sought through plaintiff's Second Notice for Discovery & Inspection, as well as through the nonparty subpoenas served on defendants' accountants, were not material and necessary to proving the allegations in the complaint, and were otherwise undiscoverable (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 746 [2000]; *see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, 487 [1st Dept 2009]; CPLR 3101(a).

The financial records and other documents sought by plaintiff relating to nonparties have no relevance to proving the allegations in the complaint. Regardless of what these documents show, they are not relevant to whether the judgment debtor Young Girl 7, Inc., or any of the other Young Girl Entities, was the corporate alter ego of defendant Hara, or whether the defendants fraudulently transferred their assets in an effort to evade the underlying judgment.

With respect to the documents bearing some relevance to the complaint's allegations – such as financial documents sought from the named defendants – these documents have already been made available to plaintiff, or were otherwise objected to by defendants in response to plaintiff's earlier requests.

Finally, the financial documents of nonparties sought through the nonparty accountant subpoenas are not only irrelevant, but are not subject to discovery on the basis of their "confidential and private nature" (*Gordon v Grossman*, 183

AD2d 669, 670 [1st Dept 1992]). We have considered plaintiff's remaining contentions, and find them unavailing.

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

ENTERED: FEBRUARY 18, 2016

CLERK

Acosta, J.P., Saxe, Richter, Gische, Kapnick, JJ.

16240- Index 114428/09
16241N Michael J. D.,
Plaintiff-Appellant,

-against-

Carolina E. P.,
Defendant-Respondent.

_____

Michael J. Devereaux, New York, appellant pro se.

Law office of Sergio Villaverde, New York (Sergio Villaverde of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about October 16, 2012, and order, same court and Justice, entered on or about April 22, 2014, modified, on the law, the direction to pay 100% of private school tuition and extracurricular, weekend, and summer activities expenses, and the amounts of the attorneys' fee awards, vacated, the specific amounts of the life insurance policy plaintiff is required to maintain reduced to require that plaintiff maintain a policy in the face amount of $500,000 until the child is 10 years old, in the face amount of $250,000 from the child's 10th birthday until the child is 18 years old, and in the face amount of $125,000 from the child's 18th birthday until the child is 21 years old, and the matter remanded for a hearing to determine the amount of reasonable attorneys' fees payable to defendant, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische,
Barbara R. Kapnick JJ.

16240-16241N
Index 114428/09

_____x

Michael J. D.,
Plaintiff-Appellant,

-against-

Carolina E. P.,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Ellen Gesmer, J.), entered on or about October 16, 2012, which, to the extent appealed from as limited by the briefs, after a trial, directed plaintiff to pay 100% of private school tuition for the parties' child, not to exceed the cost of the Trinity School's tuition, and 100% of the child's expenses for extracurricular, weekend, and summer activities, and to maintain a $1 million life insurance policy for the benefit of the child, with the benefit amount decreasing over time, and awarded attorneys' fees to defendant, and order, same court and Justice, entered on or about April 22, 2014, which awarded attorneys' fees to defendant.

Michael J. D., New York, appellant pro se.

Law Office of Sergio Villaverde, New York (Sergio Villaverde of counsel), for respondent.

GISCHE, J.

The central issue in this appeal concerns whether, under the Child Support Standards Act (CSSA), the trial court properly directed that the plaintiff-father pay certain expenses over basic child support, consisting of private school education, and summer, extracurricular and weekend activities. Since the CSSA was enacted, the Court of Appeals has repeatedly held that the dictates of the law, even when deviating from its formula, must be strictly followed (*Holterman v Holterman*, 3 NY3d 1 [2004]; *Bast v Rosoff*, 91 NY2d 723 [1998], *Matter of Cassano v Cassano*, 85 NY2d 649 [1995]). Accordingly, we hold that because the trial court did not follow the precise requirements of the CSSA in determining that these additional costs should be paid over and above basic child support and that because there otherwise was insufficient support in the record for their payment, the trial court decision on child support should be modified.

The CSSA is codified in the Family Court Act § 413 and Domestic Relations Law § 240(1-b). These are analogous statutes, which set forth formulas that the Family and Supreme Courts must follow in calculating parents' child support obligations (*Cassano*, 85 NY2d at 652; *Rubin v Della Salla*, 107 AD3d 60, 66 [1st Dept 2013]). The CSSA first requires a calculation of child support amount (Domestic Relations Laws 240 [1-b] [b][3]). It

then allows for the payment of certain categories of enumerated add on expenses, prorated according to the parents' relative incomes. The add on expenses permitted are expressly stated within the statute, with their own specific standards and considerations justifying the making of such an award. The add on expenses expressly addressed in the CSSA are: (1) child care expenses when a custodial parent is working, looking for work and/or engaged in an educational or training program that will lead to employment (Family Court Act § 413[1][c][4]; Domestic Relations Law § 240[1-b][c][4],[6]); (2) health insurance and unreimbursed medical expenses (Family Court Act § 413[1][c][5]; Domestic Relations Law § 240[1-b][c][5]; and (3) educational expenses (Family Court Act § 413[1][c][7]; Domestic Relations Law § 240[1-b][7]). Not expressly delineated as add on expenses in the statute are summer, extra curricular and/or weekend activities. Basic child support, when calculated properly, is presumed to meet all the child's basic needs. Thus, the expenses of leisure, extracurricular and enrichment activities, such as after school clubs, sporting activities, etc., are usually not awarded separately, but are encompassed within the basic child support award. That is not to say that a court cannot order a parent to pay for these expenses over and above basic child support. If a court does so, however, it is a deviation from the

basic statutory formula and requires an analysis under the commonly referred to paragraph "f" factors. Pursuant to Domestic Relations Law § 240 [1-b][f] (Family Court Act § 413[1][f]) "[u]nless the court finds that the non-custodial parent[']s pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon consideration of [certain] factors" enumerated in the CSSA, the child support calculation under the statute is presumptively correct. There are 10 enumerated factors to consider before deviating. They include the financial resources of the parties and child, the health, needs and aptitude of the child; the standard of living the child would have enjoyed had the household not been dissolved; tax consequences; nonmonetary contributions that a parent makes; educational needs of either parent; disparity in income of the parents; other child support obligation of the non-custodial parent; extraordinary expenses incurred in visitation and any other factor that the court finds relevant (Family Court Act § [1][f]; Domestic Relations Law § 240[1-b][f]). Although all the factors do not have to present, the court needs to articulate its reasons for making such a deviation from basic child support and relate those reasons to the statutory paragraph f factors (*Matter of Pitman v Williams*, 127 AD3d 755, 756-757 [2d Dept 2015]; *Matter of Gluckman v Qua*,

253 AD2d 267, 270-271 [3d Dept 1999], *lv. denied* 93 NY2d 814 [1999]).

In this case the parties are the parents of one child, a boy, born December 17, 2008. The parties were never married and were not living together when the child was born. After plaintiff learned he had a son, defendant and the child moved into plaintiff's luxury apartment in lower Manhattan. The parties were hopeful of continuing as a family and while living together, discussed marriage and the possibility of having a second child. They also discussed their son's future, and the possibility he would attend a private school. It was their expectation at that time that the child would enjoy the "best of everything." This living arrangement, however, was short-lived, lasting only four months (from May - August, 2009).

In August 2009, when the child was only eight months old, defendant and the child voluntarily moved out of the apartment to reside in New Jersey without plaintiff. Although proceedings with various claims were commenced in the Supreme and Family Courts, ultimately the disputes were consolidated in the Supreme Court. By the time of trial, the only issues before the court were defendant's claims for child support and attorney's fees and her motion to hold plaintiff in contempt.

The trial was held in February 2011. Although plaintiff was

present at trial, only defendant testified. This was due to an earlier discovery sanction imposed by the court, precluding plaintiff from introducing evidence at trial concerning financial issues, and drawing adverse inferences on plaintiff's financial claims and favorable inferences on defendant's financial claims.[1]

Defendant's testimony mainly concerned their lifestyle as a family and the plans plaintiff and defendant had made for the child's future at that time. She also testified that plaintiff had enrolled the child (then only a few months old), in swimming classes with a private instructor, as well as in a weekend music class and a song and stories class. According to defendant, plaintiff had told her he wanted the child to attend a private school, such as Trinity, which she believed cost $22,000 per year. Once she and plaintiff separated, however, the lessons stopped. At the time of trial the child, then two years old, was not enrolled in any school program. Defendant testified that she intended to be a full time mother to their son.

The trial court determined that plaintiff's adjusted gross income for child support purposes was $128,741.40. The court made this finding taking into account its preclusion order, yet nevertheless expressly rejecting defendant's argument that

[1]Although plaintiff had provided some financial discovery, he had not completely complied with the court's orders.

additional income should be imputed to plaintiff. The court stated that there was no evidence of undisclosed income and "father's substantial outstanding debt suggests that he does not enjoy the million dollar income she attributes to him . . ." The trial court determined that defendant's income, for child support purposes was $0, and that the parties' combined parental income was $128,741.40 and that the basic child support obligation was 17% of that amount, or $21,886.04 per annum ($1,823.84 per month). This obligation was prorated 100% to plaintiff and 0% to defendant. Add on costs, for health insurance, unreimbursed medical costs, education and extracurricular activities were awarded to be paid over and above basic child support and were allocated 100% to plaintiff and 0% to defendant.

No challenge is made to the amount awarded for basic child support, or the allocation of child support 100% to the plaintiff, or the direction that plaintiff pay for medical insurance and the unreimbursed medical costs for the child.

The trial court ordered that commencing with the 2013-14 academic year until the child's graduation from high school, plaintiff is required to contribute 100% of private school tuition up to the cost of tuition for Trinity School in New York

City.[2] Education expenses are an expressly enumerated add on expense that may be awarded according to the specific statutory standard. Domestic Relations Law 240[1-b][c][7] (Family Court Act § 413[1][c][7]) provides that:

> Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

While a court may direct a parent to contribute to a child's educational expenses, "even in the absence of special circumstances or a voluntary agreement of the parties" (*Pittman*, 127 AD3d at 757), in order to do so, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice (*see* Family Court Act § 413[1][c][7]; Domestic Relations Law § 240[1-b][f]; *Manno v Manno*, 196 AD2d 488, 491 [2d Dept 1993]). The trial court articulated no reason for ordering

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[2]Although defendant testified that she thought tuition was $22,000 per annum, the court did not impose that figure as a cap. Actual tuition is double that amount (http://www.trinityschoolnyc.org/Page/Admissions/Tuition&Financial Aid).

plaintiff to pay for private school, other than the informal discussions the parties had about their son's future while they briefly lived together, when the child was only a few months old. At the time of trial, the child was not yet school age, he was not enrolled in any regular educational program, and there is no record that the child has any special needs or gifts (*see Friedman v Friedman*, 216 AD2d 204 [1st Dept 1995] [religious grade school appropriate given religion's integral part of the family's lifestyle]; *Matter of Prystay v Avildsen*, 251 AD2d 87 [1st Dept 1998] [child had attended private school for five years and had only one year left]). The circumstances of these parties and their son does not present a justifiable basis to impose a private school obligation on plaintiff. Plaintiff's income, as it was determined by the trial court even after drawing adverse inferences to his claims, was not at a sufficiently high level that it alone provided a sufficient basis for requiring private school for the child.

The trial court also ordered that, commencing with the 2012-13 academic year until the child's graduation from high school, plaintiff is responsible for paying 100% of the child's extracurricular activities including after school, weekend and summer activities. No benchmark was provided on what these activities could include and there was no cap on how much they

could cost. These expenses are not expressly enumerated add on expenses in the CSSA and the trial court failed to articulate why a deviation requiring their separate payment was appropriate in this case. While under certain circumstances these expenses may appropriately be considered an add on for child care (Domestic Relations Law § 240[1-b][c][4]; Family Court Act § 413[1][c][4]); *Sieratzki v Sieratzki*, 8 AD3d 552, 554 [1st Dept 2004]), here no recovery of child care costs was requested or warranted because defendant does not work or go to school and it is not her intention to do so. Consequently, in order for these additional expenses to be properly added to basic child support, the trial court needed to articulate the basis for the deviation. Only by articulating the factors relied on in deciding to deviate from the presumptively correct basic child support can a trial court justify its decision to deviate therefrom because the exercise of judicial discretion in child support awards is narrowly circumscribed (*Rubin*, 107 AD3d 60, 72; *see also Bohnsack v Bohnsack*, 185 AD2d 533, 535 [3d Dept 1992]). Given the parties' brief time living as a family, it cannot be said that a standard of living was established for the child. The trial court primarily based its award on the conclusion that had the family remained intact, the child, as the son of a lawyer, would have probably enjoyed a certain standard of living. The consideration

of this solitary factor, coupled with the court's own determination of the parties' financial resources, does not, however, support the addition of unlimited add on extracurricular expenses that deviate from basic child support.

The trial court properly required that plaintiff obtain a life insurance policy to secure his support obligation in the event of plaintiff's death (Family Court Act § 416[b]; *see* Domestic Relations Law § 240[1-b][b][2]). Because we have reduced the amount of child support plaintiff is required to pay, we also modify the amount of insurance required to achieve this objective. Plaintiff shall maintain a policy in the face amount of $500,000 until the child is 10 years old, in the face amount of $250,000 from the child's 10th birthday until the child is 18 years old and in the face amount of $125,000 from the child's 18th birthday until the child is 21 years old (*see Marfone v Marfone*, 118 AD3d 1488, 1489 [4th Dept 2014]).

The court providently exercised its discretion by directing plaintiff to pay defendant's attorneys' fees in these consolidated proceedings, encompassing filiation, custody, visitation and child support issues (Family Court Act § 438[a], Family Court Act § 536; Domestic Relations Law §§ 237[b], [c]; *Anna-Sophia L. v Paul H.*, 52 AD3d 313 [1st Dept 2008]). However, the court improperly based its determination of the amount of the

fees solely on the affirmations of counsel, despite plaintiff's objections (*Kelly v Kelly*, 223 AD2d 625, 626 [2d Dept 1996], *lv denied* 90 NY2d 802 [1997]). We therefore remand for a hearing to determine the amount of defendant's attorneys' fees.

Plaintiff's request that we entertain arguments pertaining to a contempt order issued by the court December 2, 2013, almost two years ago, is denied. Although plaintiff filed a notice of appeal, he admittedly failed to seek an enlargement of time within which to perfect it, and offers no explanation of the "exigent circumstances" that he claims prevented him from doing so.

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

Accordingly the order of the Supreme Court, New York County (Ellen Gesmer, J.), entered on or about October 16, 2012, which, to the extent appealed from as limited by the briefs, after a trial, directed plaintiff to pay 100% of private school tuition for the parties' child, not to exceed the cost of the Trinity School's tuition, and 100% of the child's expenses for extracurricular, weekend, and summer activities, and to maintain a $1 million life insurance policy for the benefit of the child, with the benefit amount decreasing over time, and awarded attorneys' fees to defendant, and order, same court and Justice,

entered on or about April 22, 2014, which awarded attorneys' fees to defendant, should be modified, on the law, the direction to pay 100% of private school tuition and extracurricular, weekend, and summer activities expenses, and the amounts of the attorneys' fee awards, vacated, the specific amounts of the life insurance policy plaintiff is required to maintain reduced to require that plaintiff maintain a policy in the face amount of $500,000 until the child is 10 years old, in the face amount of $250,000 from the child's 10th birthday until the child is 18 years old, and in the face amount of $125,000 from the child's 18th birthday until the child is 21 years old, and the matter remanded for a hearing to determine the amount of reasonable attorneys' fees payable to defendant, and otherwise affirmed, without costs.

All concur.

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

ENTERED: FEBRUARY 18, 2016

CLERK