SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 3, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

4279-
4280 Index 157316/14

J. Armand Musey,
Plaintiff-Appellant,

-against-

425 East 86 Apartments Corp., et al.,
Defendants-Respondents,

George Greenberg,
Defendant.

Loanzon LLP, New York (Tristan Loanzon of counsel), for appellant.

Braverman Greenspun, P.C., New York (Tracy Peterson of counsel), for respondents.

Order, Supreme Court, New York County (Paul Wooten, J.), entered July 16, 2015, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' motion, pursuant to CPLR 3211(a)(5), to dismiss as time-barred so much of the third cause of action that sought a declaration that house rules concerning the roof/terrace were null and void, and order, same court and Justice, entered January 30, 2017, which, to the

extent appealed from as limited by the briefs, and to the extent appealable, denied plaintiff's motion for leave to amend, and granted defendant cooperative corporation's (co-op) motion to quash plaintiff's nonparty subpoenas duces tecum, unanimously affirmed, with costs.

In December 2012, plaintiff entered into a contract to purchase the shares of a penthouse unit in a cooperative apartment building located in Manhattan. The penthouse included a terrace appurtenant to the unit; however, plaintiff was unable to inspect the terrace prior to purchase because part of the building's roof, including the subject terrace, was undergoing extensive renovation and repair. Plaintiff finalized the purchase of his shares in February 2013.

In July 2013, the co-op board adopted new house rules, providing, in relevant part:

> "4. The roof membrane shall be protected at all times from foot traffic, planters, deck covering, furniture and/or other objects. The Board of Directors may enlist the services of a professional engineer to determine the protection that may be required and their determination will be final. Any costs related to such an evaluation shall be the responsibility of the Shareholder. Such protection may include but shall not be limited to a secondary membrane over the existing roof membrane, or installation of a separator pad. The Shareholder may also be required to obtain a warranty from the membrane or pad manufacturer, which warranty shall include, in addition to the new membrane or pad, any new installation/construction to be

placed on the new membrane or pad.

> "5. The Shareholder shall execute an agreement in a form acceptable to the Corporation accepting full responsibility for and indemnifying the Corporation against the cost of repairing any and all damage to the underlying roof membrane and any damage to the public areas and/or apartment(s) below, which is caused, directly or indirectly, by the planters, deck coverings and/or other objects placed on the roof terrace, the Shareholder's use of the roof terrace and/or other objects placed on the roof terrace or Shareholder's failure to properly maintain the roof terrace area. Such agreement shall be binding upon all successors in interest to the Shareholder."

Plaintiff objected to these new house rules and exchanged multiple emails with various members of the co-op board concerning his grievances. Plaintiff contended, in part, that the new house rules deprived him of his right to the exclusive use and quiet enjoyment of the terrace and attempted to shift the costs associated with the implementation of the new rules to him, in violation of the proprietary lease.

In July 2014, nearly one year after receiving the house rules, plaintiff commenced this plenary action. As relevant to this appeal, plaintiff's third cause of action for declaratory relief sought a declaration that rules 4 and 5 of the house rules violated the terms of the proprietary lease and were, therefore, null and void. Plaintiff further sought a declaration "directing [the co-op] to take all actions required to make the terrace

habitable, including but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use." Plaintiff's fourth cause of action for breach of contract was based on allegations that the house rules violated the warranty of habitability (Real Property Law § 235-b) because the roof/terrace was not habitable in its current condition.

Defendants-respondents moved to dismiss the complaint pursuant to CPLR 3211(a)(7), or, in the alternative, for summary judgment dismissing the complaint. Plaintiff opposed defendants' motion and cross-moved for summary judgment on the third and fourth causes of action. The motion court granted defendants' motion, except for the cause of action for a declaratory judgment on the replacement of the three doors connecting the apartment to the adjacent roof, and the cause of action for breach of contract as against the co-op. In granting the motion to dismiss the other claims, the court found, inter alia, that plaintiff's claims relating to the house rules were time-barred because they should have been brought in an article 78 proceeding, which has a four-month statute of limitations, not in a plenary proceeding. The motion court denied plaintiff's cross motion for summary judgment.

Both plaintiff and the co-op later moved to reargue portions of their prior motions for summary judgment. Plaintiff also sought leave to amend the complaint to further define the claims previously asserted and to add additional claims against the co-op. The motion court denied plaintiff's motion to reargue and to amend, but granted, in part, the co-op's cross motion to reargue to the extent of granting it summary judgment on that branch of plaintiff's fourth cause of action for breach of the lease provision of quiet enjoyment. The motion court also granted the co-op's separate motion to quash two nonparty subpoenas issued by plaintiff to the co-op's accountant and the co-op's roofer.

Supreme Court properly dismissed, as time-barred, so much of the third cause of action that sought a declaratory judgment that the house rules enacted by the co-op, concerning use of the roof/terrace adjoining plaintiff's penthouse unit, were contrary to the terms of the proprietary lease. Plaintiff's allegations were in the nature of a dispute over the house rules pertaining to the use of the terrace. Where, as here, a cooperative shareholder seeks to challenge a co-op board's action, such challenge is to be made in the form of an article 78 proceeding (*see Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] [finding that the shareholder plaintiffs were prohibited from

challenging the proprietary of the amendments to the cooperative's by-laws because "they [were] required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof"]; *see also Matter of Dobbins v Riverview Equities Corp.*, 64 AD3d 404 [1st Dept 2009]).

The cases of *Shapiro v 350 E. 78th St. Tenants Corp.* (85 AD3d 601 [1st Dept 2011]), and *Estate of Del Terzo v 33 Fifth Ave. Owners Corp.* (136 AD3d 486 [1st Dept 2016], *affd* 28 NY3d 1114 [2016]) do not dictate a different result, and indeed, have no application here because they do not involve a challenge to any bylaws or house rules, or other rules promulgated by the board. *Shapiro* concerned the board's failure to maintain the roof appurtenant to the plaintiff's unit, and a finding that this failure "deprived plaintiff of its use, in violation of the offering plan and proprietary lease" (85 AD3d at 602). Similarly, *Estate of Del Terzo* involved the board's "unreasonabl[e] withholding [of] its consent to an assignment of the lease and shares to a member of a lessee's family," which the court determined to be a violation of the proprietary lease (136 AD3d at 486). In contrast here, plaintiff takes issue with the new house rules promulgated by the board, and any attempt to repackage his grievances as a breach of the proprietary lease

must fail.

An article 78 proceeding must be commenced within four months after the determination to be reviewed becomes "final and binding upon the petitioner" (CPLR 217[1]). "A determination generally becomes binding when the aggrieved party is 'notified'" (*Matter of Village of Westbury v Department of Transp. of State of N.Y.*, 75 NY2d 62, 72 [1989]). Here, plaintiff was provided with the final and binding house rules on or about July 27, 2013, yet, he did not commence this plenary action until on or about July 25, 2014, well beyond the four-month statute of limitations.

The motion court also properly denied leave to amend the complaint. As to the proposed amended first cause of action for breach of the proprietary lease based on a breach of the covenant of quiet enjoyment, the motion court determined that the proposed contract claim was barred by the doctrine of the law of the case. The motion court had previously determined that any challenge to the house rules must be made in a special proceeding under article 78; thus, plaintiff's attempt to repackage his dislike of the new house rules requiring him to install the appropriate surface on his apartment's terrace/roof as a breach of the lease by the co-op was properly denied. Plaintiff further sought to amend, inter alia, the claim for declaratory relief (the proposed

amended second cause of action) and to add a claim for injunctive relief (the proposed amended third cause of action), asserting, inter alia, that the co-op was obligated to renovate the roof/terrace space and to pay for such renovations. However, and as the motion court noted, it had previously determined that there was no justiciable controversy, and that such claims should have been brought pursuant to a special proceeding under article 78, and thus were time-barred. Moreover, injunctive relief is not available, because money damages are readily ascertainable (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011]; *see also German v S&P Assoc. of N.Y., LLC*, 139 AD3d 524, 525 [1st Dept 2016]). Further, although the implied warranty of habitability applies to shareholders of co-op apartments (*Frisch v Bellmarc Mgt.*, 190 AD2d 383, 384-385 [1st Dept 1993]), a terrace that is safe and suitable for plaintiff's own exclusive, outdoor use is an amenity, not an essential function that the co-op must provide (*see Solow v Wellner*, 86 NY2d 582, 588 [1995]).

The motion court providently exercised its discretion when it quashed plaintiff's nonparty subpoenas, which largely sought information that is irrelevant to the issues in this action (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]; *Haron v Azoulay*, 132 AD3d 475, 475 [1st Dept 2015]). While some information

sought from the co-op's accountant might be useful, it was not the court's obligation to prune the overly broad subpoenas (*Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453-454 [1st Dept 1995]).

Finally, no appeal lies from the denial of plaintiff's motion to reargue (*Jones v 170 E. 92nd St. Owners Corp.*, 69 AD3d 483 [1st Dept 2010]; *see* CPLR 5701[a][2][viii]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4468 Edgard Espinoza, Index 305358/14
Plaintiff-Appellant,

-against-

Fowler-Daley Owners, Inc.,
et al.,
Defendants-Respondents,

Flag Waterproofing and Restoration,
LLC,
Defendant.

_____

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

Brody, O'Connor & O'Connor, New York (Magdalene P. Skountzos of counsel), for respondents.

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Appeal from order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered August 19, 2016, which denied plaintiff's motion for summary judgment on liability without prejudice to renew after the determination of outstanding discovery motions and the completion of discovery, unanimously dismissed, without costs, as academic.

There is no reason to entertain this appeal because, after the outstanding discovery was completed, the motion court granted plaintiff's motion to renew his summary judgment motion, which had been denied without prejudice to renew. No appeal lies from

an order or judgment that has been superseded by a subsequent order or judgment, as the initial order or judgment has become academic (*see Makastchian v Oxford Health Plans*, 270 AD2d 25 [1st Dept 2000]; *Matter of Niagara Mohawk Power Corp. v Town of Tonawanda Assessor*, 219 AD2d 883 [4th Dept 1995]; *see also* 10 Carmody-Wait 2d, NY Prac § 70:31 at 50-51). Here, deciding the motion on the merits renders the question raised on this appeal (whether the motion court correctly determined that plaintiff's motion was premature) entirely academic *(see e.g. Interboro Mut. Indem. Ins. Co. v Gatterdum*, 163 AD2d 788 [3d Dept 1990] [Where trial court grants a motion to reargue, the original order is superseded and appeal rendered academic]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Renwick, Kapnick, Kern, Moulton, JJ.

4487 The People of the State of New York, Respondent, Ind. 9208/98

-against-

Teofilo Lopez, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald of counsel), for respondent.

Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered July 27, 1999, as amended July 19, 2010, as amended July 22, 2010, convicting defendant, after a jury trial, of eight counts each of robbery in the first and second degrees, and sentencing him to an aggregate term of 15 years, with 5 years' postrelease supervision, unanimously modified, as an exercise of discretion in the interest of justice, to reduce the sentences on the first degree robbery convictions to 10 years, and otherwise affirmed.

In 2012, this Court granted the People's motion to dismiss for lack of timely prosecution. The Court of Appeals remitted for the assignment of counsel and a de novo determination regarding dismissal (23 NY3d 89, 101-102 [2014]).

"Whether [late] appeals [by fugitives returned to custody] should be permitted to proceed is subject to the broad discretion of the Appellate Division" (*People v Taveras*, 10 NY3d 227, 233 [2008]; *see* CPL 470.60[1]). We exercise our discretion to consider this appeal on the merits.

We find that the trial issues raised by defendant are not meritorious.

We find however, that defendant's sentence was excessive to the extent indicated and modify accordingly.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4543 The People of the State of New York, Respondent, Ind. 4810/11

-against-

Nevzet Ahmemulic, Defendant-Appellant.

Rosemary Herbert, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered May 15, 2012, convicting defendant, after a jury trial, of forcible touching, and sentencing him to a term of six years' probation, 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, including its evaluation of alleged inconsistencies in testimony and motives to falsify.

Defendant's challenge to the jury charge on the ground of duplicitousness is unpreserved (*see People v Becoats*, 17 NY3d 643, 650-651 [2011], *cert denied* 566 US 964 [2012], and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4546 Angelo Slabakis, Index 651986/15
Plaintiff-Respondent,

-against-

Walter Schik, et al.,
Defendants-Appellants,

XYZ Entities 1 Through 10, et al.,
Defendants.

Smith & Shapiro, New York (Eliad S. Shapiro of counsel), for appellants.

McCarter and English, New York (Judah Skoff of counsel), for respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered August 19, 2016, which granted defendants-appellants' motion to dismiss without prejudice and with leave to replead, unanimously affirmed, with costs.

The court providently exercised its discretion by granting plaintiff leave to replead because one cannot determine, as a matter of law, that he will be unable to allege the requisite elements of the various causes of action (*see e.g. Davis v Scottish Re Group Ltd.,* 138 AD3d 230, 236, 238 [1st Dept 2016]).

Plaintiff has since repled his complaint; thus, "the sufficiency of the allegations in the earlier complaint is rendered academic" (*Peters v Peters,* 118 AD3d 593, 594 [1st Dept 2014]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4547 Kenneth J. Glassman, Index 650838/16
Plaintiff-Appellant,

-against-

Sarah Weinberg,
Defendant-Respondent.

_____

Kenneth J. Glassman, New York, appellant pro se.

Brennan Law Firm PLLC, New York (Kerry A. Brennan of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered May 30, 2017, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his account stated claim and for summary judgment dismissing defendant's counterclaims and second, third, fourth, sixth, seventh, eighth, and tenth affirmative defenses, unanimously modified, on the law, to grant the motion to the extent of dismissing the affirmative defenses except for the sixth affirmative defense, and otherwise affirmed, without costs.

In May 2013, the parties entered into a retainer agreement pursuant to which plaintiff agreed to represent defendant in an action seeking rescission of the sale of a building in which defendant lived. Plaintiff commenced that action, and thereafter

sent defendant invoices for legal services rendered through July 2015 in connection with that action and several other matters. Ultimately, the "barebones" complaint in the rescission action was dismissed in its entirety (*Weinberg v Sultan*, 142 AD3d 767 [1st Dept 2016]). Plaintiff sought unsuccessfully to assert a charging or retaining lien over funds that he was holding in an escrow account (*Weinberg v Sultan*, 145 AD3d 598 [1st Dept 2016]), and then commenced this action to recover unpaid legal fees. Defendant asserted numerous affirmative defenses, and counterclaims for legal malpractice and breach of fiduciary duty.

Plaintiff made a prima facie showing of his entitlement to summary judgment on his account stated claim by providing documentary evidence of the invoices, and an affidavit stating that he sent the invoices on a monthly basis to defendant, and that defendant received the invoices and failed to object to the invoices until this litigation (*see L.E.K. Consulting LLC v Menlo Capital Group, LLC*, 148 AD3d 527, 528 [1st Dept 2017]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]). In addition, defendant admitted in her answer that she had made partial cash payments on the invoices.

In opposition, defendant relied on the pleadings in her verified amended answer to raise issues of fact. However, with

the exception of the sixth affirmative defense, defendant's vague and unsubstantiated allegations that the fees were excessive (second and seventh affirmative defenses), that invoices were not timely provided (tenth affirmative defense), that there were errors in some invoices (third affirmative defense), and that certain time entries were inappropriate (eight affirmative defense) are insufficient to raise an issue of fact and are therefore dismissed. Moreover, defendant retained the invoices without objecting until over 10 months after the last invoice was received, and her belated objections are insufficient to rebut the prima facie showing of an account stated (*see Abyssinian Dev. Corp. v Bistricer*, 133 AD3d 435, 436 [1st Dept 2015]). While defendant contends in the fourth affirmative defense that she did not agree that the fee rate set forth in the retainer agreement would apply to legal matters outside of the rescission action, she did not timely object to the rate charged for plaintiff's work on the other legal matters, which was clearly set forth in the invoices, and thus this defense is dismissed.

Defendant's sixth affirmative defense asserts that she never agreed to have plaintiff represent her in an article 81 proceeding commenced to appoint a guardian for her. As this defense, unlike the other defenses, pertains to the nature and

scope of plaintiff's representation, she raised an issue of fact precluding summary judgment as to the amounts billed in connection with the guardianship proceeding (*Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35-36 [1st Dept 2004]).

Nevertheless, plaintiff's motion for partial summary judgment on the account stated claim cannot be granted as to the other amounts billed, because plaintiff has not demonstrated entitlement to dismissal of defendant's legal malpractice counterclaims, which are sufficiently intertwined with the account stated claim so as to provide a bona fide defense (*see Emery Celli Brinckerhoff & Abady, LLP v Rose*, 111 AD3d 453, 454 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). In support of his motion for summary judgment dismissing these counterclaims, plaintiff failed to make a prima facie showing that his representation of defendant met the applicable standard of professional care and/or did not proximately cause any damages (*see Rojas v Paine*, 125 AD3d 745, 746 [2d Dept 2015]). With respect to the services he provided in *Weinberg v Sultan*, plaintiff simply asserted that defendant and her daughter were unable to provide facts concerning the closing, but made no showing that his investigation of the case, preparation of the

complaint, and conduct of the litigation met the standard of "ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" (*Rudolf v Shayne, Dachs, Stanisci, Corker, & Sauer*, 8 NY3d 438, 442 [2007] [internal quotation marks omitted]). Similarly, with respect to the other three legal malpractice counterclaims, plaintiff made conclusory assertions that he acted properly, without addressing defendant's allegations or submitting any evidentiary support. Since plaintiff did not meet his initial burden, the burden did not shift to defendant to raise an issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

The motion court correctly sustained the counterclaims alleging plaintiff's breach of fiduciary duty. Plaintiff did not respond to the third counterclaim's allegation that his efforts to delay turnover of the escrowed funds were contrary to his fiduciary duty as an escrow agent. Further, plaintiff did not

dispute the fourth counterclaim's allegation that he kept the escrowed funds in a noninterest bearing account, nor did he offer any legal support for his claim that this conduct did not breach a duty of care owed to defendant.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4548-
4549 Ind. 3951/14

The People of the State of New York,
Respondent,

-against-

Guinevere Habersham,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Siobhan C. Atkins of counsel), for appellant.

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

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered October 28, 2015, as amended February 3, 2016,

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: OCTOBER 3, 2017

CLERK

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

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4550- Ind. 545/12
4551 The People of the State of New York,
Respondent,

-against-

Pavette Kellman,
Defendant-Appellant.

_____

Deborah Innocent, Richmond Hill, for appellant.

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J. at pretrial motions; Daniel P. Conviser, J. at jury trial and sentencing), rendered June 25, 2013, as amended January 13, 2016, convicting defendant of criminal possession of a weapon in the third degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Review of defendant's challenge to the sufficiency of the evidence presented to the grand jury is foreclosed by statute (CPL 210.30[6]). To the extent defendant is also claiming that the indictment was facially insufficient, that claim is without merit.

Defendant's challenge to the sufficiency of the trial evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the evidence amply established that the weapon recovered from defendant met the definition of a stun gun, in that it was a "device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electric shock to such person" (Penal Law § 265.00[15-c]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4552 The People of the State of New York, Respondent, Ind. 3326/11

-against-

Jose Bermudez, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Paul A. Andersen of counsel), for respondent.

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Appeal from judgment, Supreme Court, Bronx County (Patricia DiMango, J.), rendered August 6, 2013, convicting defendant, upon his plea of guilty, of robbery in the second degree, and sentencing him to a term of 3½ years, held in abeyance, and the matter remitted for further proceedings in accordance herewith.

During the plea proceeding, the court asked defendant whether he was a United States citizen, and defendant answered "No." Rather than advising defendant that if he was not a United States citizen, he could be deported as a result of his plea, as required under *People v Peque* (22 NY3d 168 [2013], *cert denied sub nom. Thomas v New York*, 574 US __, 135 S Ct 90 [2014]), which applies to cases on direct appeal (*People v Brazil*, 123 AD3d 466 [1st Dept 2014], *lv denied* 25 NY3d 1198 [2015]), the court asked

defendant, “You are not a U.S. citizen?” to which defendant answered, “Oh yeah, yeah.” Given the phrasing of the question in the negative, the response could be interpreted as asserting either citizenship or noncitizenship. The court did not inquire further into defendant’s answers or advise him of the immigration consequences of his plea, and the record is devoid of any indication that defendant was otherwise aware, such as through defense counsel, of those consequences. Nor does this exchange, in the context of the plea allocution, suggest that defendant affirmatively misrepresented his immigration status, as he accurately answered the court’s question (*compare Brazil*, 123 AD3d at 467). Thus, his responses, even if contradictory, did not absolve the court of the obligation to state briefly that the guilty plea could render defendant deportable.

Therefore, defendant should be afforded the opportunity to move to vacate his plea upon a showing that there is a “reasonable probability” that he would not have pleaded guilty had the court advised him of the possibility of deportation

(*Peque*, 22 NY3d at 198; *see People v Belliard*, 135 AD3d 437, 438 [1st Dept 2016]). Accordingly, we remit for the remedy set forth in *Peque* (22 NY3d at 200-201), and we hold the appeal in abeyance for that purpose.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4553 The People of the State of New York, Ind. 5647/14
Respondent,

-against-

Edward Gadson,
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 (Sabrina M. Bierer 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 Wittner, J.), rendered December 17, 2015,

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 3, 2017

CLERK

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

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4554 Duvar Ayers, et al., Index 23311/13E
Plaintiffs-Respondents-Appellants,

-against-

Avinash Mohan, M.D., et al.,
Defendants,

Raul Ulloa, M.D., et al.,
Defendants-Appellants-Respondents.

_____

Gaines, Novick, Ponzini, Cossu & Venditti, LLP, White Plains (John M. Murtagh of counsel), for appellants-respondents.

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondents-appellants.

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Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 27, 2016, which, to the extent appealed from as limited by the briefs, upon reargument of defendants Raul Ulloa, M.D. and Correct Care Solutions, LLC's (CCS) motion, granted summary judgment dismissing the amended complaint as to Dr. Ulloa, and adhered to its prior denial of summary judgment as to CCS, unanimously affirmed, without costs.

Dr. Ulloa is a physician who provided medical treatment to plaintiff Duvar Ayers at the infirmary at nonparty Westchester County Jail (jail), where plaintiff was incarcerated. Pursuant to a contract between Westchester County (County), a municipal

corporation, and New York Correct Care Solution Medical Services, P.C. (NYCCS), NYCCS agreed to provide medical services to the inmates at the County's Department of Correction (the Contract). By guaranty agreement executed on the same date, CCS agreed to guarantee NYCCS' performance under the Contract (the Guaranty).

CCS failed to make a prima facie showing that it is not a proper party to this action. The Contract naming NYCCS and the County as the contracting parties is not dispositive, particularly in the absence of any affidavits or other evidence establishing that CCS is a separate and distinct entity. Further, defendants relied on correspondence sent by defense counsel to the Federal District Court (before the instant action was remanded to Bronx County Supreme Court), which admitted that CCS had contracted with the County and that Dr. Ulloa was employed by CCS. This correspondence constitutes an informal judicial admission that raises a triable issue of fact as to whether CCS is a proper party to the action (*see GJF Constr., Inc. v Sirius Am. Ins. Co.*, 89 AD3d 622, 626 [1st Dept 2011]).

Even if defendants had met their prima facie burden, plaintiffs' opposing papers, which include the Guaranty and the injured plaintiff's medical records from the infirmary bearing the CCS logo, raised a triable issue of fact sufficient to defeat

CCS's motion for summary judgment. Accordingly, Supreme Court correctly denied summary judgment as to CCS.

Supreme Court also correctly granted summary judgment as to Dr. Ulloa. The jail is a public institution within the meaning of General Municipal Law (GML) § 50-d (*see e.g. Shakur v McGrath*, 517 F2d 983 [2d Cir 1975]), maintained in whole or in part by the County, as evidenced by the Contract. Moreover, Dr. Ulloa did not receive compensation for his services from his inmate patients. Thus, Dr. Ulloa falls within the ambit of GML § 50-d, which imposes a statutory obligation on the County to indemnify and defend Dr. Ulloa against medical malpractice claims and required plaintiffs to serve a notice of claim on the County in compliance with GML § 50-e(1)(b) (*Pedrero v Moreau*, 81 NY2d 731 [1992]; *see Campanelli v Flushing Ultrasound Servs.*, 287 AD2d 428, 430 [2d Dept 2001], *lv dismissed* 98 NY2d 692 [2002]; *cf. Ayers v Mohan*, 145 AD3d 553 [1st Dept 2016] [the defendants failed to establish that a notice of claim upon a public benefit corporation (which does not fall within the ambit of GML § 50-d) was required]). Since plaintiffs failed to serve a timely notice of claim upon the County, Supreme Court correctly dismissed the

amended complaint as against the doctor (*Pedrero*, 81 NY2d at 733).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4555 Michal G. Ciechorski, Index 100509/11
Plaintiff-Appellant,

-against-

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

_____

Hofmann & Schweitzer, New York (Timothy F. Schweitzer of counsel), for appellant.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (Daniel G. McDermott of counsel), for the City of New York and New York City Economic Development Corporation, respondents.

Ahmuty, Demers & McManus, Albertson (Glenn A. Kaminska of counsel), for Hudson Meridian Construction Group, Inc., respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 14, 2016, which, insofar as appealed from as limited by the briefs, granted the motion of defendant Hudson Meridian Construction Group, LLC (Hudson) for summary judgment dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 240(1) claims as against it, granted the cross motion of defendants City of New York and New York City Economic Development Corporation (EDC) for summary judgment dismissing the Labor Law § 240(1) claims as against them, and denied plaintiff's cross motion for partial summary judgment on the Labor Law § 240(1) claim,

unanimously affirmed, without costs.

Plaintiff has abandoned his Labor Law § 240(1) claims as against EDC and Hudson by failing to address the motion court's conclusion that those particular defendants could not be held liable for any violations of the statute.

The motion court correctly dismissed the Labor Law § 240(1) claim as against the City of New York, because the statute does not cover plaintiff's injury, namely pain allegedly caused by his repeated work, over the course of weeks, of being handed heavy buckets filled with epoxy from workers at a higher level and then transporting the buckets by hand on his own level (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 500-501 [1993]). Plaintiff's assertion that he was required to catch buckets in mid-air, after they were dropped by workers standing on a barge about five or six feet above the float stage where he was standing, is unsupported by the record, even viewed in the light most favorable to him. Plaintiff's own testimony indicates that the barge workers would lean, bend, or kneel as necessary to hand the buckets to plaintiff, who was 6'5", allowing him to grasp each bucket before it was released. Since plaintiff "was exposed to the usual and ordinary dangers of a construction site, and not the extraordinary elevation risks envisioned by Labor Law

§ 240(1), [he] cannot recover under the statute" (*Toefer v Long Is. R.R.*, 4 NY3d 399, 407 [2005] [internal quotation marks omitted]).

The motion court also correctly dismissed the Labor Law § 200 and common-law negligence claims as against Hudson, since the evidence showed that the means and methods of the work were determined solely by plaintiff's employer, nonparty Reicon Group LLC (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). The evidence showed that Hudson exercised only general oversight over the performance of the work and site safety conditions, which is "insufficient to trigger liability" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4556 In re Theresa M.,
Petitioner-Respondent,

-against-

Antoine A.,
Respondent-Appellant.

_____

Leslie S. Lowenstein, Woodmere, for appellant.

Andrew J. Baer, New York, for respondent.

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

_____

Order of protection, Family Court, Bronx County (Tracey A. Bing, J.), entered on or about April 8, 2016, bringing up for review an order, same court and Justice, entered on or about April 5, 2016, which found that the respondent-father had violated an earlier order of protection by committing the family offenses of harassment in the second degree and disorderly conduct, unanimously affirmed, without costs.

The court's findings that the father committed the family offenses of harassment in the second degree (Penal Law § 240.26(1)) and disorderly conduct (Penal Law § 240.20) were supported by a fair preponderance of the evidence, including the mother's testimony that, inter alia, the father grabbed the

mother in the lobby of her apartment building and cursed at her with the intent to alarm her through physical contact, and that his conduct had alarmed and annoyed the public. The father, too, admitted the truth of some of the mother's allegations regarding the incident, including that he had cursed and yelled at the mother and that the child was frightened. The fact that the father denied some of the mother's allegations simply created an issue of credibility, which was properly resolved by the court (*Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]). As the court's findings had a sound and substantial basis in the record, there is no reason to disturb them on appeal (*id.*).

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4558 The People of the State of New York, Respondent, Ind. 3918/11

-against-

Terry J. Paige, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 22, 2013, as amended April 11, 2013, convicting defendant, upon his plea of guilty, of two counts of attempted robbery in the second degree, and sentencing him, as a persistent violent felony offender, to concurrent terms of 12 years to life, unanimously affirmed.

Defendant made a valid waiver of his right to appeal, which forecloses review of his suppression claim. The court's oral colloquy with defendant concerning the waiver, which carefully separated the right to appeal from the rights normally forfeited upon a guilty plea, met or exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]). Furthermore, it was supplemented by a detailed written waiver,

which defendant plainly understood notwithstanding his previous, patently false claim of illiteracy.

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the court properly denied his suppression motion. The officers' stop of defendant was based on a description of a robber that was sufficiently specific to provide reasonable suspicion, given the spatial and temporal proximity between the robbery and the police encounter.

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4559 A.C., an Infant, by Her Mother and Natural Guardian Naminata C., et al., Plaintiffs-Appellants, Index 350309/11

-against-

Festus F. Ajisogun, Defendant-Respondent.

_____

Law Offices of Daniel Chavez, Bronx (Elizabeth M. Meyerson of counsel), for appellants.

Richard T. Lau & Associates, Jericho (Nancy S. Goodman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered July 7, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

"A driver in an area where children are playing need not exercise 'extreme care or caution,' although [he] must exercise the care that a reasonably prudent person would exercise under the circumstances" (*DeJesus v Alba*, 63 AD3d 460, 463 [1st Dept 2009], *affd* 14 NY3d 860[2010]). Here, defendant established his entitlement to judgment as a matter of law by producing evidence that he was not speeding, driving only about 5-10 miles per hour, and that the infant plaintiff ran out from between two parked

cars into the side of his vehicle (*see Fatumata B. v Pioneer Transp. Corp.*, 118 AD3d 486, 486 [1st Dept 2014]; *DeJesus*, 63 at 463; *Yahya v Kahan*, 136 AD3d 644, 645 [2d Dept 2016]).

No issues of fact exist as to whether defendant's speed was excessive under the circumstances (*see DeJesus*, 63 AD3d at 464; *Fatumata B.*, 118 AD3d at 487). Contrary to plaintiffs' argument, *Ferrer v Harris* (55 NY2d 285 [1982]) does not stand for the broad proposition that a driver's negligence is always a question of fact when the driver was aware that children were possibly present. Plaintiffs failed to raise a triable issue of fact as to whether defendant ought to have seen the infant plaintiff before the impact. Accordingly, the point of impact was not a material issue of fact warranting denial of summary judgment (*see Hinkle v Trejo,* 89 AD3d 631 [1st Dept 2011], *lv denied* 19 NY3d 807 [2012]).

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

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

ENTERED: OCTOBER 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4560 The People of the State of New York, Respondent, Ind. 2930/14

-against-

Gregory Yates, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. 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 (Edward J. McLaughlin, J.), rendered January 13, 2015,

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 3, 2017

CLERK

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

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4561 The People of the State of New York, Respondent, Ind. 5357/14

-against-

Jaysen Dorsey, Defendant-Appellant.

Rosemary Herbert, Office of the Appellate Defender, New York (Kate Mollison of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Grace Vee 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 September 15, 2015,

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 3, 2017

CLERK

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

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4562 The People of the State of New York, Respondent, Ind. 2721/13

-against-

Abdul Robinson, 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 (Bonnie Wittner, J.), rendered May 8, 2014, 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 3, 2017

CLERK

Sweeny, J.P., Moskowitz, Kahn, Gesmer, JJ.

4563N Lennon Thomas, Index 310469/10
Plaintiff-Respondent,

-against-

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

_____

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for appellants.

The Rawlins Law Firm, PLLC, New York (Michael T. Altman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered December 18, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff's cross motion for leave to amend the complaint to substitute the name of the arresting office for John Doe Officer #1 and to add a claim under 42 USC § 1983, unanimously reversed, on the law and the facts, without costs, and the motion denied. The Clerk is directed to enter judgment dismissing the complaint.

Contrary to plaintiff's contention, the record is adequate to allow for review of the issues on appeal.

The motion court improperly granted plaintiff leave to amend the complaint to add the claim under 42 USC § 1983, because the three-year statute of limitations on that claim (*see Veal v*

Geraci, 23 F3d 722, 724 [2d Cir 1994]) had expired by the time plaintiff sought amendment, in August 2014. Application of the relation back doctrine is not warranted since plaintiff failed to comply with the condition precedent to suit by serving a timely notice of claim (General Municipal Law § 50-e[1]), and therefore there is no "valid preexisting action" to which to relate the amendment back (*see Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 80 AD3d 505 [1st Dept 2011]). Whether this condition precedent would have been met had the original complaint included a claim for malicious prosecution in addition to the false-arrest-related claims is irrelevant, since no such claim was asserted.

Substitution of Crockwell via the relation back doctrine is also improper because Crockwell is not "united in interest" with the City of New York, the original defendant (CPLR 203[b]). The City cannot be held vicariously liable for its employees' violations of 42 USC § 1983, and there is no unity of interest in the absence of a relationship giving rise to such vicarious liability (*see Higgins v City of New York*, 144 AD3d 511, 512-513 [1st Dept 2016]). Nor can plaintiff demonstrate that, but for an excusable mistake as to the proper parties' identities, he would have brought the action against Crockwell, since he knew before

the statute of limitations expired that Crockwell was the arresting officer (*see Crawford v City of New York*, 129 AD3d 554, 555 [1st Dept 2015]).

In addition, the proposed 42 USC § 1983 claim is palpably insufficient as a matter of law (*see Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005]). Plaintiff failed to allege adequately that the claimed deprivation of his constitutional rights was caused by a "governmental custom, policy, or usage" (*see Jones v Town of East Haven*, 691 F3d 72, 80 [2d Cir 2012], *cert denied* __ US __, 134 S Ct 125 [2013]). His allegations of wrongful hiring and training are conclusory (*see Saidin v Negron*, 136 AD3d 458 [1st Dept 2016], *lv dismissed* 28 NY3d 1069 [2016]; *see also City of Canton, Ohio v Harris*, 489 US 378, 390-92 [1989]; *Segal v City of New York*, 459 F3d 207, 219 [2d Cir 2006]). His allegation that police officers were encouraged to make arrests without concern for their validity, while less conclusory, is nevertheless inadequate, because there is no allegation linking that alleged unconstitutional custom or practice to his arrest.

Plaintiff alleges that the arrest was prompted by (false) accusations by as many as two complainants of kidnapping and harassment, but he does not allege that the police knew or had reason to know that these accusations were false.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4564 The People of the State of New York, Ind. 499/14
Respondent,

-against-

Jason Aponte,
Defendant-Appellant.

_____

Rosemary Herbert, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Courtney M. Wen of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered March 4, 2015, convicting defendant, after a jury trial, of unlawful imprisonment in the first degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification, including its evaluation of alleged inconsistencies in testimony and motives to falsify. The

jury could have reasonably found that there were satisfactory explanations for changes in the victim's account of the incident, and that cell phone records did not cast doubt on his testimony.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4565 Philip Lee, et al., Index 26133/04
Plaintiffs-Appellants,

-against-

Kent Hazzard Jaeger Wilson Fay & Conroy
also known as Kent Hazzard Jaeger Greer
Wilson & Fay, et al.,
Defendants-Respondents,

Gretchen Hazzard, etc.,
Defendant.

_____

Meagher and Meagher, P.C., White Plains (Merryl F. Weiner of counsel), for appellants.

Ropers Majeski Kohn & Bentley, New York (Christopher B. Hitchcock of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 23, 2016, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff was unable to demonstrate both that defendant attorneys' attempts to seek enforcement of the settlement agreement in the underlying proceeding and failure to obtain payment of the remaining amount due, execution of a collateral security agreement, and delivery of the corporate shares allegedly owned equally by the parties in that proceeding were

the result of a departure from defendants' professional standard of care, and that the sale of the corporation's sole asset prior to payment or delivery of the shares to plaintiff was the "but for" cause of any damages (*see Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007]). Defendants' failure to obtain the settling obligor's execution of a collateral security agreement is distinguishable from those cases relied upon by plaintiff in which the defendant attorneys failed to properly file executed security agreements (*cf. S & D Petroleum Co. v Tamsett*, 144 AD2d 849 [3rd Dept 1988]; *Deb-Jo Constr. v Westphal*, 210 AD2d 951 [4th Dept 1994]).

We have considered plaintiff's other contentions and find them unavailing.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4566 In re Antonio S. and Others,

Dependent Children Under the Age of Eighteen Years, etc.,

Antonio S., Sr.,
Respondent-Appellant,

The Administration for Children's Services,
Petitioner-Respondent.

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

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

Kenneth M. Tuccillo, Hastings on Hudson, attorney for the children.

Order, Family Court, Bronx County (Robert Hettleman, J.), entered on or about June 10, 2016, which, to the extent appealed from as limited by the briefs, after a combined fact-finding and Family Ct Act § 1028 hearing, determined that respondent father neglected the children Antonio S. and Jordan S., and derivatively neglected Jayden B., unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's finding that the father neglected Antonio and Jordan by failing to provide proper supervision, failing to provide sufficient food, and inflicting excessive corporal punishment on them (*see*

Family Ct Act § 1012[f][i][A],[B]; *see Matter of Alex R. [Maria R.]*, 81 AD3d 463 [1st Dept 2011]; *Matter of Lah De W. [Takisha W.],* 78 AD3d 523 [1st Dept 2010]). The caseworker testified that both Antonio and Jordan told her that their father left them alone for extended periods, did not provide adequate food, and hit them with a belt or his hand when they did not clean or refused to panhandle, so that they were afraid of him. The children's out-of-court statements were properly admitted into evidence because they cross-corroborated each other, and were partly corroborated by the mother's testimony that she found them left alone in the father's residence, without food, and had seen the father slap Antonio and seen marks on Antonio's body (*see* Family Ct Act § 1046[a][vi]; *Matter of Nicole V.*, 71 NY2d 112, 123-124 [1987]*; Matter of Nephra P.I. [Shanel N.]*, 139 AD3d 485 [1st Dept 2016], *lv denied* 27 NY3d 912 [2016]; *Matter of Jayden R. [Jacqueline C.]*, 134 AD3d 638 [1st Dept 2015]). The children's statements were sufficient to support a finding of excessive corporal punishment, beyond what was reasonable to discipline the children (*see Matter of Alex R. [Maria R.]*, 81 AD3d at 463). The Family Court properly drew a negative inference from the father's failure to testify (*Matter of Nicole H.*, 12 AD3d 182 [1st Dept 2004]), and providently exercised its

discretion in denying the father's application to compel the children to testify.

The evidence of the father's neglect of the older children demonstrates such an impaired level of parental judgment as to create a substantial risk of harm to any child in his care, thus supporting the finding that he derivatively neglected the youngest child (*see Matter of Jayden R. [Jacqueline C.]*, *supra*; Family Court Act § 1046[a][i]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4567 Diane Rivera, et al., Index 310866/11
Plaintiffs-Respondents,

-against-

New York Pain Care Center, P.C., et al.,
Defendants-Appellants,

Manhattan Medical Suite, P.C., et al.,
Defendants.

Dwyer & Taglia, New York (Peter R. Taglia of counsel), for appellants.

The Law Office of David S. Klausner, PLLC, White Plains (Crystal Massarelli of counsel), for respondents.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 21, 2016, to the extent it denied defendants-appellants' motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment dismissing the complaint as against said defendants.

Plaintiffs contend that plaintiff Diane Rivera (plaintiff) sustained Complex Regional Pain Syndrome (CRPS) during podiatric surgery as a result of medical malpractice in connection with the administration of sedation by defendant Aznavoorian, an

anesthesiologist, and the subsequent treatment by him and defendant Hosny, an anesthesiologist and pain management specialist who owns defendant Manhattan Medical Suite, P.C. (MMS), where the surgery was performed.

Defendants New York Pain Care Center, P.C. (NYPCC), Hosny, and Aznavoorian established prima facie their entitlement to summary judgment through expert affirmations, deposition transcripts, and medical records. These showed that the initial and subsequent administrations of propofol, an anesthetic administered intravenously, were uneventful and successful in sedating plaintiff, that there was no infiltration of propofol into the tissues surrounding the IV site on plaintiff's hand, that plaintiff had a venous reaction to the IV, that propofol could not have caused the alleged injury, and that the post-operative care rendered was appropriate.

In opposition, plaintiffs failed to demonstrate the existence of triable issues of fact. Their experts offered only conclusory assertions and speculation that there were departures from the standard of care and that these departures caused plaintiff's injuries (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542 [2002]; *Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [1st Dept 2006]). The anesthesiologist and pain medicine specialist

opined that only a partial infiltration occurred, at an unknown moment during the 50-minute procedure, through which an unspecified amount of propofol escaped the venous pathway and caused an injury. He offered no opinion as to the amount of propofol that could have infiltrated the tissues and set forth no medical or scientific evidence to support the proposition that such an amount could have caused CRPS. The expert's opinion as to remedial measures that should have been taken was not supported by evidence of, or even reference to, the standard of care, and failed either to address the measures that were taken, namely, elevation and the application of warm compresses, or to explain how, in these circumstances, the method he proposed was preferable and would have produced a more favorable result. Moreover, plaintiff's treating pain physician admitted that CRPS

could have been caused "from a needle stick absent the exposure to any chemical," for which there are no known preventative measures.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4568 The Residential Board of Managers of Platinum, Plaintiff-Respondent, Index 652156/14E 595233/15 590050/16

-against-

46th Street Development, LLC, et al., Defendants.

- - - - -

[And a Third-Party Action]

- - - - -

Plaza Construction LLC formerly known as Plaza Construction Corp., Second Third-Party Plaintiff-Respondent,

-against-

Del Salvio Masonry Corp., et al., Second Third-Party Defendants,

V.A.L. Floors, Inc., Second Third-Party Defendant-Appellant.

Law Office of Robert J. Miletsky, White Plains (Jessica Schwartz of counsel), for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Ethan A. Kobre of counsel), for the Residential Board of Managers of Platinum, respondent.

Welby, Brady & Greenblatt, LLP, White Plains (Richard T. Ward III of counsel), for Plaza Construction LLC, respondent.

Order, Supreme Court, New York County (David Benjamin Cohen, J.), entered on or about July 22, 2016, which denied the motion of second third-party defendant V.A.L. Floors, Inc. to dismiss

the second third-party complaint as against it, unanimously affirmed, without costs.

V.A.L.'s contention that the second third-party complaint is time-barred is without merit. "The statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim" (*Tedesco v A.P. Green Indus., Inc.,* 8 NY3d 243, 247 [2007]). There is no indication in the record that second third-party plaintiff (who is also a third-party defendant) has paid anything to third-party plaintiff. Thus, its time to sue "has not even begun to run" (*Varo, Inc. v Alvis PLC,* 261 AD2d 262, 265 [1st Dept 1999], *lv denied* 95 NY2d 767 [2000]).

While it would have been better practice for V.A.L. to have explicitly made its motion pursuant to CPLR 3211(a)(1) and/or (7) in addition to subdivision (5), it did argue in its moving papers that its contract cannot reasonably be construed to require it to indemnify second third-party plaintiff. Accordingly, we will consider this contention, and we find it unavailing. In *Inman v Binghamton Hous. Auth.* (3 NY2d 137 [1957]), on which V.A.L. relies, the plaintiff complained about the design of a stoop, rear door, and step (i.e., the architects' work), not about how they were built (the builder's responsibility) (*see id.* at 143).

Since the claims "did not arise from any defect in workmanship or in any material used" (*id.* at 147), the indemnification clause, which limited the builder's obligation "to injuries 'arising out of or in connection with the. . .Work,'" did not apply (*id.*). By contrast, if V.A.L. is eventually obliged to indemnify second third-party plaintiff, the indemnification will have to arise out of defects in the wood flooring, which was V.A.L.'s work.

In its reply brief below, V.A.L. contended that a survey prepared by nonparty RAND Engineering & Architecture showed that any problems with the wood floors were caused by water infiltration, not by defects in its work. However, an argument that is not raised until a reply brief should not be considered (*see e.g. Travelers Indem. Co. v LLJV Dev. Corp.,* 227 AD2d 151, 154 [1st Dept 1996]). Were we to reach the merits, we would find that, assuming the RAND survey constituted documentary evidence,

it did not "conclusively establish[] a defense to the asserted claims as a matter of law" (*Leon v Martinez,* 84 NY2d 83, 88 [1994]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4569 The People of the State of New York, Respondent, Ind. 1533/14

-against-

Michael Freeman, Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

Order, Supreme Court, Bronx County (Ralph Fabrizio, J.), entered on or about August 3, 2016, which adjudicated defendant a level three predicate sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). The mitigating factors cited by defendant were

adequately taken into account by the risk assessment instrument, or were outweighed by the seriousness of the underlying crime and defendant's criminal history.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4570 The People of the State of New York, SCI 890/15
Respondent,

-against-

Andrew Pagan,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson 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 (George R. Villegas at plea; Albert Lorenzo, J. at sentencing), rendered on or about April 29, 2015,

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 3, 2017

CLERK

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

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4571 In re Letitia James, etc., Index 101557/15
Petitioner-Respondent,

C.P., etc., et al.,
Petitioners,

-against-

City of New York, et al.,
Respondents,

New York City Department of Education,
et al.,
Respondents-Appellants.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for appellants.

Emery Celli Brinckerhoff & Abady, LLP, New York (Matthew D. Brinckerhoff of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered September 29, 2016, which, insofar as appealed from as limited by the briefs, denied the cross motion to dismiss the proceeding brought pursuant to CPLR article 78 as against respondents New York City Department of Education and Chancellor Carmen Farina, unanimously reversed, on the law, without costs, and the cross motion to dismiss the proceeding as against those respondents granted. The Clerk is directed to enter judgment accordingly.

The Public Advocate lacks capacity to bring this suit, since she undisputedly lacks express statutory authority to do so, and such capacity is not implied by her powers and duties pursuant to NY City Charter § 24 (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155-156 [1994]; *cf. Matter of Green v Safir*, 174 Misc 2d 400 [Sup Ct, NY County 1997], *affd* 255 AD2d 107 [1st Dept 1998], *lv denied* 93 NY2d 882 [1999]).

The Public Advocate also lacks standing to bring this suit. The Public Advocate, who does not claim third-party standing, fails to establish that she will suffer harm in the absence of the relief sought, since she does not challenge any administrative act or omission interfering with matters within her purview (*cf. Matter of City of New York v City Civ. Serv. Commn.*, 60 NY2d 436, 443 [1983]).

In any event, petitioners are not entitled to the "extraordinary remedy" of mandamus (*Matter of County of Chemung v Shah*, 28 NY3d 244, 266 [2016] [internal quotation marks and citation omitted]), which "is generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued" (*Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 118 [1st Dept 2017]). The relief sought

does not concern mere "acts which are mandatory but are executed through means that are discretionary," but involves "acts the exercise of which is discretionary" (*Klostermann v Cuomo*, 61 NY2d 525, 539 [1984]), such as deciding whether to seek penalties for particular violations of Administrative Code of City of NY § 19-605(a) by bus companies in performing their contracts with respondent Department of Education.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4572 DKRW Wind Holdings, LLC, Index 654146/13
Plaintiff-Appellant,

-against-

Transcanada Energy, Ltd.,
Defendant-Respondent.

Hodgson Russ LLP, Buffalo (Robert J. Lane, Jr. of counsel), for appellant.

Hahn & Hessen LLP, New York (Steven J. Mandlesberg of counsel) and Shackelford, Bowen, McKinley & Norton, LLP, Dallas, TX (Worthy Walker of the bar of the State of Texas, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 7, 2016, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on its first through fourth causes of action, and granted defendant's motion for summary judgment dismissing those causes of action, unanimously modified, on the law, to deny defendant's motion as to the first and third causes of action, and otherwise affirmed, without costs.

This breach of contract action arises from a "Project Fee Agreement" (the PFA) by which plaintiff transferred to defendant its interest in developing a wind energy facility located near Kibby Mountain in Maine (the Kibby Project) in exchange for

certain payments, including an annual "Operating Fee." Plaintiff claims that defendant breached the PFA by improperly calculating two components of the fee - "gross electricity sales revenue" and "Royalty Rate."

Plaintiff argues that defendant wrongfully failed to include in "gross electricity sales revenue" revenue from sales of environmental attributes associated with the energy generated by the Kibby Project that are known as renewable energy credits (RECs). We find that the PFA is ambiguous as to the meaning of the term "gross electricity sales revenue" and that the extrinsic evidence submitted by the parties to prove their intent is inconclusive (*see Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]; *Dorel Steel Erection Corp. v Seaboard Sur. Co.*, 291 AD2d 309 [1st Dept 2002]).

Plaintiff emphasizes that the PFA does not expressly exclude REC revenue from "gross electricity sales revenue." Defendant counters that it does not expressly include REC revenue either. However, the question is what someone in the renewable energy industry would generally understand the term "gross electricity sales revenue," standing alone, to include, and the answer to that question is not clear as a matter of law from the face of the PFA.

The PFA provides that it is to be interpreted in accordance with New York law. Nevertheless, because the underlying transactions involved energy that was produced and consumed outside of New York, New York's regulatory scheme governing energy produced or consumed in New York — which, at the time the parties contracted, apparently did not provide for trading in RECS "unbundled" from the associated electricity — is not relevant to determining whether the term "gross electricity sales revenue," as used in the PFA, includes REC revenue. Notwithstanding the PFA's New York choice-of-law clause, New York's regulatory scheme for energy sales within New York, as it existed at the time of contracting, has no bearing on how the parties intended to divide between themselves the revenue from out-of-state energy sales that were not governed by the New York regulatory scheme.

We also reject plaintiff's alternative argument that Maine law, at the time the parties contracted, required that the PFA be construed to include the associated RECS. Plaintiff relies on a Notice of Investigation issued by the Maine Public Utilities Commission that concluded that certain power purchase agreements should be construed as including both electricity and RECs unless otherwise specified. However, this conclusion was admittedly

"tentative[]" and, at any rate, applied only to contracts that, unlike the PFA, were subject to the federal Public Utility Regulatory Policies Act (16 USC § 2601 *et seq.*) and predated implementation of New England's system for trading unbundled RECs. Because unbundled sales were not yet possible, these contracts had no reason to make any provision for them. It is undisputed that by the time the PFA was executed unbundling was commonplace. The other cases cited by plaintiff are distinguishable on this same ground (*see Wheelabrator Lisbon, Inc. v Connecticut Dept. of Pub. Util. Control*, 531 F3d 183, 186-187 [2d Cir 2008]; *ARIPPA v Pennsylvania Pub. Util. Commn.*, 966 A2d 1204, 1206, 1212-1214 [Pa Commw Ct 2009]; *In the Matter of the Ownership of Renewable Energy Certificates*, 389 NJ Super 481, 484-485 [NJ App Div 2007]).

The parties' experts offer conflicting opinions as to whether the "industry standard" was to assume RECs were included unless specifically excluded or vice versa. The fact that defendant specifically excluded RECs in a later series of agreements is immaterial, since these are just one example, and this example cannot shed light on what the expectation would be where, as here, RECs are not mentioned at all.

Most persuasive is the change in terminology from "gross

revenues" in a prior agreement between the parties to "gross electricity sales revenue" in the PFA. However, while the addition of the words "electricity sales" suggests an intention to limit the revenue that would otherwise be included, the precise nature of the limitation is ambiguous. While defendant's representative testified that his intention in adding these words was to exclude RECs, the words can also reasonably be read as plaintiff suggests - to exclude revenue from sources other than energy sales, for example, tax credits, capacity sales, and equipment sales.

Plaintiff separately argues that defendant wrongfully used a turbine not envisioned by the parties during contract negotiation, thereby substantially reducing the "Capacity Factor," a component of the Royalty Rate. However, the PFA indisputably did not contain a requirement that any particular turbine be used, and plaintiff cannot now read such a requirement

into it.

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: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4573 In re Roemaine Q.,

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

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

Zachary W. Carter, Corporation Counsel, New York (Megan E.K. Montcalm of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Adetokunbo O. Fasanya, J.), entered on or about March 29, 2017, which adjudicated appellant a juvenile delinquent, upon his admission that he committed the act of unlawful possession of a weapon by a person under 16, and placed him with the Administration for Children's Services' Close to Home program for a period of 12 months, unanimously modified, as an exercise of discretion in the interest of justice, to the extent of placing appellant on level three probation for a period of 18 months, nunc pro tunc to March 29, 2017, with the conditions that appellant comply with mental health services including individual and family therapy, anger management, and medication management at Harlem Hospital or an equivalent provider; that appellant

comply with his individualized education plan, consistently attend a District 75 school, and avoid behavioral problems both at school and home; and that appellant continue to participate in positive social activities outside of school, and otherwise affirmed, without costs.

We recognize the seriousness of the underlying offense of unlawful possession of a weapon by a person under 16. However, we note that the weapon here was a BB gun, and that the 13-year-old appellant did not use it to commit an act of violence. We conclude that the disposition indicated above, which is precisely the same as the presentment agency's own recommendation at the dispositional hearing, is the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), and we modify accordingly in the exercise of our discretion.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4574 The People of the State of New York, Ind. 44560C/05
Respondent,

-against-

Lawrence Perez,
Defendant-Appellant.

_____

Feldman and Feldman, Uniondale (Steven A. Feldman of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

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Order, Supreme Court, Bronx County (Martin Marcus, J.), entered on or about April 14, 2016, which denied defendant's CPL 440.10 motion to vacate a judgment of conviction rendered August 5, 2008, unanimously affirmed.

The only argument raised on this appeal is identical to a claim this Court rejected on defendant's direct appeal, regarding the trial court's retention of an allegedly unqualified juror (142 AD3d 869, 870 [1st Dept 2016], *lv denied* 28 NY3d 1149 [2017]). Aside from the fact that this record-based issue is not the proper subject of a CPL 440.10 motion, we see no reason to depart from our prior determination.

To the extent defendant's CPL 440.10 motion alleged ineffective assistance of trial counsel, that claim has been

abandoned on appeal. In the alternative, 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]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4575 The People of the State of New York, Ind. 4339/10
Respondent,

-against-

James Cruz,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Noah J. Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Barbara F. Newman, J.), rendered September 11, 2014, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

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 determinations concerning identification and credibility. Defendant was identified by a neutral eyewitness who was familiar with defendant and had an ample opportunity to observe him both during the murder and during the events leading up to it. The evidence also supports an inference that, rather than acting recklessly, defendant fired shots with the intent to kill one or more of his enemies, whom he

mistakenly believed to be present, and instead killed a bystander. Accordingly, defendant was properly convicted of intentional murder under a theory of transferred intent (*see* Penal Law § 125.25[1]). To the extent that, in addition to challenging the weight of the evidence, defendant is making a legal sufficiency claim, it is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we similarly reject it, and we likewise reject defendant's ineffective assistance of counsel claim relating to the lack of preservation.

The court providently exercised its discretion in admitting phone calls recorded during defendant's pretrial detention in which he recounted, to various acquaintances, his then-attorney's description of surveillance videotapes that had been viewed by the lawyer, but not by defendant. On appeal, defendant claims that the admission at trial of evidence of what the former attorney told defendant violated his rights to counsel and due process. However, defendant objected to this evidence on entirely different grounds, and the court "did not expressly decide, in response to protest, the issues now raised on appeal" (*People v Miranda*, 27 NY3d 931, 932 [2016]), notwithstanding its "mere reference" (*id*. at 933) to a matter related to the present

issues. Accordingly, defendant's present claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. The references to what the lawyer told defendant about the existence of surveillance videotapes of the homicide were necessary to provide context for defendant's reaction to this news, as expressed to persons defendant chose to call, and this reaction permitted the jury to draw a reasonable inference of consciousness of guilt. Defendant, who was on notice that the calls might be recorded, voluntarily disclosed what would have been privileged communications and thereby waived any attorney-client privilege (*see United States v Mejia*, 655 F3d 126, 133-35 [2d Cir], *cert denied* 565 US 992 [2011). Furthermore, even if phone calls to friends and family could be excluded on the ground that they "provided insight into possible defense strategies and preparation" (*People v Johnson*, 27 NY3d 199, 205 n [2016]), the calls at issue made no such revelations.

Each of the other three evidentiary rulings challenged on

appeal was a provident exercise of discretion that did not deprive defendant of a fair trial. In each instance, the evidence was relevant under the particular circumstances of the case, and was not unduly prejudicial.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4576-
4577-
4578 Index 652367/10

AQ Asset Management LLC, etc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine (in his capacity as Escrow Agent),
Defendant-Respondent-Appellant,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants-Respondents.

- - - - -

[And Another Action]

_____

Kerry Gotlib, New York, for appellants-respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for respondent-appellant.

Reitler Kailas & Rosenblatt LLC, New York (Edward P. Grosz of counsel), respondents.

_____

Orders, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 18, 2016, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for summary judgment dismissing defendants Habsburg Holdings Ltd. and Osvaldo Patrizzi's counterclaims for recovery of inventory sale proceeds, for breach of Patrizzi's consulting agreement, for accountings as against them, and for aiding and abetting breach of fiduciary duty related to plaintiff Zimmermann and defendant

Michael Levine's interpretation of a contract, and denied Levine's motion for summary judgment dismissing Habsburg and Patrizzi's cross claims based on fraud and breach of fiduciary duty in connection with Levine's drafting of an agreement between Patrizzi and Zimmermann, unanimously modified, on the law, to deny plaintiffs' motion as to the inventory sale proceeds counterclaims based on fraud and fiduciary duty, the counterclaim for breach of the consulting agreement, and the counterclaim for an accounting of inventory sale proceeds as against plaintiff Antiquorum S.A., and to grant Levine's motion for summary judgment dismissing Habsburg and Patrizzi's cross claims based on fraud and breach of fiduciary duty in connection with Levine's drafting of an agreement between Patrizzi and Zimmermann, and otherwise affirmed, without costs.

Although the inventory lists submitted by Habsburg and Patrizzi are hearsay evidence, they may be considered in opposition to plaintiffs' motion, because they are not the only evidence submitted in opposition (*see Uncyk v Cedarhurst Prop. Mgt., LLC*, 137 AD3d 610, 611 [1st Dept 2016]). Issues of fact as to the handling of the Antiquorum S.A. inventory by Patrizzi or others after his departure and whether plaintiffs engaged in a scheme to oust Patrizzi from the company preclude summary

dismissal of the inventory sale proceeds claims based on fraud and breach of duty fiduciary. However, we affirm the dismissal of the counterclaim for the equitable remedy of a constructive trust, because there is no evidence of unjust enrichment, and Habsburg and Patrizzi have an adequate remedy at law, as shown by the relief they seek, i.e., damages resulting from the deprivation of inventory sale proceeds (*see Cuomo v Uppal*, 68 AD3d 569, 570 [1st Dept 2009]). We affirm the dismissal of the constructive fraud claim, because Habsburg and Patrizzi cannot show the existence of a fiduciary or confidential relationship that would warrant their reposing confidence in Levine at the time of the return of the $2 Million Transfer in 2010 to Antiquorum S.A. and Zimmermann (*see AQ Asset Mgt., LLC v Levine*, 119 AD3d 457, 463 [1st Dept 2014]).

The accounting counterclaim against Zimmermann as transfer escrow agent was correctly dismissed based on the motion court's prior finding that Zimmermann had already fully documented his activities in that capacity. The accounting counterclaim against Zimmermann as to sums in the escrow account related to the stock purchase agreement and Antiquorum S.A. was correctly dismissed based on the court's finding that the claim related to Zimmermann's fee from Artist House Holdings Inc., plaintiff AQ

Asset Management LLC's predecessor, had previously been dismissed as speculative. The accounting counterclaim against Antiquorum USA, Inc. was correctly dismissed, because that entity owns no inventory. However, we reinstate the accounting counterclaim against Antiquorum S.A., because it has been narrowed to address Antiquorum S.A.'s inventory sale proceeds only.

Dismissal of the counterclaim for breach of Patrizzi's consulting agreement is precluded by issues of fact as to Patrizzi's departure from the company that leave unresolved whether Zimmermann's alleged actions constituted a repudiation or an anticipatory breach of the agreement (*see Duke Media Sales v Jakel Corp.*, 215 AD2d 237 [1st Dept 1995]).

The cross claims alleging fraud and breach of fiduciary duty based on Levine's drafting of the stock/sales proceeds distribution agreement should have been dismissed based on the evidence in the record establishing that Patrizzi voluntarily

signed the agreement after being given an opportunity to review its terms.

We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4579 Steven Cross, et al., Index 155271/14
Plaintiffs-Appellants,

-against-

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

_____

Sacks and Sacks LLP, New York (Scott N. Singer of counsel), for appellants.

Malapero & Prisco, LLP, New York (Francis B. Mann, Jr. of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered August 3, 2016, which denied plaintiffs' motion for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff ironworker Steven Cross was walking across an installed steel "q-decking" floor on a construction site, when two sheets of the decking floor collapsed, causing him to fall to the floor below. Even though the decking was to become a permanent part of the floor of the building under construction, it is undisputed that, at the time of the accident, additional work needed to be done, including the pouring of concrete, before

the floors would be complete. On this record, plaintiff was entitled to summary judgment as to liability on his claim under Labor Law § 240(1) (*see Berrios v 735 Ave. of the Ams., LLC,* 82 AD3d 552 [1st Dept 2011]).

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4580 The People of the State of New York, Ind. 2390/14
Respondent,

-against-

Adam Worth,
Defendant-Appellant.

Rosemary Herbert, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Yan Slavinskiy 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 (Melissa Jackson, J.), rendered on or about February 10, 2015,

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 3, 2017

CLERK

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

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4581 C.T. Holdings, Ltd., Index 152765/14
Plaintiff-Respondent,

-against-

The Schreiber Family Charitable
Foundation, Inc., et al.,
Defendants,

Meir Aaron Schreiber also known as
Marc Aaron Schreiber, etc.,
Defendant-Appellant.

Sadovnik Legal, P.C., New York (Shella Sadovnik of counsel), for appellant.

Jay S. Markowitz, Williston Park, for respondent.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered February 10, 2016, which, upon granting plaintiff's motion for summary judgment on its claim to renew a judgment entered November 5, 1998, adjudged that plaintiff was entitled to recover against defendants the principal sum of the underlying judgment, plus interest from the original date of entry, unanimously affirmed, without costs.

Plaintiff judgment creditor timely commenced this action for a renewal judgment more than ten years after the docketing of the original judgment as a lien against appellant's property (CPLR 5014[1]). Plaintiff made a prima facie showing of its

entitlement to a renewal judgment by demonstrating that defendants have not satisfied any part of the judgment (*see Premier Capital, LLC v Best Traders, Inc.*, 88 AD3d 677, 677-678 [2d Dept 2011]). In opposition, appellant argued that plaintiff was not entitled to a renewal judgment because it had unreasonably delayed in enforcing the original judgment, while interest accumulated on the judgment and tax liens were imposed. On appeal, he argues that the equitable doctrine of laches applies since his circumstances have worsened during the ten years since the judgment was docketed.

The "mere delay" in enforcement of a judgment, without actual prejudice resulting from the delay, does not constitute laches (*Premier Capital* at 678; *see Saratoga County Chamber of Commerce v Pataki*, 100 NY2d 801, 816 [2003], *cert denied* 540 US 1017 [2003]; *Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005]). Appellant relies on facts outside the record which, in any event, do not constitute injury or prejudice resulting from plaintiff's delay. The accumulation of postjudgment interest does not support a claim of laches, since plaintiff is entitled by statute

to interest on the unpaid amount of the original judgment, which is valid for twenty years (CPLR 211[b], 5004), regardless of whether the judgment is renewed.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4582 John Evatz, Index 101284/11
Plaintiff-Appellant,

-against-

Chanel, Inc.,
Defendant-Respondent.

_____

Sanders & Sanders, Cheektowaga (Harvey P. Sanders of counsel), for appellant.

Proskauer Rose LLP, New York (Edna D. Guerrasio of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 25, 2016, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Dismissal of the complaint was proper where plaintiff failed to create any triable issue of fact as to whether defendant made a misrepresentation to him that defendant knew was false in order to induce him to accept a position as a sales manager in defendant's Watches and Fine Jewelry (WFJ) Department, allegedly in order to steal plaintiff's high end clients (*see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *Frank Crystal & Co., Inc. v Dillmann*, 84 AD3d 704 [1st Dept 2011]).

Plaintiff cited four alleged misrepresentations. First,

plaintiff failed to raise a triable issue as to whether defendant had represented that WFJ sales at its Madison Avenue store totaled approximately $5 million per year. While he testified contradictorily at times what that figure represented, and in particular whether it represented sales solely at the Madison Avenue store, his testimony failed to raise any triable issue whether that number represented sales of WFJ at the Madison Avenue store. He also failed to establish that this representation was false, since, in the preceding year, total sales of WFJ at the Madison Avenue store and defendant's 57th Street store were $7.1 million.

Next, his claim that Chanel misrepresented that sales at the store were "growing," raised in his affidavit in opposition to summary judgment, contradicts his deposition testimony that a Chanel executive told him "nothing's happening, nothing's selling" in fine jewelry, and the trial court properly declined to give any weight to that statement in his affidavit (*Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 494 [1st Dept 2010]). Even if defendant had represented that sales were growing, plaintiff could not have justifiably relied on it since he was told that nothing was selling (*see generally Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Frank Crystal & Co., Inc.,* 84

AD3d at 704-705).

Regarding the third alleged misrepresentation, plaintiff failed to establish that Chanel misrepresented that it had a sales strategy in place. In his deposition, he did not elaborate on what strategy was in place, and he acknowledged that he was hired to "creat[e] the strategy" to generate WFJ sales, and that one Chanel executive specified no strategy other than "we need more sales."

Regarding the fourth alleged misrepresentation, the court correctly concluded that plaintiff's claim that defendant misrepresented that it would provide the proper financial "support" to allow plaintiff to foster relationships with high end clients was not sufficiently detailed to be actionable. Plaintiff testified to assurances of receiving "the necessary funds" to entertain "VIPs," that he would have "whatever [he] need[ed]," and that it "should not be a problem," but he acknowledged that a Chanel executive clarified that it "need[ed] an idea" of what plaintiff had in mind. Plaintiff did not then request a more concrete expense account or budget. Nor could he have justifiably relied on such a vague promise (*see Ederer v Gursky*, 35 AD3d 166, 167-168 [1st Dept 2006], *affd* 9 NY3d 514 [2007]).

It is further noted that the record demonstrates that plaintiff failed to establish any cognizable injury, as he was unemployed when he accepted defendant's offer, and had no other job offers at the time (*see Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 [1st Dept 2009]; *Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 72 [1st Dept 1990]). To the extent that he argues that he suffered damage to his career and reputation, his claim is too speculative on these facts to be a cognizable injury (*see Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 [2017]).

Having properly dismissed the misrepresentation cause of action, the court also properly dismissed the demand for punitive damages. Nor was there any basis to award attorneys' fees.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4584 The People of the State of New York, Ind. 695/12
Respondent,

-against-

David Brown,
Defendant-Appellant.

_____

Rosemary Herbert, Office Of the Appellate Defender, New York (Katherine M.A. Pecore of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jennifer L. Watson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at suppression hearing, plea, and resentencing; Nicholas Iacovetta, J. at initial sentencing), rendered August 28, 2014, as amended December 22, 2014, convicting defendant of promoting prison contraband in the first degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly denied defendant's motion to suppress contraband recovered in a strip search and visual body cavity inspection conducted while defendant was a pretrial detainee at Rikers Island. The search was conducted pursuant to a policy under which correction officers would enter a particular housing area unannounced, search any inmates who were seen to behave in a

furtive or suspicious manner, and, if no inmate behaved in a manner that aroused suspicion, search several "randomly selected" inmates. The officers searched defendant because he fidgeted nervously when the officers entered the dormitory, and then made "a sudden movement," moving his hand behind his body toward the back of his pants. An officer testified that in his experience, such behavior by an inmate upon the arrival of correction officers almost always signified an effort to hide contraband.

Defendant argues that, in order to conduct such an intrusive search of a pretrial detainee, officers are required to have individualized reasonable suspicion that the inmate is concealing contraband underneath the inmate's clothing or in his or her body. However, under the federal constitutional standard, policies allowing strip searches and visual body cavity inspections without individualized suspicion are permissible where they strike a reasonable balance between the legitimate security interests of the institution and the privacy interests of the inmates (*see Florence v Board of Chosen Freeholders of County of Burlington*, 566 US 318 [2012]; *Bell v Wolfish*, 441 US 520 [1979]), and we conclude that, regardless of whether the officers had reasonable suspicion, that standard was satisfied here.

Relying chiefly on *People v Hall*, 10 NY3d 303 [2008], *cert denied* 555 US 938 [2008]), defendant argues that, with respect to pretrial detainees (as opposed to sentenced inmates), reasonable suspicion is required as a matter of New York State constitutional law. Since defendant did not explicitly rely on independent state constitutional law grounds before the suppression court, his present argument is unpreserved (*see People v Robinson*, 74 NY2d 773, 775 [1989], *cert denied* 493 US 966 [1989]; *People v Hamlin*, 71 NY2d 750. 762 [1988]) and we decline to review it in the interest of justice.

As an alternative holding, we reject it on the merits. Defendant contends that the reasoning of *Hall*, which held that an arrestee at a precinct may not be subjected to such intrusions in the absence of reasonable suspicion regarding the location of hidden contraband, is broad enough to compel the conclusion that this requirement also applies to a pretrial detainee in a high-population detention facility. However, we find that nothing in *Hall*, which dealt with stationhouse searches of arrestees, supports a departure from federal precedent in the very different factual scenario presented by the search of pretrial detainees in a correctional facility – a distinction that *Hall* itself noted (10 NY3d at 308).

In any event, even if the reasonable suspicion standard were applied here, it was satisfied by defendant's conduct (*see People v Colon*, 130 AD3d 434 [1st Dept 2015], *lv denied* 26 NY3d 1007 [2015]), particularly in light of the officers' expertise (*see generally People v Valentine*, 17 NY2d 128, 132 [1966].

Defendant also argues that the search was arbitrary insofar as the search policy permitted officers to use their unguided discretion in selecting inmates to search when no inmates acted in a manner that aroused suspicion. We need not reach that issue, because it is clear that defendant was not searched under the portion of the policy allowing random searches, but under the provision involving suspicious behavior. Regardless of the merits of the challenged policy as it might be applied in other situations, this defendant was not selected at random, and the decision to search him was not arbitrary.

Finally, defendant's contention that the officers used unreasonable force in conducting the search is not supported by the record. The hearing evidence establishes that the officers

used reasonable force after they detected contraband, and after defendant resisted their efforts to remove it.

We have considered and rejected defendant's argument concerning identification evidence.

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

ENTERED: OCTOBER 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4585 The People of the State of New York, Respondent, Ind. 3901N/14

-against-

Efrain Solivan, 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 (Neil E. Ross, J.), rendered on or about March 16, 2015, 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 3, 2017

CLERK

Friedman, J.P., Manzanet-Daniels, Kapnick, Kern, Singh, JJ.

4586 The People of the State of New York, Ind. 5311N/12
Respondent,

-against-

Jose Hernandez,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ross D. Mazer 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 (Robert Stolz, J.), rendered on or about June 26, 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 3, 2017

CLERK

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