SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 25, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Sweeny, Moskowitz, Clark, JJ.

11051 Irwin McSweeney, Index 115322/09
Plaintiff-Respondent,

-against-

Sang H. Cho,
Defendant-Appellant.

_____

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for appellant.

Berkowitz & Vargas, P.C., New York (Andrew D. Weitz of counsel), for respondent.

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Order, Supreme Court, New York County (George J. Silver, J.), entered August 13, 2012, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to demonstrate that he suffered a serious injury within the meaning of Insurance Law § 5102(d), and granted plaintiff's cross motion for partial summary judgment on the issue of liability and for leave to amend his bill of particulars, unanimously affirmed, without costs.

In October 2008, defendant's car struck plaintiff, an auxiliary police officer, as he was directing traffic. Specifically, defendant's car hit plaintiff on his right side,

the car's bumper striking plaintiff's right knee. Plaintiff contends that the accident caused "serious injury" to his right knee under the No-Fault Law categories of "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system."

Defendant moved for summary judgment, and met his prima facie burden on the motion by submitting the affirmed report of an expert who opined, based upon his nearly identical clinical findings of limitations of range of motion in both of plaintiff's knees, that plaintiff did not suffer a traumatic injury to his right knee but instead presented with a preexisting degenerative condition consistent with his age, 62.

However, plaintiff raised an issue of fact as to whether he suffered serious injury caused by the automobile accident by submitting the affirmed report of a treating orthopedist who saw him approximately six months after the accident and referred him for an MRI. The MRI showed medial and lateral meniscus tears in the right knee. The orthopedist recommended arthroscopic surgery to repair these tears. Having postoperative complaints of pain, plaintiff continued to receive injections to his right knee, along with physical therapy. In August 2011, the same orthopedist performed range-of-motion testing, and diagnosed plaintiff with limited range of motion in his right knee. He

also opined that plaintiff's injuries were permanent.

In his affirmed report, this orthopedist concluded, in direct contrast to defendant's expert, that the October 2008 car accident was the competent producing cause of the medial and lateral meniscal tears, creating an issue of fact for the jury (*see Perl v Meher*, 18 NY3d 208, 219 [2011]; *Pinzon v Gonzalez*, 93 AD3d 615 [1st Dept 2012]; *Williams v Perez*, 92 AD3d 528 [1st Dept 2012]). The orthopedist also noted that plaintiff's right knee had been asymptomatic before the accident.

The court properly granted plaintiff summary judgment on liability given the uncontested facts that plaintiff was directing traffic at the subject intersection when he was hit by defendant's car and that defendant admitted that he did not see the auxiliary officer in his path before striking him (*see Malone v Morillo*, 6 AD3d 324 [1st Dept 2004]). On this record, no issue concerning plaintiff's comparative negligence exists.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12052 The People of the State of New York, Respondent, Ind. 4546/11

-against-

William Pelzer, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J. at hearing; Roger S. Hayes, J. at jury trial and sentencing), rendered May 18, 2012, convicting defendant of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 12 years, unanimously affirmed.

The court properly denied defendant's suppression motion. Defendant's arrest was supported by probable cause (*see generally People v Carrasquillo*, 54 NY2d 248, 254 [1981]), which does not require proof beyond a reasonable doubt (*Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]). The victim's identification of defendant from a photo array need not be made with complete certainty to give rise to probable cause (*see People v Rhodes*, 111 AD2d 194 [2d Dept

1985]). Furthermore, the arresting detective was also aware that defendant had previously committed a similar burglary on the same block. Even if these burglaries were not so similar as to demonstrate a distinctive modus operandi, the prior burglary tended to provide corroborating evidence supporting probable cause. The discrepancies between defendant's appearance and the victim's description of the burglar were not so significant as to undermine probable cause under the totality of circumstances.

Defendant's arguments concerning trial evidence and the court's charge are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12053 In re Margarita Tavarez-Vargas, Index 400215/12
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development,
Respondent-Respondent.

_____

Cardozo Housing Rights Clinic, New York (Paris R. Baldacci of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Hanh H. Le of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered February 11, 2013, denying the petition to annul a determination of respondent New York City Department of Housing Preservation and Development (HPD), dated August 15, 2011, which denied petitioner rental assistance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, HPD's determination annulled, and the matter remanded to HPD to provide rental assistance to petitioner.

Petitioner vacated her subsidized apartment after the landlord and HPD notified her that her two children were impermissibly living in the single-occupancy unit. HPD's initial notice of termination stated that it was terminating petitioner's

"Section 8" subsidy because she had failed to notify HPD that she had vacated the premises. The Hearing Officer decided to reinstate the rental assistance, but HPD reversed this decision on the ground that petitioner had been receiving project-based assistance under the Shelter Plus Care program, and the applicable regulation provides that "[p]articipants do not retain rental assistance if they move" (24 CFR 582.100[b]).

This determination was arbitrary and capricious, an abuse of discretion, and affected by an error of law (*see* CPLR 7803[3]; *see also Matter of Rosenkrantz v McMickens*, 131 AD2d 389 [1st Dept 1987]). HPD's position that it was offering non-Section 8 assistance, and thus was precluded from offering Section 8 assistance, is belied by HPD's own documentation, including notices informing petitioner of the Section 8 assistance she was receiving in connection with the apartment. Moreover, HPD's refusal to offer relocation assistance is inconsistent with HPD's own administrative plan, which generally permits participants in a variety of housing programs to move, and specifically provides

that the usual requirement that a tenant have completed the initial lease term do not apply in certain situations, including an emergency or where, as here, the family becomes overcrowded.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12055 In re Isaiha M. and Another,

Dependent Children Under the
Age of Eighteen Years etc.,

Atavia M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Carol Khan, New York, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Hanh H. Le of counsel), for respondent.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about April 22, 2013, which denied respondent mother's motion to vacate a fact-finding order of the same court and Judge, entered on or about November 13, 2012, which, upon the mother's default in appearing, determined that she had neglected the subject children, unanimously affirmed, without costs.

The court properly determined that appellant mother failed to demonstrate a reasonable excuse for her failure to appear at the fact-finding hearing or a meritorious defense to the allegations of educational and medical neglect (*see Matter of Amirah Nicole A. [Tamika R]*, 73 AD3d 428, 428-429 [1st Dept 2010], *lv dismissed* 15 NY2d 766 [2010]). The mother stated, without specificity, that she encountered "unforeseen problems"

in her transportation to the airport, which delayed her arrival and resulted in her missing her flight from South Carolina to New York in time to be present at the hearing. However, her relocation to South Carolina with the children violated the terms of the court's prior parole order, and, due to her cryptic account of the delay, the court could not assess whether the problems were foreseeable or beyond her control (*see Matter of Christopher James A. [Anne Elizabeth Pierre L.]*, 90 AD3d 515 [1st Dept 2011], *lv denied* 18 NY3d 918 [2012]).

Even if appellant had established a reasonable excuse for the default, she failed to present a detailed and specific defense to the neglect claims. Appellant did not deny that her older child, who has developmental delays resulting from a brain injury, missed 100 out of 128 school days, and that he was unable to receive the services he required for his special needs because they were provided at school. Appellant also did not deny that she refused entry to her apartment to medical personnel charged with monitoring the child's condition and administering his medication.

The evidence established that appellant's younger child also missed a significant amount of school without any explanation for his absences, supporting the finding of educational neglect (*see Matter of Aliyah B. v Denise J.*, 87 AD3d 943, 943-944 [1st Dept 2011]).

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12057 Allison D., an Infant by her Mother and Natural Guardian Janet D., et al., Plaintiffs,

-against-

New York City Transit Authority, et al., Defendants.

- - - - -

New York City Transit Authority, Third-Party Plaintiff-Respondent,

-against-

Columbia University, et al., Third-Party Defendants-Appellants.

Index 110307/10
590609/11

_____

London Fischer LLP, New York (Christopher Ruggiero of counsel), for appellants.

Smith Mazure Ditrector Wilkins Young & Yagerman PC, New York (Louise M. Cherkis of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 26, 2012, which denied third-party defendants' motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Defendant Washington, the driver of the bus that hit the concrete barrier that ultimately struck the infant plaintiff, testified that the barrier was situated in such a manner that it protruded beyond the closed lane of traffic into a travel lane. Such testimony presents a triable issue of fact as to whether

third-party defendants Turner Construction Company and Columbia University (collectively Turner) were negligent in the placement or maintenance of the barrier. Although Turner submitted an affidavit from a professional engineer in support of its motion, the expert's opinion that a "moisture patch" in an annexed photograph indicates where the barrier was located just prior to the accident is conclusory. Even crediting the expert's opinion, the photograph depicting a darkened patch does not show any demarcation of lanes of traffic from which it can be determined that the "moisture patch" was wholly within the closed lane (*see e.g. Aller v City of New York*, 72 AD3d 563 [1st Dept 2010]; *Soto v Lime Green Gourmet Deli*, 18 AD3d 284 [1st Dept 2005]).

Furthermore, Turner's argument that the barrier merely furnished the occasion for the accident and is not a proximate cause of the accident regardless of whether it was negligently placed, is unavailing (*cf. Sheehan v City of New York*, 40 NY2d 296 [1976]; *see Zisa v City of New York*, 39 AD3d 313 [1st Dept 2007]). Turner cannot escape liability for negligent placement of the barrier simply because the bus failed to avoid it.

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

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12058 Maria Tai, et al., Index 652769/11
Plaintiffs-Appellants,

-against-

Daniel R. Broche, et al.,
Defendants-Respondents.

_____

Thomas F. Farley, P.C., White Plains (Thomas F. Farley of counsel), for appellants.

Watson, Farley & Williams LLP, New York (Neil A. Quartaro of counsel), for Broche respondents.

Milber Makis Plousadis & Seiden, White Plains (Leonardo D'Alessandro of counsel), for Andrew Weltchek, respondent.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered January 7, 2013, which granted defendants' motions to dismiss the complaint, unanimously modified, on the law, to deny defendants Daniel R. Broche and the Estate of Agnes M. Broche's motion as to the second, third, fourth, and sixth causes of action as against them, and otherwise affirmed, without costs.

This action arises out of claims asserted in an action in Supreme Court, New York County, entitled *Panasia Estate, Inc. v Daniel R. Broche, as Ancillary Executor of the Estate of Agnes M. Broche*, in which Panasia Estate, Inc. sought specific performance of a contract (the Panasia contract) for the sale of two buildings owned by the Estate of Agnes M. Broche (the Estate),

asserting that Property 51 LLC and Property 215 LLC (together, the Tai companies), tortiously interfered with the Panasia contract. Panasia obtained summary judgment on its claim against the Tai companies for tortious interference. In addition, by order entered June 30, 2011, the court (Kenney, J.) granted Panasia summary judgment on its claim for specific performance, and denied the Tai companies' cross motion for leave to amend their answer to include claims against the Estate for, inter alia, breach of contract and indemnification, without prejudice to the commencement of an action on the proposed cross claims. In granting Panasia specific performance, the court found that the Tai companies were not bona fide purchasers and, thus, that their contracts should be vacated as void ab initio. That this determination did not preclude the Tai companies from commencing a separate action against Broche reflects the court's intent that the contracts be voided only as they related to Panasia's claims, so that specific performance could be had. This Court's dismissal of the appeal from a subsequent order as an untimely appeal of the June 2011 order (*Panasia Estate, Inc. v Broche*, 103 AD3d 426 [1st Dept 2013]) does not change this fact.

Since the validity of the contracts as between the Tai companies and the Estate has not yet been decided, or litigated, plaintiffs are not barred by the doctrine of collateral estoppel

from pursuing their contract claims (*see e.g. D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990]). Accordingly, the claim for breach of the implied covenant of good faith and fair dealing (third cause of action), which the motion court dismissed on the sole ground of collateral estoppel, should not be dismissed. However, in their appeal from the dismissal of their claim arising from ¶ 70(c) of the parties' Second Amendment (ninth cause of action), plaintiffs fail to address the court's finding that the contract did not provide them with a unilateral right to the election sought therein. Nor do they address the finding that their claims arising from ¶¶ 69 and 70(a) (eighth and fifth causes of action, respectively) were premature. Accordingly, we do not reach the issue whether these claims were correctly dismissed.

The doctrine of unclean hands is not an applicable defense to plaintiffs' equitable claims since the Broche defendants were "willing wrongdoers" (*Manshion Joho Ctr. Co., Ltd. v Manshion Joho Ctr., Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). Their conduct enabled plaintiffs to tortiously interfere with the Panasia contract (*see 390 W. End Assoc. v Baron*, 274 AD2d 330 [1st Dept 2000]), which was wrongful conduct directed at a third party (*see Brown v Lockwood*, 76 AD2d 721, 728-729 [2d Dept 1980]). Thus, the claims for restitution (second cause of

action), unjust enrichment (fourth cause of action), and money had and received (sixth cause of action) should not be dismissed. The constructive trust claim (fourteenth cause of action) was correctly dismissed because plaintiffs failed to plead a confidential or fiduciary relationship (*see Sharp v Kosmalski*, 40 NY2d 119, 121 [1976]).

The complaint was correctly dismissed as against Andrew Weltchek, the Broche defendants' attorney in the *Panasia* action and on the contracts. Plaintiffs' awareness of the pendency of that action, the filing of a notice of pendency, and Panasia's rejection of the Estate's attempt to terminate the Panasia contract defeats the justifiable reliance element of their fraud

claims (*see Buechner v Avery*, 38 AD3d 443 [1st Dept 2007] [fraud]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996] [fraudulent misrepresentation]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 326 [1st Dept 1996] [fraudulent concealment]; *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [negligent misrepresentation]).

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: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12059 The People of the State of New York, Ind. 5725N/11
Respondent,

-against-

Carlos R. Vasquez,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jared Walkowitz 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 (Ruth Pickholz, J.), rendered on or about April 9, 2012,

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

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

ENTERED: MARCH 25, 2014

CLERK

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

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12060-
12060A

Kathleen DeCanio, et al.,
Plaintiffs-Appellants,

-against-

Principal Building
Services Inc., et al.,
Defendants-Respondents.

Index 113086/09

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellants.

Marshall Dennehey Warner Coleman & Goggin, P.C., New York (John K. McElligott of counsel), for Principal Building Services Inc., respondent.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for City and County Paving, respondent.

Orders, Supreme Court, New York County (Richard F. Braun, J.), entered August 17, 2012, which granted defendants' motions for summary judgment dismissing the complaint, unanimously modified, on the law, the motion denied as to defendant Principal Building Services Inc. (PBS), and otherwise affirmed, without costs.

The court properly granted the summary-judgment motion of defendant snow-removal subcontractor City and County Paving Corp. (CCPC). CCPC's snow-removal contract with defendant property manager PBS, standing alone, is insufficient to "trigger a duty of care running" to plaintiff (*Fung v Japan Airlines Co., Ltd.*, 9

NY3d 351, 360 [2007]). Further, CCPC's acts of plowing and salting the employee parking lot where plaintiff allegedly slipped and fell, as required by its contract with PBS, cannot be said to have "created or exacerbated a dangerous condition" (*id.* at 361 [internal quotation marks omitted]). In addition, the record shows that CCPC did not completely absorb the landowner's duty to maintain the premises safely. Indeed, the snow-removal contract between PBS and CCPC obligated CCPC to plow only after two inches of snow or more fell, or after PBS asked it to do so, and it did not require snow or ice removal in the area where plaintiff fell (*id.*; *see also Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141 [2002]). Nor may plaintiff assert that she detrimentally relied upon PBS's or CCPC's continued performance of snow-removal services, as she did not set forth that allegation in the pleadings (*see Gartmann v City of New York*, 67 AD3d 468, 468-469 [1st Dept 2009]).

A question of fact, however, exists as to whether PBS's contractual responsibility to maintain the entire facility displaced the landowner's duty to maintain the property in a reasonably safe condition (*see Tamhane v Citibank, N.A.*, 61 AD3d 571, 572-573 [1st Dept 2009]). Indeed, PBS's property manager testified that PBS was responsible for the maintenance of the entire premises, including the parking lot where plaintiff fell

(*see Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 588-589 [1994]).

In addition, PBS failed to make a prima facie showing that it lacked constructive notice of the ice in the employee parking lot. Indeed, it submitted no evidence refuting plaintiff's contention that the ice that allegedly caused her to fall existed at the accident location for approximately two days before the incident (*see Penn v 57-63 Wadsworth Terrace Holding, LLC*, 112 AD3d 426 [1st Dept 2013]). The property manager's deposition is not probative as to whether PBS lacked actual or constructive notice of the ice in the employee parking lot, as he had no personal knowledge of the condition of the lot at the time of the incident or in the hours immediately preceding it (*Lebron v Napa Realty Corp.*, 65 AD3d 436, 437 [1st Dept 2009]). Further, his testimony as to which employees he would rely upon to notify him about ice and other conditions at the premises is insufficient to

satisfy PBS's burden of establishing that it lacked notice of the complained-of condition prior to the accident (*see Mike v 91 Payson Owners Corp.*, __ AD3d __, 2014 NY Slip Op 00605 [1st Dept 2014]; *Lebron*, 65 AD3d at 437).

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12061 The People of the State of New York, Respondent, Ind. 10/11

-against-

Nilton Rodriguez, Defendant-Appellant.

_____

Brafman & Associates P.C., New York (Mark M. Baker of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 17, 2011, as amended October 20, 2011, convicting defendant, after a nonjury trial, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations, including its resolution of inconsistencies in testimony. The victim's mother, who caught defendant in his final act of sexual conduct toward the victim, provided significant corroborating testimony.

The submissions on defendant's CPL 440.10 motion to vacate the judgment are not properly before this Court because defendant

did not obtain leave to appeal from the denial of the motion (*see* CPL 450.15[1]; 460.15; *People v Dukes*, 284 AD2d 236 [2001], *lv denied* 97 NY2d 681 [2001]). "Defendant's request that the bench for this appeal entertain a leave application is procedurally improper because CPL 460.15 specifically provides that such an application can only be made to an individual justice, and can only be made once" (*People v Wilkov*, 77 AD3d 512, 513 [1st Dept 2010], *lv denied* 16 NY3d 746 [2011]).

Since defendant's objection to expert testimony was made on completely different grounds from those raised on his appeal, he did not preserve his appellate claim that the expert's testimony was improper because it was tailored to the facts of the case (*see e.g. People v Garcia*, 83 NY2d 817, 819 [1994]). Defendant's constitutional claim is likewise unpreserved (*see People v Lane*, 7 NY3d 888, 889 [2006]). We decline to review these claims in the interest of justice, and as alternative holding, we reject them on the merits. The court properly exercised its discretion in admitting expert testimony on child sexual abuse as an aid in reaching a verdict (*see People v Taylor*, 75 NY2d 277, 288 [1990]). The expert, Dr. Eileen Treacy, discussed in general terms how a child might react to sexual abuse, and when and to whom a child might reveal the abuse. Significantly, the expert's testimony did not include responses to any hypotheticals tailored

to the facts of the case or otherwise imply that the expert found the testimony of the particular complainant to be credible (*compare People v Williams*, 20 NY3d 579, 584 [2013]; *see also People v Spicola*, 16 NY3d 441, 462-467 [2011], *cert denied* 565 US , 132 S Ct 400 [2011]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12063 2470 Cadillac Resources, Inc., et al., Plaintiffs-Appellants, Index 603613/08

-against-

DHL Express (USA), Inc., Defendant-Respondent,

Deutsche Post AG, Defendant.

_____

Einbinder & Dunn, LLP, New York (Michael Einbinder of counsel), and Phillips Nizer LLP, New York (Jeremy Richardson of counsel), for appellants.

Dechert LLP, New York (Edwin V. Woodsome of the bars of the State of California, the District of Columbia and the Commonwealth of Massachusetts, admitted pro hac vice, of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered January 28, 2013, which, insofar as appealed from, granted defendant DHL Express (USA), Inc.'s motion for summary judgment dismissing the tenth and eleventh causes of action as against it, unanimously affirmed, without costs.

The tenth cause of action is duplicative of the previously dismissed breach of contract claim (*see* 84 AD3d 697, 698 [1st Dept 2011], *lv dismissed* 18 NY3d 921 [2012]). Plaintiffs essentially seek to enforce against DHL the terms of the reseller agreement between DHL and nonparty Worldwide Express Operations,

LLC (WWE), which this Court has determined they have no standing to do as third-party beneficiaries (*id.*). To the extent plaintiffs now argue that their signing of the "Sales Code of Ethics for Re-Sellers" (the Code), which was part of the reseller agreement, imposed on DHL obligations set forth in the reseller agreement, this argument is also unavailing. Plaintiffs have not established that they became parties to the reseller agreement by signing the Code (which DHL did not sign). The Code does not incorporate by reference the terms of the reseller agreement. In fact, the Code does not impose any obligations on DHL or contain any of the material terms that DHL allegedly breached. Thus, there is no evidence of mutual assent to a binding contract between DHL and plaintiffs (*see Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589-590 [1999]).

The eleventh cause of action is based on DHL's counterclaim for breach of contract, which seeks to recover for unpaid invoices. It alleges that the contract that is formed when DHL picks up or delivers a package on behalf of a plaintiff invokes

DHL's obligations under the reseller agreement. However, the contracts between DHL and plaintiffs on which DHL's counterclaim is based are distinct from the reseller agreement between DHL and WWE, which, in any event, plaintiffs cannot enforce against DHL.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12064 The People of the State of New York, Respondent, Ind. 4911/11

-against-

Anthony Anderson, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about April 4, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12065 Eric D. Hadar, et al., Index 652811/11
Plaintiffs-Respondents,

-against-

Clay Pierce, et al.,
Defendants,

Michael Rosenbaum,
Defendant-Appellant.

_____

Graham Curtin, P.A., New York (Christopher J. Carey of counsel), for appellant.

Kasowitz, Benson, Torres & Friedman LLP, New York (Gary W. Dunn of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 9, 2013, which, to the extent appealed from, denied defendant Michael Rosenbaum's motion to dismiss the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

The second through fourth causes of action in the complaint are based on the purportedly false statements made in the course of preparing a complaint filed in a prior Supreme Court action and in the complaint itself. Those causes of action have been dismissed as against Rosenbaum's codefendants, lawyers who represented other parties in the underlying action, based on the

judicial proceedings privilege, because the alleged false statements were pertinent to that litigation and a Surrogate's Court proceeding, which this Court found were not shams (*Hadar v Pierce*, 111 AD3d 439 [1st Dept 2013] [*Hadar I*]; *and see Pomerance v McTiernan*, 51 AD3d 526 [1st Dept 2008]). As we stated, the allegations that Eric Hadar (a defendant in the prior action and a plaintiff in the instant case) was allegedly falsely accused of mismanagement, self-dealing, financial improprieties, and other misconduct were pertinent to a prior action that charged him with a breach of his fiduciary duty by mismanaging corporate assets through nonfeasance, neglect, frequent absence and lapses of judgment, misuse of corporate assets, and overcharging of management fees (*see Hadar I*, 111 AD3d at 439).

The privilege also applies to the fifth cause of action, which alleges defamation. Plaintiffs contend that they pleaded distinct allegations as against Rosenbaum that are outside the scope of the privilege, but those allegations also pertain to conduct undertaken by Rosenbaum as counsel for Eric's father, Richard Hadar, in preparation for the litigation, and they are insufficient to distinguish the claims against him from those against the Patterson defendants (*see Hadar I*, 111 AD3d at 439; *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605 [1st Dept 2010]). Although Rosenbaum only argued that the defamation claim should

be dismissed on the ground of the judicial proceedings privilege, our prior decision is controlling here, pursuant to the doctrine of stare decisis, and, under the circumstances, the issue can be raised for the first time on appeal (*see Chateau D' If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12066 Elie Hirschfeld, Index 303872/09
Plaintiff-Appellant,

-against-

Susan Hirschfeld,
Defendant-Respondent.

_____

Garr Silpe, P.C., New York (Ira E. Garr of counsel), for appellant.

Balber Pickard Maldonado & Van Der Tuin, P.C., New York (James A. Moss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura E. Drager, J.), entered January 16, 2013, which, to the extent appealed from, granted defendant wife's application for an award of damages and directed plaintiff husband to pay her $475,000 per year for 2009, 2010, and 2011, less a credit of $175,000 for payments made to the wife in each of those years, and $475,000 for calendar year 2012, less a credit of any sums paid to the wife for a summer rental that year, plus prejudgment interest of 3%, unanimously affirmed, without costs.

Paragraph 4e of the parties' Modification Agreement provides, in relevant part, that the wife shall have "exclusive use and possession of the East Hampton Residence . . . until September 30, 2017 or her earlier remarriage or cohabitation with an unrelated male." We find that the plain language of this

provision reflects the parties' intent that the wife have exclusive use and possession of the East Hampton Residence until the September 30, 2017 expiration date, or until the occurrence of one of the noted events (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). There is no interpretation that supports the husband's contention that the Modification Agreement limits the wife's use and possession of the East Hampton Residence to summers only. The husband's reliance on various provisions in Paragraph 4e fails to lend support to his contention.

The motion court properly found that the wife's damages were measurable for the husband's breach of the Modification Agreement, where he leased the East Hampton Residence to third parties during the wife's period of exclusive use and possession. There was no basis for requiring the wife to prove how many times or on which occasions during the course of each year she would have actually used the property if it had been made available. The fair market rental value of the property is the proper measure of damages, and is evidenced by the actual rent of $475,000 per year received by the husband (*see Bremer v New York Cent. & Hudson Riv. R.R. Co.*, 118 AD 139, 142 [1st Dept 1907]; *Freidus v Eisenberg*, 123 AD2d 174, 177-178 [2d Dept 1986], *affd as modified* 71 NY2d 981 [1988]).

The court's award of prejudgment interest was a proper exercise of its discretion (*see* CPLR 5001[a]; *Wyser-Pratte v Wyser-Pratte*, 68 AD3d 624, 626 [1st Dept 2009]).

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

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

ENTERED: MARCH 25, 2014

CLERK

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12067 The People of the State of New York, Sci No. 1196/10
Respondent,

-against-

Ana Kruppenbacher,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Neil B. Ross, J.), rendered on or about October 6, 2010,

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: MARCH 25, 2014

CLERK

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

Gonzalez, P.J., Mazzarelli, Renwick, Feinman, Gische, JJ.

12068-
12068A-
12069N

Index 112104/08
590342/09
590057/11

John E. Dreher,
Plaintiff,

-against-

City of New York, et al.,
Defendants.

- - - - -

TDX Construction Corporation,
Third-Party Plaintiff,

-against-

Calcedo Construction Corporation,
Third-Party Defendant-
Appellant,

Glass Solutions Unlimited Corp.,
Third-Party Defendant-Respondent.

[And A Fourth-Party Action]

- - - - -

John E. Dreher,
Plaintiff-Appellant-Respondent,

-against-

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

- - - - -

TDX Construction Corporation,
Third-Party Plaintiff-
Respondent-Appellant,

-against-

Calcedo Construction Corporation, et al.,
Third-Party Defendants-
Respondents-Appellants.

- - - - -

TDX Construction Corporation,
Fourth-Party Plaintiff-
Respondent-Appellant,

-against-

Kuritzky Glass Co., Inc.,
Fourth-Party Defendant-
Respondent-Appellant.

_____

Appeals having been taken to this Court by the above-named appellants from orders of the Supreme Court, New York County (Joan M. Kenney, J.), entered on or about October 1, 2012, April 22, 2013 and June 24, 2013,

And said appeals having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated February 28, 2014,

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11562 Nova Soto-Bay, et al., Index 302617/10
Plaintiffs-Appellants,

-against-

Ronald Prunty,
Defendant,

Deanna Daniel, et al.,
Defendants-Respondents.

_____

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for appellants.

Picciano & Scahill, P.C., Westbury (Keri A. Wehrheim of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 30, 2012, which granted the motion of defendants Deanna Daniel and Arthur Daniel for summary judgment dismissing the complaint as against them, affirmed, without costs.

On March 26, 2009, a dark and drizzly evening, defendant Deanna Daniel was traveling on the Sunrise Highway service road when her vehicle struck the front of defendant Ronald Prunty's vehicle, which was in the process of exiting a parking lot. Prunty testified at his deposition that his "whole hood, probably, up to the end" was past the "lip of the driveway" and "[s]ix inches, maybe, if that much" of his vehicle were past the white line demarcating the shoulder parking lane, extending into

the "service road itself." Plaintiff, a passenger in Prunty's vehicle, testified at her deposition that she did not recall Prunty bringing his vehicle to a stop before entering the road and that she did not see defendants' vehicle before impact.

The Daniel defendants established prima facie their entitlement to summary judgment by demonstrating that the vehicle operated by Ms. Daniel was lawfully proceeding, within the speed limit, in the right lane of the Sunrise Highway service road and that the vehicle operated by Prunty illegally entered the service road without yielding the right of way, in violation of Vehicle and Traffic Law § 1143 (*see Vazquez v New York City Tr. Auth.*, 94 AD3d 870 [2d Dept 2012]). Ms. Daniel testified that she had her headlights and windshield wipers on, that she was traveling at about 30 miles per hour in a 40-mile-per-hour zone because it was drizzling, and that while she sounded her horn and stepped on her brakes, she could not swerve to avoid the collision because she saw the lights of another car in the left-hand lane behind her (*see Sanchez v Lonero Tr., Inc.*, 100 AD3d 417 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact as to any alleged comparative fault on the part of the Daniel defendants. Plaintiff's affidavit in opposition materially conflicted with her sworn deposition testimony (*see Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

Plaintiff did not refute Ms. Daniel's testimony that she could not swerve to the left because there was another vehicle in the left-hand lane, and the argument that Ms. Daniel could have avoided hitting Prunty's vehicle in the few seconds preceding the accident is purely speculative (*see Ishak v Guzman*, 12 AD3d 409 [2d Dept 2004]; *see also Figueroa v Diaz*, 107 AD3d 754 [2d Dept 2013]; *Vazquez*, 94 AD3d at 871; *Sanchez v Lonero Tr., Inc.*, 100 AD3d at 417; *Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160 [1st Dept 1998]). Nor did plaintiff produce competent evidence raising an issue of fact whether Ms. Daniel was driving at an unsafe speed, given the weather conditions. Prunty could only speculate as to how fast Ms. Daniel was "probably" going and testified that "seven, eight, nine seconds or so" transpired between the time he first saw her and the time she grazed his vehicle.

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

FEINMAN, J. (dissenting)

I respectfully dissent because there is an issue of fact whether defendant Deanna Daniel's comparative negligence contributed to the accident.

To obtain summary judgment on the issue of liability in a negligence action, the movant must eliminate any material issue, not only as to the nonmoving party's negligence, but also as to whether its own negligence contributed to the accident (*see Thoma v Ronai*, 82 NY2d 736 [1993]; *Calcano v Rodriguez*, 91 AD3d 468, 469 [1st Dept 2012]). While I agree with the majority that codefendant Ronald Prunty violated Vehicle and Traffic Law § 1143 by entering six inches, at most, into the roadway without yielding the right of way to Daniel, even a driver who has the right of way maintains a duty to use reasonable care to avoid a collision (*see Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 298 [1st Dept 2008]). This duty includes the responsibilities, among others, to be vigilant and see what is there to be seen, and to drive at a reasonable and prudent reduced speed in light of existing hazards, including weather conditions (*see* Vehicle and Traffic Law § 1180[a], [e]; *Thoma*, 82 NY2d at 737; *Basabe v Carrozza*, 106 AD3d 641, 642 [1st Dept 2013]; *Calcano*, 91 AD3d at 472 [Catterson J., concurring]; *Nevarez*, 58 AD3d at 298).

Here, the motor vehicle accident occurred on a drizzly

evening as Daniel was driving on a dark service road past the exit from a busy bowling alley parking lot. The majority points to Daniel's testimony that she had her headlights and wipers on and that she sounded her horn and stepped on her brakes. It then concludes the accident was unavoidable. However, when asked at her deposition if she heard Daniel use her horn, plaintiff Nova Soto-Bay testified, "No, definitely not." Although Prunty testified that he did not "know for a fact" what the speed limit was, he estimated that Daniel's car was "going fairly fast, probably thirty or forty miles per hour" before it skidded three or four car lengths into his front left bumper. According to Prunty, at the time of impact his vehicle was stopped in the parking lot exit and protruding "six inches, maybe, if that much" into the roadway. Prunty's testimony, which the majority points to, that almost 10 seconds elapsed between the moment he saw Daniel's vehicle and the impact leads to an inference that Daniel should have had time to see his car as well, but Daniel testified that she did not see it before the accident. Daniel's use of wipers would support a jury finding that a reduced speed due to the weather was warranted. These circumstances raise issues of fact whether Daniel failed to use reasonable care to avoid a collision by failing to honk, by failing to reduce her speed in light of the weather hazards, and by failing to be vigilant to

the extent she failed to see what there was to be seen, i.e. Prunty's car. Furthermore, the majority relies on Daniel's testimony that she could not swerve to the left because she saw the lights of another vehicle behind her in the next lane, but ignores plaintiff's rebuttal argument that Daniel did not explain why she could not have steered her vehicle to avoid hitting the few inches of Prunty's vehicle in her lane without leaving the other side of her lane.

Of course, even if a factfinder were to conclude that there was a failure by Daniel to use reasonable care, it would still have to decide whether any such negligence on her part contributed to the accident. The majority, like the motion court, has gone beyond issue identification and engaged in fact-finding more appropriately left for trial. For these reasons,

the motion court's grant of summary judgment to the Daniel defendants should be reversed and the motion denied.

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

ENTERED: MARCH 25, 2014

CLERK

Mazzarelli, J.P., Acosta, Renwick, Freedman, Manzanet-Daniels, JJ.

11854-
11855N

Index 603997/06

Community Counseling &
Mediation Services,
Plaintiff-Respondent-Appellant,

—against—

Richard Chera, et al.,
Defendants,

Next Generation Chera, LLC, etc.,
Defendant-Appellant-Respondent.

- - - - - -

Community Counseling &
Mediation Services,
Plaintiff-Appellant,

-against-

Richard Chera, et al.,
Defendants,

Long Island University,
Defendant-Respondent.

_____

Westerman, Ball, Ederer, Miller & Sharfstein, LLP, Uniondale (Greg S. Zucker of counsel), for appellant-respondent.

Loanzon LLP, New York (Tristan C. Loanzon of counsel), for respondent-appellant/appellant.

Goldberg & Rimberg PLLC, New York (Joel S. Schneck of counsel), for respondent.

_____

Order, Supreme Court, New York County (Louis Crespo, Special Referee), entered on or about March 26, 2013, which, after a hearing on damages, directed entry of a judgment against defendants Richard Chera and Next Generation Chera, LLC, awarded

plaintiff $100,442 in compensatory damages, plus prejudgment statutory interest and 35% of its total attorneys' fees and expenses, and declared, upon a finding that plaintiff was entitled to a 7% reduction in rent, that plaintiff's contract rent obligation from April 1, 2013 until March 31, 2017, the end of the term of the lease, shall be $932,616, unanimously modified, on the law and the facts, to delete Richard Chera's name from the first decretal paragraph, to reduce plaintiff's block-billed attorneys' fees by 10% instead of by 65%, and to award plaintiff 100% of its attorneys' fees incurred during the hearing, and otherwise affirmed, without costs. Order, same court (Debra A. James, J.), entered March 5, 2013, which denied plaintiff's motion for leave to amend the complaint to add a cause of action for fraudulent inducement and two claims for attorneys' fees as against defendant Long Island University (LIU), unanimously affirmed, without costs.

Plaintiff did not assert its cause of action for breach of the lease, the only surviving cause of action, against Richard Chera individually. Rather, it was only asserted against Next Generation.

The Special Referee correctly denied Next Generation's motion for a directed verdict (*see Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]), particularly in light of Next Generation's

failure to produce an expert appraiser to refute plaintiff's expert evidence as to the diminution in value of the leasehold by Next Generation's installation of waste pipes in the ceiling without concealing them, in violation of paragraph 13 of the lease. We reject Next Generation's argument that plaintiff's damages were based on "aesthetic harm" only, since plaintiff's expert's opinion as to the diminution in value of the leasehold was supported by his review of data on comparable spaces in the area, as well as his visual inspection of the space and his professional analysis of the market.

While the Referee qualified Next Generation's witness as an expert, and the expert opined that there was no diminution in value to the leasehold due to the exposed waste pipes, the Referee properly weighed the expert's lack of valuation and appraisal experience in finding that his opinion was "based on aesthetics" and an "evaluation," rather than a "valuation," of the leasehold.

We reject Next Generation's argument that plaintiff was not entitled to attorneys' fees because it was not the "prevailing party"; plaintiff prevailed on its central claim. From the beginning of this litigation, plaintiff's central claim has been that Next Generation breached the lease by installing waste pipes in the ceiling and failing to conceal them. Contrary to Next

Generation's contention, it is of no moment that plaintiff did not prevail on its claims for trespass, nuisance, and negligence (*see Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345 [1st Dept 1997], *lv denied* 92 NY2d 818 [1998]; *see also Board of Mgrs. of 55 Walker St. Condominium v Walker St.*, 6 AD3d 279 [1st Dept 2004]). We note that the award to plaintiff of approximately $100,442 and the 7% reduction in future rents constitute "substantial relief" on the cause of action for breach of the lease (*see Board of Mgrs.*, 6 AD3d at 280).

Next Generation waived its objection to the admission of attorneys' fee summaries prepared by plaintiff's counsel by failing to object when the summaries were admitted (*Matter of Government Empls. Ins. Co. v Martin*, 102 AD3d 523 [1st Dept 2013]).

We disagree with the Special Referee's across-the-board reduction of 65% in attorneys' fees. Although there is no per se rule as to the maximum or minimum that block-billed fees should be reduced to account for unnecessary work, we find that, under the circumstances of this case, a 10% reduction should be applied to those hours that were block-billed (*see Silverstein v Goodman*, 113 AD3d 539 [1st Dept 2014]). Plaintiff, however, is entitled to 100% of the balance of the attorneys' fees incurred, including those for the four-day damages trial, since the Referee found

that the number of hours was reasonable for the work performed, and none of the factors he identified in support of the 65% reduction were present during the hearing.

The Special Referee properly found that plaintiff is entitled to attorneys' fees at the agreed-upon rate of $150 per hour, for which plaintiff was billed and which it paid, rather than at counsel's actual rate of $350 (*see Brosnan v Behette*, 186 AD2d 165 [2d Dept 1992], *lv denied* 81 NY2d 706 [1993]).

The proposed claim for fraudulent inducement, based merely on a "misrepresented intent to perform," is duplicative of the breach of contract claim (*see Hawthorne Group v RRE Ventures*, 7 AD3d 320, 324 [1st Dept 2004]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291 [1st Dept 1999]).

The "broad language" of the August 2006 letter agreement on which the proposed claim against LIU for attorneys' fees is based, i.e., that LIU "will be responsible for all damage and or liability that arise[s]" from work performed in the "rear of [plaintiff's] space," does not evince an "unmistakably clear"

intent on LIU's part to pay plaintiff's attorneys' fees (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989]).

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: MARCH 25, 2014

CLERK

Saxe, J.P., Moskowitz, DeGrasse, Clark, JJ.

11903 JF Capital Advisors, LLC, Index 651902/11
Plaintiff-Appellant-Respondent,

-against-

The Lightstone Group, LLC, et al.,
Defendants-Respondents-Appellants.

_____

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

Emery Celli Brinckerhoff & Abady LLP, New York (Elizabeth S. Saylor of counsel), for respondents-appellants.

_____

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered on or about November 27, 2012, which granted in part defendants' motion to dismiss the complaint for failure to state a cause of action under CPLR 3211(a)(7), unanimously modified, on the law, defendants' motion as to the remainder of the complaint granted, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is an investment advisory firm composed of hotel and hospitality industry experts, and defendants are real estate investment companies. Plaintiff commenced this action seeking compensation from defendants for financial advisory services it provided under an alleged oral contract in connection with defendants' acquisition of certain hotels and other investment opportunities.

Specifically, the complaint alleges that from November 2010 until May 2011, in connection with eight different projects that defendants were "interested in pursuing," plaintiff performed a broad range of advisory services for which defendants have not compensated plaintiff; these services allegedly include financial analysis and modeling, market research, data analysis, due diligence, property tours, site visits, investment analysis and evaluation services. The complaint asserts causes of action for quantum meruit and unjust enrichment in connection with these services. Plaintiff generally does not seek compensation for negotiations that it performed on defendants' behalf, but does seek compensation for the other services it allegedly performed for example, preparing investment committee materials and reviewing documents for loan portfolios.

The parties disagree on whether the statute of frauds applies to plaintiff's claims. The relevant provision of the statute of frauds states that a contract to pay compensation for "negotiating the purchase, sale, exchange, renting or leasing of any real estate or . . . of a business opportunity" is void unless it is in writing (GOL § 5-701[a][10]). The statute also provides that "'[n]egotiating' includes procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction" (*id.*).

The motion court correctly granted in part defendants' motion to dismiss plaintiff's claims for quantum meruit and unjust enrichment with regard to three of the eight investment opportunities that defendants considered, because plaintiff acknowledged either participating in negotiations or preparing documents for bidding, i.e., assisting in negotiations of business transactions. In those cases, plaintiff plainly acted as an intermediary as the statute of frauds contemplates (*see Freedman v Chemical Constr. Corp.*, 43 NY2d 260, 266 [1977]).

That plaintiff provided other services in addition to negotiating deals is not dispositive here. On the contrary, plaintiff undertook those other services to assist defendants' negotiations, largely by determining the value to defendants of pursuing the deal (*see e.g. Whitman Heffernan Rhein & Co. v Griffin Co.*, 163 AD2d 86 [1st Dept 1990], *lv denied* 76 NY2d 715 [1990]; *Gutkowski v Steinbrenner*, 680 F Supp 2d 602, 613 [SD NY 2010]). The statute of frauds thus squarely covers the financial advisory services plaintiff performed on those projects.

The statute of frauds also barred plaintiff's unjust enrichment and quantum meruit claims for the financial advisory services it allegedly performed on the remaining five investment opportunities that defendants considered, for which defendants allegedly requested that plaintiff provide certain investment

analyses. At the very least, plaintiff's services in this context amount to "assisting in the negotiation or consummation of the transaction" (GOL § 5-701[a][10]). The motion court erroneously declined to dismiss those claims on the basis that the information plaintiff provided defendants was not ultimately used to assist in the negotiation or consummation of those investment opportunities. Indeed, investment analyses and financial advice regarding the possible acquisition of investment opportunities "clearly fall within" GOL § 5-701(a)(10) (*Enfeld v Hemmerdinger Estate Corp.*, 34 AD2d 980, 981 [2d Dept 1970], *affd* 28 NY2d 606 [1971]; *see also Whitman*, 163 AD2d at 87; *GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 F Supp 2d 308, 324 n 5 [SD NY 2009]).

Finally, contrary to plaintiff's assertions, dismissal of its claims before discovery is not premature, because it had available all of the facts necessary to describe the services it

allegedly performed, and thus to establish whether its claims fell outside of the statute of frauds. It also acknowledged in the complaint that no written agreement ever came to fruition and no amount of discovery will remedy that.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12031 The People of the State of New York, Respondent, Ind. 1144/10

-against-

Edwin Vasquez-Mendez, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Lewis Bart Stone, J. at motion to controvert warrant; Thomas Farber, J. at plea and sentencing), rendered October 5, 2010, convicting defendant of criminal possession of a controlled substance in the second degree, and sentencing him to a term of seven years, unanimously affirmed.

The court properly denied defendant's motion to controvert a search warrant. Defendant argues that the warrant application, describing two drug sales made, by a person other than defendant, at the doorway of an apartment, failed to provide probable cause to search the apartment, even if there was probable cause to search the person of the alleged seller. However, defendant did not preserve that particular claim, and the motion court did not "expressly decide[ ]" (CPL 470.05 2]) that issue (*see People v*

Turriago, 90 NY2d 77, 83-84 [1997]; *see also People v Colon*, 46 AD3d 260, 263 [2007]). Accordingly, we decline to review this claim in the interest of justice.

As an alternative holding, we find that the warrant was properly issued, since there was reasonable cause to believe that evidence of a crime would be found in the apartment (*see People v Pinchback*, 82 NY2d 857 [1993]). It is a logical inference that a person who, on separate occasions, responds to a knock at an apartment door and sells drugs to a stranger is involved with a drug operation being conducted out of that apartment, and it is also a logical inference that a supply of drugs is likely to be found somewhere therein. Probable cause does not require proof beyond a reasonable doubt (*Brinegar v United States*, 338 US 160, 175 [1949]; *People v Bigelow*, 66 NY2d 417, 423 [1985]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12033-
12034 In re Carmine G.,

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

Franklin G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Daniel R. Katz, New York, for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

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

_____

Order, Family Court, New York County (Jody Adams, J.), entered on or about February 6, 2012, which, after a fact-finding hearing, determined that respondent father had neglected the subject child, unanimously affirmed, without costs. Appeal from order of disposition, same court and Judge, entered on or about July 26, 2012, which, to the extent appealed from as limited by the briefs, directed respondent father to engage in a mental health evaluation, cooperate with recommendations and attend domestic violence counseling and anger management, unanimously dismissed, without costs.

A preponderance of the evidence supports the Family Court's

finding that respondent neglected the subject child by engaging in a verbal and physical altercation with the child's mother while the child was present in the home and aware of what was transpiring. The caseworker's testimony that the child told her that he heard his parents yelling and engaging in a physical altercation, and that the mother's injuries were the result of the altercation demonstrates that the child was in imminent risk of emotional and physical impairment (*see Matter of Angie G. [Jose D.G.]*, 111 AD3d 404, 404-405 [1st Dept 2013]).

The child's out-of-court statements as to the injuries respondent inflicted upon the mother were corroborated by the caseworker's testimony and the police officer's statement as to the injuries he observed on the mother as indicated in the domestic incident report for the date of the incident (*see Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]). Respondent failed to preserve his hearsay objections to other evidence admitted at the hearing, and we decline to review them (*see Matter of Isaiah R.*, 35 AD3d 249 [1st Dept 2006]).

Since respondent failed to appear at the dispositional hearing and his counsel did not participate, the order of disposition was entered on his default, and is not appealable (*see Matter of Natalie Maria D. [Miguel D.]*, 73 AD3d 536 [1st Dept 2010]).

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12035-
12035A

Denise Kingue Bonnaig, etc.,
Plaintiff-Appellant,

-against-

Dr. Hilary C. Walton,
Defendant.

BrainPop U, etc., et al.,
Defendants-Respondents,

Index 110429/11

Bonnaig & Associates, New York (Mahima Joishy of counsel), for appellant.

Shiboleth LLP, New York (Daniel B. Faizakoff of counsel), for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered June 4, 2012, which, to the extent appealed from as limited by the briefs, granted defendants-respondents' cross motion to dismiss the complaint as against them, unanimously reversed, on the law, and the motion denied. Appeal from order, same court and Justice, entered June 12, 2013, which, upon renewal, adhered to the original determination, unanimously dismissed, without costs, as academic.

Supreme Court should not have dismissed plaintiff attorney's claim against defendants-respondents asserting breach of a charging lien under former Judiciary Law § 475 (amended by L 2012, ch 478, § 1). Contrary to the court's conclusion,

plaintiff's filing of a charge before the Equal Employment Opportunity Commission (EEOC) in 2007 on behalf of her client and against defendants-respondents constituted the commencement of a "proceeding" before a "federal department" within the meaning of former § 475. Indeed, a charging lien under that section has been deemed to attach to similar proceedings before another federal agency (*see Barnes v Printron, Inc.*, 2003 WL 124520, *1-2, 2003 US Dist LEXIS 492, *2, *5 [SD NY, Jan. 15, 2003, No. 93-Civ-5085 (JFK)] [federal securities arbitration proceeding before the National Association of Securities Dealers]), and the filing of a charge with the EEOC has been deemed to be a commencement of an administrative proceeding (*see Brodsky v Friedlander*, 191 Misc 2d 459, 461 [Sup Ct, Erie County 2002]; *Am. Ctr. for Intl. Labor Solidarity v Federal Ins. Co.*, 548 F3d 1103, 1104-1106 [DC Cir 2008]).

Based on the foregoing determination, we need not reach the issue of whether the 2012 amendment to § 475 applied retroactively.

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

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12036 Martin H. Levenglick, Index 350601/03
Plaintiff-Appellant,

-Against-

Joanna Levenglick,
Defendant-Respondent.

_____

Pedowitz & Meister, LLP, New York (Robert A. Meister of counsel), for appellant.

Joanna Levenglick, respondent pro se.

_____

Appeal from order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about August 27, 2013, as amended September 11, 2013, which granted defendant's motion to enforce a provision of the parties' Stipulation of Settlement and directed plaintiff to pay unpaid and future tuition for the undergraduate education of the parties' emancipated daughter, unanimously dismissed, without costs, as academic.

The challenged order was superseded by a subsequent order of the same court and Judge, entered on or about September 30, 2013, from which no appeal was taken (*see Matter of Pedro A. v Susan M.*, 95 AD3d 458 [1st Dept 2012]). The subsequent order rescinded the order on appeal to the extent that it directed plaintiff to make payments to Columbia University and to defendant on behalf of the parties' emancipated child, and directed that a special

referee determine whether the parties intended for plaintiff to pay for the child's college expenses after she reached the age of 21.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12037 The People of the State of New York, Ind. 4652/10
Respondent,

-against-

Jayson Albertorio,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista 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 on or about January 31, 2012,

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

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

ENTERED: MARCH 25, 2014

CLERK

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

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12039 The People of the State of New York, Respondent, Ind. 4925C/12

-against-

Anthony Esteves, Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered on or about March 12, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12041- Index 23297/05
12042- Robin Windham, et al.,
12042A Plaintiffs-Appellants,

-against-

The New York City Transit Authority, et al.,
Defendants-Respondents.

_____

Gregory Peck and Associates, P.C., New York (Philip J. Hoffman of counsel), for Robin Windham, appellant.

Rehan Nazrali, Jackson Heights, for Kimberly Windham, Cheryl Harper and Chandler Windham, appellants.

Jeffrey Samel & Partners, New York (Jessica Wisniewski of counsel), for The New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Juan J. Fuentes, respondents.

Picciano & Scahill, P.C., Westbury (Keri A. Wehrheim of counsel), for Thomas V. Shaughnessy, Edwin M. Moreta and Thomas V. Shaughnessy Construction Corp., respondents.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 31, 2012, which granted defendants Shaughnessy, Moreta, and Thomas V. Shaughnessy Construction Corp.'s and defendants New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority and Fuentes's motions for summary judgment dismissing the complaint as against them on the threshold issue of serious injury pursuant to Insurance Law § 5102(d), unanimously modified, on the law, to

deny the motions as to plaintiffs Robin Windham's and Cheryl Harper's claims of "significant limitation of use" and "permanent consequential limitation of use" and as to Robin Windham's and plaintiff Kimberly Windham's 90/180-day claims, and otherwise affirmed, without costs. Appeal from order, same court and Justice, entered October 12, 2012, which denied Robin's motion to renew and/or to reargue, unanimously dismissed, without costs, as academic and as taken from a nonappealable paper, respectively. Appeal from order, same court and Justice, entered October 12, 2012, which denied Kimberly, Harper, and Chandler's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

This action stems from a motor vehicle accident that took place on December 6, 2004. Plaintiff Robin Windham was driving her car, with passengers plaintiffs Kimberly Windham, Cheryl Harper, and Chandler Windham. Plaintiffs allege that the car was hit hard on the left by the Shaughnessy defendants' cement truck, and then squeezed and hit on the right side by a bus owned by defendant New York City Transit Authority. All plaintiffs allege that they suffered serious injuries as a result, and Robin and Kimberly alleged in their bill of particulars and testified that they missed about four months of work as a result of those injuries and were confined to home.

Defendants made a prima facie showing that none of the plaintiffs suffered a serious injury resulting in "significant limitation" and "permanent consequential limitation" of use (*see* Insurance Law § 5102[d]). They submitted, among other things, reports by their orthopedist and neurologist, who examined each plaintiff 3½ years after the accident and found full range of motion, negative test results, and resolved sprains in all the body parts claimed to have been injured in the subject accident (*see Kone v Rodriguez*, 107 AD3d 537, 537 [1st Dept 2013]). They also submitted a report by a radiologist opining that Chandler's claimed injuries were preexisting and degenerative.

In opposition, Robin raised a triable issue of fact as to the existence of a "permanent consequential" and "significant" limitation of use of her cervical and lumbar spine by submitting reports by her radiologist finding bulging and herniated discs in the MRI films of the cervical and lumbar spine, reports of electrodiagnostic studies finding radiculopathy, and reports by her treating physician showing significant reductions in range of motion in the cervical and lumbar spine starting shortly after the accident and continuing until the time of her most recent examination, seven years after the accident. Contrary to the motion court's finding, the range of motion limitations set forth in the reports were not "so minor, mild or slight as to be

considered insignificant" as a matter of law (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 353 [2002] [internal quotation marks omitted]). While defendants argue that Robin did not explain gaps in treatment, she raised an issue of fact by submitting evidence that she sought treatment for recurring pain after the initial three months of treatment.

Harper raised triable issues of fact as to permanent consequential or significant limitations in use. Her treating physician's report, which was based on a final examination as well as a review of earlier treatment records, found significant limitations in range of motion in her cervical and lumbar spine, and opined that those injuries were causally related to the subject accident (*see Angeles v American United Transp., Inc.*, 110 AD3d 639, 640 [1st Dept 2013]). Although the MRI report showing bulging and herniated discs was not affirmed, it may be considered in opposition to summary judgment, together with Harper's treating physician's report, which was affirmed, because it is not the sole evidence offered, defendants' experts acknowledged their review of the same MRI report, and defendants did not submit the opinion of an expert radiologist disputing the findings therein (*see Silverman v MTA Bus Co.*, 101 AD3d 515 [1st Dept 2012]). As indicated, plaintiffs were not required to present proof of contemporaneous range of motion findings as a

prerequisite to establishing serious injury (*see Perl*, 18 NY3d at 218). The evidence that Harper ceased treatment when her no-fault benefits terminated constitutes at least "the bare minimum required to raise an issue regarding 'some reasonable explanation' for the cessation of physical therapy" (*see Ramkumar v Grand Style Transp. Enters. Inc.*, 22 NY3d 905, 907 [2013]).

Kimberly failed to raise an issue of fact whether she suffered injuries resulting in "permanent consequential" or "significant" limitation of use as a result of the accident. Although she submitted medical evidence similar to Robin's and Harper's, she failed to present any explanation at all for her six-year gap in treatment, which amounted to a cessation of treatment, after about three months, despite her having other health insurance from her work as a public school teacher (*see Merrick v Lopez-Garcia*, 100 AD3d 456 [1st Dept 2012]; *compare Ramkumar*, 22 NY3d at 906-907).

Chandler failed to raise an issue of fact since he presented no admissible medical evidence of a "permanent consequential" or "significant" limitation of use.

Defendants failed to establish prima facie that Robin and Kimberly did not sustain "a medically determined injury or impairment of a non-permanent nature" that prevented them from performing substantially all of their customary daily activities

for 90 of the 180 days immediately following the accident (*see* Insurance Law § 5102[d]). If Kimberly establishes a serious injury in this category, she will be entitled to recover damages for all injuries causally related to the accident, including those that do not meet the serious injury threshold (*see Rubin v SMS Taxi Corp.*, 71 AD3d 548, 549-550 [1st Dept 2010]).

Defendants established prima facie that Harper and Chandler did not sustain a 90/180-day injury by submitting portions of their deposition testimony showing that they did not claim to have been confined to bed or home for the requisite amount of time (*see Komina v Gil*, 107 AD3d 596 [1st Dept 2013]). In opposition, Harper and Chandler failed to raise a triable issue of fact since they presented no objective medical evidence to substantiate their claims (*see Vasquez v Almanzar*, 107 AD3d 538, 541 [1st Dept 2013]).

Our denial of defendants' motion for summary judgment dismissing Robin's claims renders her appeal from the denial of her renewal motion academic. In any event, the renewal motion was correctly denied since Robin failed to establish that there had been a change in the law that would change the prior determination (*see* CPLR 2221[e][2]).

No appeal lies from the denial of a motion for reargument (*Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011]). We note that Kimberly, Harper, and Chandler's motion was identified as one seeking leave to reargue only, based upon matters of fact or law allegedly overlooked by the court in determining the prior motion (*see* CPLR 2221[d][1], [2]). Thus, Kimberly, Harper, and Chandler could not, by way of a "Supplemental Affirmation in Support" filed more than three months after the motion, convert the motion for leave to reargue to a motion for leave to renew based upon new facts not offered on the prior motion. In any event, the new evidence they proffered would not change the prior determination (*see* CPLR 2221[e][2]), and they did not provide a reasonable justification for their failure to present those facts on the prior motion (CPLR 2221[e][3]).

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12043 Chowaiki & Co. Fine Art Ltd., et al.,
Plaintiffs-Appellants,

-against-

Michael A. Lacher,
Defendant-Respondent.

Index 653237/11

Kaplan & Levenson P.C., New York (Steven M. Kaplan of counsel), for appellants.

Traub Lieberman Straus & Shrewsberry, LLP, Hawthorne (Jonathan Harwood of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered September 21, 2012, which, to the extent appealed from, dismissed plaintiffs' causes of action for breach of fiduciary duty, violation of Judiciary Law §487, fraud, legal malpractice, and unjust enrichment, and granted defendant's motion to strike scandalous or prejudicial matter from the complaint, unanimously modified, on the law, to reinstate the cause of action for unjust enrichment, and otherwise affirmed, without costs.

In this action arising from defendant attorney and his law firm's representation of plaintiffs in an action brought against them by a former employee, plaintiffs allege that they were excessively billed for services rendered, and that they were harassed, threatened and coerced into paying the excessive and

overinflated fees. The motion court properly dismissed plaintiffs' claim for breach of fiduciary duty as duplicative of the breach of contract claim, since the claims are premised upon the same facts and seek identical damages, return of the excessive fees paid (*see CMMF, LLC v J.P. Morgan Inv. Mgt. Inc.*, 78 AD3d 562 [1st Dept 2010]; *cf. Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1 [1st Dept 2008]). Although plaintiffs sufficiently allege an independent duty owed to them, arising from the attorney-client relationship, the fraud claim is similarly redundant of the breach of contract claim, since it also seeks the same damages (*see Coppola v Applied Elec. Corp.*, 288 AD2d 41, 42 [1st Dept 2001]; *Makastchian v Oxford Health Plans*, 270 AD2d 25, 27 [1st Dept 2000]).

However, we find that, as a dispute exists as to the application of the retainer agreement as to defendant, plaintiffs need not elect their remedies and may pursue a quasi-contractual claim for unjust enrichment, as an alternative claim (*see Wilmoth v Sandor*, 259 AD2d 252, 254 [1st Dept 1999]).

The cause of action based upon Judiciary Law §487 was properly dismissed since relief under this statute is not lightly given and the conduct alleged does not establish the existence of a chronic and/or extreme pattern of legal delinquency which caused damages (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1,

13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]; *Nason v Fisher*, 36 AD3d 486, 487 [1st Dept 2007]).

Plaintiffs' claims of excessive billing and related conduct, which actions are not alleged to have adversely affected their claims or defenses in the underlying action, do not state a claim for legal malpractice (*see e.g. AmBase Corp. v Davis, Polk & Wardwell*, 8 NY3d 428, 434 [2007]).

We find that the court did not improvidently strike scandalous and/or prejudicial matter from the complaint. References to other actions and a tax levy are irrelevant to plaintiffs' claims (*see* CPLR 3024[b]; *Soumayah v Minnelli*, 41 AD3d 390, 392 [1st Dept 2007]). Although an order that "orders or refuses to order that scandalous or prejudicial matter be stricken from a pleading" is not appealable as of right (CPLR 5701[b][3]), we reach this issue, since defendant has not raised the question of appealability (*see Pearlberg v Lacks*, 23 AD2d 834 [1st Dept 1965]).

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12044 The People of the State of New York, Ind. 622/02
Respondent,

-against-

Lamont Jones, also known as Jamie Jones,
Defendant-Appellant.

_____

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

_____

Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 19, 2012, as amended on July 6, 2012 and on August 17, 2012, resentencing defendant, as a second felony offender, to an aggregate term of 20 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*see People v Lingle*, 16 NY3d 621 [2011]).

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12045 Sunrise Capital Partners Management LLC, et al., Plaintiffs-Respondents, Index 651891/11

-against-

Jeff Glattstein, et al., Defendants,

David McLachlan, Defendant-Appellant.

_____

Eaton & Van Winkle LLP, New York (Robert B. Bernstein of counsel), for appellant.

Davidoff Hutcher & Citron LLP, New York (Joshua S. Krakowsky of counsel), for respondents.

_____

Appeal from order, Supreme Court, New York County (Eileen Bransten, J.), entered October 18, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion for a default judgment as against defendant McLachlan (defendant) pursuant to CPLR 3215, deemed an appeal from judgment, same court and Justice, entered December 19, 2012, awarding plaintiffs the aggregate amount of $512,576.51 jointly and severally against all defendants, and, so considered, said judgment unanimously affirmed, with costs.

Defendants' excuse that they did not contact outside counsel because they were relying on in-house counsel to resolve the

matter is insufficient, as they offered no facts as to how or why they believed in-house counsel was handling the matter. Moreover, defendants' excuse that they believed plaintiffs did not intend to proceed with the lawsuit is conclusory. Defendants have not alleged any statements made by plaintiffs that would indicate they were not serious about prosecuting their claim. Accordingly, defendant has failed to proffer an acceptable excuse for the default, and the Court need not determine whether a meritorious defense exists (*see e.g. Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789 [1st Dept 2012]).

In any event, defendant's new defense is based on documents dehors the record (*see Gintell v Coleman*, 136 AD2d 515, 517 [1st Dept 1988]), is conclusory, and contradicts the offerings in defendant Satin's earlier affidavit (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]).

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12046-
12047 In re ACN Digital Phone Service, LLC,
Petitioner-Respondent,

-against-

Universal Microelectronics Co., LTD,
Respondent-Appellant.

Index 654062/12

_____

Katten Muchin Rosenman LLP, New York (Jonathan J. Faust of counsel), for appellant.

Winston & Strawn LLP, New York (Thomas Patrick Lane of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 3, 2013, which granted petitioner-respondent's motion to confirm an arbitration award and denied respondent-appellant's motion to vacate the award, in the total sum of $7,660,993.68, unanimously affirmed, with costs. Appeal from the underlying order, entered March 11, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Because the transactions at issue were in international commerce, the proceeding to confirm/vacate the arbitration award is governed by the Federal Arbitration Act, 9 USC § 1 *et seq.* (*see Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 478 n

8 [2006], *cert dismissed* 548 US 940 [2006]). Respondent-appellant seeks to vacate the award under the federal "manifest disregard" of the law doctrine. That doctrine holds that an award may be vacated if the arbitrators ignored well-settled law. However, the doctrine requires "egregious conduct" on the part of the arbitrators to support vacatur of an award (*see id.* at 478-479). Further, respondent-appellant seeks vacatur under the law of this State, on the ground that the award is "irrational," in that it ignores and rewrites the agreement between the parties (*see Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 346 [1985]). It appears that, even though the FAA governs, this Court may apply state grounds for vacatur, where they are consistent with the FAA's terms and purposes (*see Volt Info. Sciences v Board of Trustees*, 489 US 468, 477 [1989] ["The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration"]).

However, here, respondent-appellant meets neither standard for vacatur. The finding by the arbitrators that the parties had agreed on a delivery schedule for the various purchase orders at issue, and that the "credit" for late delivery should be treated as a "refund," now that the parties are no longer doing business, was not either a manifest disregard of the law or irrational

(*see Banc of Am. Sec., LLC v Solow Bldg. Co.* II, LLC, 104 AD3d 563, 563-564 [1st Dept 2013]). The same is true for the analogous treatment the panel gave to respondent-appellant's failure to provide 2% extra units to cover defective units. The fact that respondent-appellant breached certain terms of the contract did not put petitioner-respondent on notice that it was repudiating the contract, nor did it repudiate the contract. As such, there was no error, let alone a manifest disregard or irrational interpretation, in the panel finding that petitioner-respondent had not waived its claims for breach (*cf. Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003]). Because the award was properly confirmed, there is no basis to disturb the award of attorney's fees.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12049 The People of the State of New York, Respondent, Ind. 1065/11

-against-

Steven Midgette, Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Cassandra M. Mullen, J. at jury trial and sentencing), rendered March 8, 2012, convicting defendant of burglary in the second degree (eight counts) and attempted burglary in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 15 years, unanimously affirmed.

Defendant's legal sufficiency claim is unpreserved, since the colloquy at a midtrial charge conference did not address the issue of sufficiency (*see People v Polanco*, 279 AD2d 307, 307 [1st Dept 2001], *lv denied* 96 NY2d 833 [2001]), defense counsel subsequently made only a general motion to dismiss that did not incorporate anything said at the charge conference (*see People v Gray*, 86 NY2d 10, 19 [1995]), and any specific arguments were

untimely raised at the sentencing proceeding (*see People v Wilkins*, 111 AD3d 451 [1st Dept 2013]). As an alternative holding, we reject the legal sufficiency claims on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

Contrary to defendant's contention, the evidence established that, in each of the eight incidents that led to burglary convictions, he entered portions of hotels without being licensed or privileged to enter, and with knowledge of that fact. Notwithstanding the absence of barriers, locked doors, or signs announcing restrictions on access, the totality of the circumstances, including defendant's behavior, warranted the inference that he was aware of the unlicensed nature of his entry (*see e.g. People v Watson*, 221 AD2d 264 [1st Dept 1995], *lv denied* 87 NY2d 926 [1996]; *People v Jenkins*, 213 AD2d 279 [1st Dept 1995], *lv denied* 85 NY2d 974 [1995]).

The attempted burglary conviction was supported by evidence that defendant, who had previously taken property from a hotel bar when the bar was closed and being used to store luggage, entered the same hotel and headed for the closed bar. When stopped by a hotel employee, defendant stated that he was there to pick someone up, but instead departed alone. This evidence established that defendant "carr[ied] the project forward within

dangerous proximity to the criminal end to be attained" (*People v Bracey*, 41 NY2d 296, 300 [1977]).

Defendant's motion to suppress clothing recovered from his person after he was arrested was properly denied. The only witness at the suppression hearing was a police officer who did not observe the arrest, but subsequently recovered defendant's clothing while he was being held at the police station. However, the People met their burden to establish the lawfulness of the arrest through circumstantial evidence warranting the conclusion that the nontestifying apprehending officer acted lawfully, since the "only rational explanation" (*People v Johnson*, 281 AD2d 183 [1st Dept 2001], *lv denied* 96 NY2d 903 [2001]) of the sequence of events is that the nontestifying officer arrested defendant based on probable cause supplied by a hotel employee, as described in detail by the testifying officer. In any event, any error in the court's suppression ruling was harmless, because the fruits of defendant's arrest were only relevant to the nearly uncontested issue of identity.

The jury charge properly tracked the statutory language of the CJI (*see People v Lewis*, 5 NY3d 546, 551 [2005]), and the court properly exercised its discretion (*see People v Samuels*, 99 NY2d 20, 25-26 [2002]) when it declined defendant's request to add explanatory language regarding factors that could be relevant

to the issue of knowing, unlawful entry. The constitutional aspect of defendant's challenge to the charge is unpreserved, and we decline to review it in the interest of justice. As an alternate holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12050 Hector Pagan, Index 306276/11
Plaintiff-Respondent,

-against-

Sidi Ouattara, et al.,
Defendants-Appellants.

_____

O'Connor Redd LLP, Port Chester (Joseph M. Cianflone of counsel), for appellants.

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

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered May 7, 2013, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established entitlement to judgment as a matter of law on the issue of liability in this action where he was injured when the school bus he operated was parked when it was sideswiped by a tractor trailer driven by defendant Quattara and owned by defendant S.L. Benfica Transportation, Inc. Plaintiff presented evidence showing that it was the negligence of Quattara in attempting to park in front of the bus that was the proximate cause of the accident.

Defendants' opposition failed to raise a triable issue of fact. Although the school bus was parked in violation of 34 RCNY

4-08(a)(3) at the time it was struck, defendants failed to raise a triable issue as to whether this was a proximate cause of the accident. Rather, it merely furnished the occasion for the accident (*see Gerrity v Muthana*, 7 NY3d 834 [2006]; *Sheehan v City of New York*, 40 NY2d 496 [1976]; *Beloff v Gerges*, 80 AD3d 460 [1st Dept 2011]).

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

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

ENTERED: MARCH 25, 2014

CLERK

Tom, J.P., Friedman, Sweeny, Saxe, Freedman, JJ.

12051N Rafael Zapata, Index 260424/12
Plaintiff-Respondent,

-against-

New York City Housing Authority,
Defendant-Appellant.

_____

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for appellant.

Segal & Lax, New York (Patrick D. Gatti of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 18, 2012, which granted plaintiff's motion for leave to file a late notice of claim against the New York City Housing Authority (NYCHA), unanimously reversed, on the law and the facts, without costs, and the motion denied.

In this action for personal injuries allegedly sustained by plaintiff when he was assaulted on premises owned by defendant NYCHA, plaintiff failed to establish that defendant had actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter or to demonstrate that defendant was not prejudiced by the delay (*see* General Municipal Law § 50-e(5); *Matter of Bailey v City of N.Y. Hous. Auth.*, 55 AD3d 443 [1st Dept 2008]). Plaintiff's counsel's averment that, upon a routine review of case files, it was

discovered that a notice of claim had not been filed does not constitute a reasonable excuse for failing to timely serve the notice of claim (*see Matter of Santiago v New York City Tr. Auth.*, 85 AD3d 628, 628–629 [1st Dept 2011]).

While the absence of a reasonable excuse does not itself compel denial of the motion, as noted, plaintiff also failed to show that NYCHA acquired actual knowledge of the facts constituting his claim within 90 days, or a reasonable time thereafter (*see Matter of Bailey*, 55 AD3d 443). Even if NYCHA was aware that plaintiff reported an assault to the police during the statutory period, knowledge of the report does not constitute notice to NYCHA of plaintiff's intention to file a civil suit based on a claim of negligent security (*see Rivera v New York City Housing Auth.*, 25 AD3d 450 [1st Dept 2006]). Further, the "delay of more than six months between the alleged assault and

the filing of the notice of claim undeniably compromised [NYCHA's] ability to identify witnesses and collect their testimony based upon fresh memories" (*id.*).

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

ENTERED: MARCH 25, 2014

CLERK