SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 7, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, Saxe, Manzanet-Daniels, Clark, JJ.

14221 The People of the State of New York, Respondent, Ind. 823/09

-against-

Carlos Valentin,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Robert A. Sackett, J.), rendered September 28, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, reversed, on the law, and the matter remanded for a new trial.

In charging the jury on the justification defense, the court erred when, over defendant's objection, it included the initial aggressor exception to the defense embodied in Penal Law § 35.15(1)(b). This concept, that defendant would not have been justified in using deadly physical force if he was the initial aggressor, was completely inapplicable to the facts of the case.

Although the jury could have reasonably determined that defendant's use of deadly force was unjustified (where defendant used a gun against the deceased, who wielded a mop handle), it could not have reasonably found that defendant was the initial aggressor because the evidence does not support such a conclusion. There was no evidence that defendant was the first person in the fatal encounter to use or threaten the imminent use of deadly force, or any kind of force, for that matter. On the contrary, the evidence tended to indicate either that it was the deceased who first used force, by swinging a mop handle at defendant, or that defendant and the deceased used or threatened force simultaneously.

The dissent acknowledges the inconsistent testimony of Edward Hogan, a key prosecution witness, with regard to the sequence of the deceased swinging the mop handle and defendant withdrawing the gun from his jacket. Nevertheless, under no iteration of Hogan's description of the events can it be concluded that defendant withdrew the gun *before* the deceased swung the mop handle. At most, it can be said that defendant withdrew the gun simultaneously with the deceased's attack. To find that defendant was the initial aggressor would require a finding that he withdrew the gun (and threatened to use it) *before* the deceased swung the mop handle, an inference that

cannot logically flow from Hogan's (inconsistent) testimony that both events happened simultaneously. There is no "concurrent aggressor" exception to the defense of justification. Accordingly, the court's initial aggressor charge was improper.

This error may not be deemed harmless. Defendant's justification defense presented a close question of whether defendant had a reasonable basis for his use of deadly force, and the charging error could have affected the verdict because the jury might have concluded that defendant was the initial aggressor and, thus, not entitled to a justification defense. Contrary to the dissent, a mop handle swung at a person's head may constitute "deadly physical force," defined as "physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" (Penal Law § 10.00[11]). "Depending on how it is used, even a normally innocuous item may constitute 'deadly physical force'" (*People v Dodt*, 61 NY2d 408, 414 [1984]). Under the circumstances of this case, a jury could reasonably conclude that the deceased used or threatened to use deadly physical force against defendant by swinging the mop handle at him (*see id.*; *People v Ozarowski*, 38 NY2d 481, 491 n 3 [1976] [baseball bat used to strike victim's head was a "dangerous instrument"]) and that defendant reasonably believed he needed to use deadly

physical force to defend himself (*see* Penal Law § 35.15[2]).

Finally, although the evidence was far from overwhelming, the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]), and thus there is no basis for dismissing the indictment. In light of our remand for a new trial, we do not address defendant's remaining contentions.

All concur except Saxe, J. who dissents in a memorandum as follows:

SAXE, J. (dissenting)

I would affirm defendant's conviction for first-degree manslaughter.

Defendant was charged with murder in the second degree, attempted murder in the second degree, manslaughter in the first degree, attempted assault in the first degree, assault in the second degree, and criminal possession of a weapon in the second degree, for the fatal shooting of Justin McWillis and the non-fatal shooting of Edward Hogan on January 18, 2009.

The People's evidence at trial about the shooting primarily came from Edward Hogan, who acknowledged that the incident was connected to an incident from the previous night.

Defendant's mother, Maria Rivera, owned the house at 1504 Vyse Avenue, and rented an apartment in the house to the family of Anthony Jones; the house was protected by a locked iron gate.

A defense witness, Liliana Lara, who was also a tenant at 1504 Vyse Avenue, testified that she believed that the Jones family, like herself, had keys to the gate, but that Anthony Jones and his friends would regularly jump the gate to gain access to the property and engage in conduct requiring her to call the police, such as drinking and smoking marijuana. On the night of January 17, 2009, she saw a group of 10 to 15 men,

including McWillis, chasing and cursing at defendant and his girlfriend as they ran towards the house. She saw one male holding a knife and McWillis pointing something metal that looked like a gun at defendant. She called 911, but never got the chance to speak to the officer who responded.

Officer Willie Colon testified that he drove to 1504 Vyse Avenue at 10:49 p.m. on January 17, 2009, to investigate a report about a dispute with a knife. He spoke with Maria Rivera, who said some young men had been trying to climb the gate in front of her house and had called her names, but she denied having seen a knife or other weapon. Defendant, who was present, demanded of Officer Colon that he make a report of the incident, but Colon declined to do so because there were no injuries or property damage. According to Officer Colon, defendant then said, "I know my 2nd Amendment rights to bear arms. If I put a bullet to one of these kids' heads you guys aren't going to do shit. I don't need the cops anymore. If I put a machete to any one of these kids' heads the cops aren't going to do shit."

Anthony Jones's sister, LaQuanda Carter, testified that Maria Rivera had refused to give the Jones family a key to the gate.

With regard to the night of the shooting, Edward Hogan testified that he was with his friend Justin McWillis, along with Anthony Jones and two others, when he saw defendant leave his house across the street at 1504 Vyse Avenue and head towards a bodega on the same side of the street. Hogan crossed the street and approached defendant, stating, "Let me speak to you for a second." Defendant replied, "What do you want, to get shot?," to which Hogan responded, "If I had [a] beef with you, I would have just popped off on you." After Hogan again asked to speak to him, defendant asked Hogan what he wanted. Hogan then brought up the incident from the previous night, and defendant complained that Anthony Jones and other kids had disrespected his mother by being loud and banging on the iron gate she had installed in front of the house.

As Hogan and defendant spoke, McWillis and his two other friends crossed the street and approached the bodega. As they neared the entrance, defendant and McWillis locked eyes. McWillis went inside, followed by defendant and then Hogan. Inside the bodega, defendant and McWillis got into an argument, and McWillis grabbed a mop handle.

Hogan went outside, followed by defendant and McWillis. Once outside, they continued to argue, but McWillis put down the mop handle. Hogan started to walk away, but turned to see McWillis pick up the mop handle again and walk towards defendant, who was heading back down the block towards his house. Hogan saw McWillis swing the mop handle at defendant, while, simultaneously, defendant reached into his unzipped jacket for his gun. The two men were close, about 18 inches apart. Defendant pointed the gun at Hogan and fired, hitting him in the right forearm, which was raised. Hogan then saw McWillis drop to the ground. McWillis died of a gunshot to the chest fired at close range.

Hogan's testimony as to the point at which McWillis swung the mop handle was inconsistent; at one point he stated that he was "pretty sure" that McWillis hit defendant "at the time before [defendant] shot me," but he also stated that he got shot before McWillis hit defendant with the stick, although he did not see McWillis make contact with defendant. When asked if McWillis hit defendant in the head with the stick from behind and if defendant then turned around, Hogan first said that he did not know, and then said, "That is not what happened." He also testified,

"[Y]ou could say he hit him after I got shot; but when he hit him, the gun was already pulled out." However, Hogan acknowledged that 10 days after the shooting, he told an investigator that defendant was hit from behind before any shots were fired, and that he told police that defendant did not fire any shots until he was hit by McWillis.

Anthony Jones's sister, LaQuanda Carter, testified that she heard one gunshot and turned and then saw defendant shoot McWillis at close range.

Defendant was convicted only of the charge of manslaughter, relating to the death of Justin McWillis.

DISCUSSION

Initially, I agree with the majority that there is no merit to defendant's contention that the evidence is legally insufficient. "Evidence of guilt is legally sufficient if the facts, viewed in the light most favorable to the People, provide a valid line of reasoning and permissible inferences from which the finder of fact could have rationally concluded that the elements of the crime were established beyond a reasonable doubt" (*People v Kancharla*, 23 NY3d 294 [2014]). Such a valid line of reasoning is available to support the verdict.

I also agree with the majority that defendant's weight of the evidence argument is not viable. Assuming arguendo that an acquittal would not have been unreasonable (*see People v Danielson*, 9 NY3d 342, 348 [2007]), the weight of the credible evidence supported the finding of guilt (*id.*). Defendant suggests that the weight of the evidence established that the shootings were justified in that it was McWillis who provoked a fight, having threatened him the night before as well as on the night in question, and that he only pulled out his gun after McWillis instigated the altercation with the mop handle, while Hogan, behind McWillis, raised his arm as if he were holding a gun, after having previously intimated that he was armed with a gun. However, another line of reasoning, far more reasonable, was that the altercation was entirely verbal until the moment when McWillis followed defendant out of the bodega and down the street and defendant turned around, and that regardless of when McWillis swung the mop handle, defendant's shooting of McWillis was an unjustified use of deadly physical force against a non-lethal threat.

I disagree with the majority's statement that the initial aggressor charge given by the trial court in relation to the

justification defense constituted reversible error. The justification defense, applicable where the use of deadly force is justified in response to a reasonable belief that another is using or about to use deadly physical force (Penal Law § 35.15 [2][a]), is available if the defendant was not the initial aggressor, or if, in spite of being the initial aggressor, the defendant withdraws from the encounter and effectively communicates that withdrawal to the other person (*see* Penal Law § 35.15[1][b]; *People v Petty*, 7 NY3d 277, 285 [2006]; *People v Mickens*, 219 AD2d 543 [1st Dept 1995], *lv denied* 87 NY2d 904 [1995]).

Contrary to the majority's assessment, in my view the initial aggressor charge was not completely inapplicable to the facts of the case. There was, in fact, evidence that it was defendant who was the first to use or threaten the imminent use of deadly force. For example, Hogan's admittedly inconsistent testimony included assertions that would have permitted the jury to find that when McWillis followed after defendant as he was walking away from the bodega, he held the mop handle but did not use or threaten to use it until defendant drew his gun. Nor would the jury have been misled into thinking that defendant

could be viewed as the initial aggressor based on the verbal exchange that led up to the encounter; unlike the charge in *People v Baez* (118 AD2d 507 [1st Dept 1986]), the trial court's charge here clearly instructed that "[a]rguing[] [and] using abusive language . . . unaccompanied by physical threats or acts does not make a person an initial aggressor and does not justify physical force."

The court also appropriately decided not to give the part of the initial aggressor charge allowing an initial aggressor to rely on the justification defense *if* he "had withdrawn from the encounter and effectively communicated such withdrawal (Penal Law § 35.15[1][b]." Although defendant walked away from the earlier verbal interchange, there was no evidence that he withdrew from the encounter at the point in the events when the verbal encounter turned (or threatened to turn) physical, the point at which defendant could have been found to be the initial aggressor.

More importantly, however, even if that portion of the charge was erroneous, the error did not constitute a due process violation; indeed, it could have had no ultimate impact. No matter what the court charged in relation to the initial

aggressor issue, there was simply no evidentiary support for a finding that defendant was justified in using deadly physical force against McWillis when faced with McWillis's either threatened or actual use of a mop handle. The use of deadly physical force is only justified in response to a reasonable belief that another is using or about to use deadly physical force (Penal Law § 35.15[2][a]). Even assuming that the use of a mop handle could conceivably cause death or serious physical injury, the manner in which McWillis wielded the mop handle, by swinging it, does not qualify as creating a threat of deadly physical force. The jury could not reasonably have concluded, even taking into account his particular circumstances, that defendant could have reasonably believed that he was in deadly peril from McWillis at the time he shot him.

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

ENTERED: MAY 7, 2015

CLERK

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

14563 The People of the State of New York, Respondent, Ind. 3957N/11

-against-

Dennis Simon, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 18, 2013, convicting defendant, after a jury trial, of criminal possession of a controlled substance in the third and fifth degrees and unlawful possession of marijuana, and sentencing him, as a second felony drug offender, to an aggregate term of 5 years and a $100 fine, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence, including defendant's possession of 18 bags of cocaine hidden in his underwear, supported the inference that he intended to sell the drugs. That inference was also supported by expert testimony.

The court properly exercised its discretion when it admitted expert testimony concerning circumstances that indicate an intent to sell drugs (*see People v Hicks*, 2 NY3d 750 [2004]). The testimony was within the scope permitted under *Hicks*, and it did not express an opinion on the ultimate issue of defendant's intent (*see People v Gray*, 113 AD3d 561 [1st Dept 2014], *lv denied* 23 NY3d 963 [2014]; *People v Peguero*, 88 AD3d 589 [1st Dept 2011], *lv denied* 18 NY3d 927 [2012]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Friedman, Manzanet-Daniels, Clark, Kapnick, JJ.

14817-
14817A Index 309039/09

Mark Ward,
Plaintiff-Respondent,

-against-

Urban Horizons II Housing Development Fund Corporation, et al.,
Defendants-Appellants.

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Law Offices of Cheng & Associates, PLLC, Long Island City (Pui Chi Cheng of counsel), for appellants.

Jacoby & Meyers, LLP, New York (Lawrence D. Lissauer of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered July 2, 2014, in favor of plaintiff on the issue of liability on his Labor Law § 240(1) claim, pursuant an order, same court and Justice, entered June 19, 2014, which, inter alia, granted plaintiff's motion for summary judgment on the issue of liability on the § 240(1) cause of action, unanimously affirmed, on the law, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff commenced this lawsuit seeking to recover for personal injuries sustained on July 2, 2008, while installing

lighting in a new apartment building under construction at 1330 Intervale Avenue in the Bronx. Plaintiff, standing atop an A-frame ladder, was attempting to drill a hole through an I-beam in preparation for the installation of exterior lighting. The work required the use of two hands, so plaintiff did not have a hand available to hold onto the ladder. Plaintiff testified that as he was drilling, the bit became stuck. Plaintiff lost control of the drill, causing him to fall backward off the ladder and onto the floor. It is undisputed that no equipment was provided to plaintiff to guard against the risk of falling from the ladder while operating the drill, and that plaintiff's coworker was not stabilizing the ladder at the time of the fall.

Plaintiff's testimony that he fell from the ladder while performing drilling work established prima facie entitlement to summary judgment on the issue of liability on his Labor Law § 240(1) claim (*see Ross v 1510 Assoc. LLC*, 106 AD3d 471 [1st Dept 2013]; *McCarthy v Turner Constr., Inc.*, 52 AD3d 333 [1st Dept 2008]).

In response, defendants failed to raise a triable issue of fact concerning the manner in which the accident occurred or whether the A-frame ladder provided adequate protection (*see*

Raynor v Quality Plaza Realty, LLC (84 AD3d 774 [2d Dept 2011] [plaintiff entitled to summary judgment on liability where he fell 17-20 feet from an unsecured extension ladder while installing light fixtures]).

The coworker's testimony that he heard neither plaintiff nor the drill fall to the floor does not raise a triable issue of fact. Plaintiff's coworker admittedly did not witness the fall from the ladder. At the time the accident occurred, he testified that he was looking at "girls . . . outside the window." He did not dispute that plaintiff was standing on the ladder, was using a drill, and that the sound of the drill suddenly stopped. He also testified that when he turned around, he observed plaintiff on the floor with the drill at a distance from him. Defendants' arguments concerning the inferences a jury could draw from the coworker's testimony constitute nothing more than impermissible speculation insufficient to defeat summary judgment. There is nothing in the record to indicate that the accident happened other than as testified to by plaintiff, making this case distinguishable from those relied on by defendants (*see e.g. Ellerbe v Port Auth. of N.Y. and N.J.,* 91 AD3d 441 [1st Dept 2012] [plaintiff reported that he fell because he "lost his

footing"]; *Macchia v Nastasi White Inc.*, 26 AD3d 225 [1st Dept 2006] [foreman testified that the plaintiff was not working on the date of the accident and that his work, washing furniture with a rag, did not involve the use of a ladder]).

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

ENTERED: MAY 7, 2015

CLERK

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

14894 Rosa Matos, Index 305985/11
Plaintiff-Appellant,

-against-

Ramon Urena, et al.,
Defendants-Respondents.

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Antoinette Osbourne, Jamaica, for appellant.

Marjorie E. Bornes, Brooklyn, for respondents.

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Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered January 10, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously reversed, on the law, without costs, and the motion denied.

Defendants made a prima facie showing of entitlement to judgment as a matter of law by showing that plaintiff did not sustain a serious injury to her cervical and lumbar spine by submitting the affirmed reports of an orthopedic surgeon and a radiologist who both reviewed plaintiff's MRI films and concluded that her spinal conditions were preexisting and degenerative in nature, and not causally related to the accident (*see Paduani v Rodriguez*, 101 AD3d 470, 470 [1st Dept 2012]).

In opposition, however, plaintiff raised an issue of fact regarding whether the 2009 accident aggravated preexisting conditions by submitting an affirmed report from her expert, an orthopedic surgeon, who compared MRI reports taken before and immediately after the 2009 accident. There is no dispute that plaintiff presently has orthopedic injury to her cervical and lumbosacral spine or that she required surgery in 2011. Although plaintiff's expert found that plaintiff had some residual injuries from an earlier 2002 accident, he concluded that additional bulges and herniations, not previously present, were causally related to the later accident. He also based his conclusion that the 2009 accident caused aggravated injuries to her spine on the fact that plaintiff underwent surgery following the 2009 accident and the absence of any indication that surgery was necessary beforehand (*see Sutliff v Qadar*, 122 AD3d 452 [1st Dept 2014]). Accordingly, defendants' motion for summary judgment should have been denied.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15018 The People of the State of New York, Respondent, SCI 30178/12

-against-

Michael Corn, Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered on or about March 6, 2013, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The People met their burden of establishing, by clear and convincing evidence, risk factors sufficient to establish a total point score of 105, yielding a presumptive level two sex offender adjudication. Clear and convincing evidence supported the court's assessment of 15 points under the risk factor for lack of supervised release, "based upon the absence of release conditions that will minimize the risk of repeat offenses" (*People v Lewis*, 37 AD3d 689, 690 [2d Dept 2007], *lv denied* 8 NY3d 814 [2007]). Defendant's "contention that assessing points for both

unsatisfactory conduct while supervised and release without supervision constitutes 'double counting' is without merit" (*People v Farahat*, 78 AD3d 805 [2d Dept 2010], *lv denied* 16 NY3d 705 [2011]).

Clear and convincing evidence also supported the assessment of 20 points under the risk factor for relationship with victim, i.e., that defendant and the victim were strangers. Defendant's statement and other documents supported an inference that defendant and the victim met for the first time on the night of the incident, and were thus strangers within the meaning of the risk factor (*see People v Mabee*, 69 AD3d 820 [2d Dept 2010], *lv denied* 15 NY3d 703 [2010]).

Since defendant concedes that 60 points were correctly assessed, his challenge to the assessment of 10 points under the risk factor for use of forcible compulsion is academic since the subtraction of those points could not affect the presumptive risk level. In any event, the court properly assessed those 10 points since several documents in the record setting forth the victim's account of the offense established that defendant used forcible compulsion (*see People v Mingo*, 12 NY3d 563, 573-574 [2009]). We have considered and rejected defendant's remaining arguments regarding the assessment of points.

Although defendant is correct that the court should have

applied a preponderance of the evidence standard (*see People v Gillotti*, 23 NY3d 841, 860-861 [2014]), "application of such a standard would not have affected the result because defendant failed to establish that the mitigating factors he alleged were of a kind or to a degree not adequately taken into account by the guidelines" (*People v Graves*, 121 AD3d 504 [1st Dept 2014]). The factors cited by defendant, including his age and his lack of other sex offenses, are outweighed by, among other things, the seriousness of the offense and defendant's extensive criminal record, including his history of absconding and failing to comply with various forms of supervision, including the sex offender registration requirements that had already been imposed in the state where he committed the underlying sex offense (*see People v Gonell*, 125 AD3d 545 [1st Dept 2015]; *People v Montgomery*, 117 AD3d 521 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]).

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15019 In re Norris Sandy, Index 160734/13
Petitioner,

-against-

NYC Housing Authority,
Respondent.

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Advocates for Justice Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for petitioner.

David Farber, New York (Judith J. Jenkins of counsel), for respondent.

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Determination of respondent, dated July 18, 2013, which found petitioner guilty of the disciplinary charges preferred against him and terminated his employment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Cynthia S. Kern, J.], entered April 3, 2014), dismissed, without costs.

The determination is supported by substantial evidence (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). The record contains the applicable written standard safety measures to be undertaken during elevator repair and/or outages; evidence that the circumstances (i.e., both elevators being out of service) warranted the standard safety measures of

posting out-of-service notices at the elevator banks and securing the elevators so that the public could not use them; and evidence that petitioner failed to follow these standard procedures. Contrary to petitioner's contention, there is substantial evidence, i.e., a computerized elevator monitoring system printout, testimony interpreting the data, and recorded 911 calls, that the elevator in which a resident of the building was injured was in inspection mode and not in service when the injury occurred.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15020 In re Isaiah Jaysean J.,

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

Cierra Tassandra J.,
Respondent-Appellant,

New Alternatives for Children, Inc.,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Dawn M. Orsatti of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about November 4, 2013, which, following a fact-finding determination that respondent mother had permanently neglected the subject child, terminated her parental rights to the child and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence that petitioner agency exercised diligent efforts to encourage and strengthen the parental relationship,

and that, despite petitioner's efforts, respondent failed to plan for the child's future during the relevant time period (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). Although respondent completed programs in parental skills and anger management, she behaved disruptively and violently during scheduled visits, failed to complete mental health services and obtain suitable housing, did not gain insight into the obstacles preventing return of her child, and failed to benefit from the programs she attended (*see Matter of Ebonee Annastasha F. [Crystal Arlene F.]*, 116 AD3d 576 [1st Dept 2014], *lv denied* 23 NY3d 906 [2014]; *Matter of Dina Loraine P. [Ana C.]*, 107 AD3d 634 [1st Dept 2013]).

A preponderance of the evidence supports the determination that the termination of respondent's parental rights was in the best interests of the child, who, at the time of disposition, had lived with his foster mother, his maternal great grand-mother, for over two years, where he was well cared for and his special needs were met (*see Matter of Jenna Nicole B. [Jennifer Nicole B.]*, 118 AD3d 628 [1st Dept 2014]; *Matter of Ashley R.*

[Latarsha R.], 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

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

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15021 In re Edward M.,
Petitioner-Appellant,

-against-

Stephanie Deneice M.,
Respondent-Respondent.

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

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

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Appeal from order, Family Court, Bronx County (Sue Levy, Referee), entered on or about April 11, 2014, which, inter alia, dismissed petitioner father's petition for visitation with the subject child, unanimously dismissed, without costs, as moot.

The appeal is dismissed as moot because the child is now over the age of 18 (*see Wibrowski v Wibrowski*, 256 AD2d 172 [1st Dept 1998]; *Matter of Hershko v Hershko*, 103 AD3d 635 [2d Dept 2013], *lv denied* 21 NY3d 854 [2013]).

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15023 The People of the State of New York, Ind. 2770N/12
Respondent,

-against-

Tony Manley,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Weinberg, J.), rendered on or about January 30, 2013,

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

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

ENTERED: MAY 7, 2015

CLERK

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

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15024 Wesson & Associates, Inc., Index 653944/12
Plaintiff-Appellant,

-against-

Genpact Process Solutions, LLC, et al.,
Defendants-Respondents.

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Amos Weinberg, Great Neck, for appellant.

McGuireWoods LLP, New York (Philip A. Goldstein of counsel), for respondents.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about May 30, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the breach of contract cause of action, unanimously affirmed, with costs.

The contract between plaintiff placement agency and the defendant companies excludes recovery of a placement fee where, as here, plaintiff refers a candidate "for a specific position who [is] not hired for such position and who: [is] later referred by another firm or person . . . or [is] sourced independently through [defendant] GENPACT's resume database, for a different position." On their motion, defendants showed that, almost one year after plaintiff referred a candidate to them for a specific position, that candidate was hired to fill a different position,

and that plaintiff was not involved in that placement.

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's contention that a Genpact employee's referral of the same candidate for a different position does not trigger the exclusionary language of the contract is unsupported by a clear reading of the express terms of the agreement and ignores the fact that Genpact was allowed to use its resume database as a source for referrals (*see generally W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

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

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15025 The People of the State of New York, Respondent, Ind. 6168/09

-against-

Darren Thomas, Defendant-Appellant.

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered March 21, 2012, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant's constitutional speedy trial claim is unreviewable because he has not supplied minutes for the great majority of the adjournments in this case (*see People v Arroyo*, 93 AD3d 608, 609 [1st Dept 2012], *lv denied* 19 NY3d 957 [2012]). Contrary to defendant's argument, these minutes are necessary because of their bearing on the critical issue of the reasons for the delay.

To the extent the present record permits review, we conclude, after considering the factors set forth in *People v*

Taranovich (37 NY2d 442, 445 [1975]), that defendant's constitutional right to a speedy trial was not violated. Although the 27-month delay between defendant's arrest and guilty plea was lengthy, almost all of that delay is attributable to defendant's extensive motion practice and adjournment requests, as well as competency proceedings and complications arising from defendant's choice to represent himself (*see People v Parris*, 106 AD3d 555, 556 [1st Dept 2013], *lv denied* 21 NY3d 1018 [2013]). Furthermore, defendant has not established that he was prejudiced by the delay.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15027 American Transit Insurance Company, Index 301291/12
Plaintiff-Respondent,

-against-

Jaga Medical Services, P.C., et al.,
Defendants-Appellants,

Michael Chedister, et al.,
Defendants.

_____

The Rybak Firm, PLLC, Brooklyn (Damin J. Toell of counsel), for appellants.

The Law Office of Jason Tenenbaum, P.C., Garden City (Jason Tenenbaum of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John A. Barone, J.), entered July 12, 2013, which, to the extent appealed from, declared that defendants-appellants were not entitled to no-fault benefits as a result of a motor vehicle accident due to the claimant's failure to appear for scheduled examinations under oath (EUO), unanimously reversed, on the law, without costs, the underlying motion for summary judgment denied, and the judgment vacated.

The reason for the EUO request is a fact essential to justify opposition to plaintiff's summary judgment motion (*see American Tr. Ins. Co. v Curry*, 45 Misc3d 171, 174-175 [Sup Ct, New York County 2013]), and such fact is exclusively within the

knowledge and control of the movant. Further discovery on plaintiff's handling of the claim so as to determine whether, inter alia, the EUOs were timely and properly requested is also essential to justify opposition.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15028 John Koeppel, Index 650889/13
Plaintiff-Appellant,

-against-

Volkswagen Group of America, Inc., et al.,
Defendants-Respondents.

_____

Glenn Backer, New York, for appellant.

Barack Ferrazzano Kirschbaum & Nagelberg LLP, Chicago, IL (Andrew M. Spangler of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered July 28, 2014, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

The motion court properly dismissed the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The amended complaint alleges no facts from which it could be inferred that defendants had any involvement with the alleged scheme of plaintiff's business partners to illegally obtain his ownership interest in the Volkswagen dealership in which they each owned an interest. Denial of the motion pursuant to CPLR 3211(d) was not warranted because plaintiff failed to suggest the existence of any facts essential to justify opposition but that

cannot yet be stated (*see Copp v Ramirez*, 62 AD3d 23, 31-32 [1st Dept 2009], *lv denied* 12 NY3d 711 [2009]).

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15029 Carlos Quiroz, Index 109944/11
Plaintiff-Respondent-Appellant,

-against-

Wells Reit - 222 East 41st Street, LLC, et al.,
Defendants-Respondents,

DAL Electrical Corporation,
Defendant,

ADCO Electrical Corp.,
Defendant-Appellant-Respondent.

_____

Perry, Van Etten, Rozanski & Primavera, LLP, New York (Amara S. Faulkner of counsel), for appellant-respondent.

Sacks and Sacks, LLP, New York (Scott N. Singer of counsel), for respondent-appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Sheryl A. Sanford of counsel), for respondents.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered December 18, 2013, which, insofar as appealed from as limited by the briefs, granted defendants Wells Reit-222 East 41st Street, LLC, Jones Day and Hunter Roberts Construction Group, L.L.C.'s (collectively, the Wells defendants) motion for summary judgment dismissing the common-law negligence and Labor Law § 200 claims as against Hunter Roberts and on their contractual indemnification claims against defendant ADCO Electric Corp., and sua sponte dismissed the common-law

negligence claim as against ADCO, unanimously modified, on the law, to reinstate the common-law negligence claim as against ADCO, and otherwise affirmed, without costs.

Plaintiff, a steamfitter, seeks damages for injuries he allegedly suffered after receiving an electrical shock while performing his work in the ceiling of a building under renovation.

The common-law negligence claim should not have been dismissed as against ADCO, the electrical subcontractor, since issues of fact exist whether ADCO properly "safed-off" the electrical wiring for ceiling light fixtures. However, the common-law negligence and Labor Law § 200 claims were correctly dismissed as against Hunter Roberts, since general oversight duties, work coordination, and safety reviews do not constitute supervision and control under Labor Law § 200 (*see Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept 2003], *lv denied* 100 NY2d 508 [2003]). That the steamfitters performed their work after, rather than before, the electricians had performed theirs merely furnished the occasion for the accident; there is no evidence that any aspect of the coordination of the trades proximately

caused plaintiff's accident (*compare Sosa v 46th St. Dev., LLC*, 101 AD3d 490 [1st Dept 2012] [general contractor was on notice that non-electrical contractors were activating power in project areas without authorization]). Further, Hunter Roberts established prima facie that it was not on notice of the unsafe condition of the wires, and plaintiff failed to raise an issue of fact in opposition.

The court correctly granted the Wells defendants summary judgment on their claim against ADCO for contractual indemnification. In opposition to the motion, plaintiff did not contest the issue of liability against Wells and Jones, and Hunter Roberts has been found free from negligence. Contrary to ADCO's contention, the fact that plaintiff was granted summary judgment on his Labor Law § 241(6) claim against the Wells defendants does not bar full contractual indemnity for them, since their liability under Labor Law § 241(6) is purely vicarious (*see Cunha v City of New York*, 12 NY3d 504, 509 [2009]; *Cerverizzo v City of New York*, 116 AD3d 469 [1st Dept 2014]; *Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549 [1st Dept 2013]).

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: MAY 7, 2015

CLERK

Mazzarelli, J.P., Saxe, Manzanet-Daniels, Clark, JJ.

15030 The People of the State of New York, Dkt. 31258C/06
Respondent,

-against-

William Sosa,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered January 15, 2008, convicting defendant, upon his plea of guilty, of operating a motor vehicle while ability impaired, and sentencing him to a $300 fine, unanimously reversed, on the law, the guilty plea vacated and the accusatory instrument dismissed in the interest of justice.

Defendant's guilty plea was not knowing, intelligent and voluntary since there was a complete absence of discussion on the

record of any of the pertinent constitutional rights (*see People v Tyrell*, 22 NY3d 359 [2013]). Neither is there any indication that defendant spoke with his attorney regarding the constitutional consequences of pleading guilty.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15031 In re Regina King, Index 100292/13
Petitioner-Appellant,

-against-

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

_____

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

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered January 10, 2014, granting respondents' motion to dismiss the petition seeking to, among other things, annul respondent Teachers' Retirement System of the City of New York's (TRS) determination, dated September 15, 2006, which calculated petitioner's total service credit and found her ineligible for an early retirement incentive (ERI) program, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court correctly dismissed as time-barred petitioner's challenge to TRS's calculation of her total service credit and its determination finding her ineligible for the ERI program. TRS's determination became final and binding for

statute of limitations purposes upon petitioner's receipt of TRS's letter dated September 15, 2006 calculating her total service credit and explaining that she was ineligible to participate in the ERI program (*see* CPLR 217[1]; *see also Matter of Cauldwest Realty Corp. v City of New York*, 160 AD2d 489, 490 [1st Dept 1990]). Petitioner does not dispute respondents' contention that she received this letter within five days after it was mailed on September 15, 2006. Nor is there any evidence in the record to substantiate petitioner's claims that TRS misled her or undermined the finality of the letter (*see Matter of Cauldwest*, 160 AD2d at 491). Petitioner's multiple efforts to get TRS to rectify its purported error were, in effect, requests for reconsideration, which do not serve to toll the statute of limitations (*id.*). Accordingly, since petitioner commenced this proceeding in 2013, well beyond the four-month statute of limitations, her challenge is time-barred (*id.*).

Petitioner's claims against respondent the Department of Education of the City of New York (DOE) for uncompensated annual leave and cumulative absent reserve time are barred by the doctrine of laches. The record shows that petitioner waited more than 10 years after she retired from her employment with DOE to demand such relief, and that she provided no excuse for the delay. Under these circumstances, DOE did not need to show that

it was prejudiced by the delay (*see Matter of Sheerin v New York Fire Dept. Arts. 1 & 1B Pension Funds*, 46 NY2d 488, 495-496 [1979]; *see also Matter of Schwartz v Morgenthau*, 23 AD3d 231, 233 [1st Dept 2005], *affd* 7 NY3d 427 [2006]).

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15033-
15033A Harry Weiss, Inc., et al.,
Plaintiffs-Respondents,

-against-

Mendez Moskowitz, et al.,
Defendants-Appellants,

Saul Bawabah doing business as
B.B. Jewelry, et al.,
Defendants.

Index 109435/09

Kudman Trachten Aloe LLP, New York (Paul H. Aloe of counsel), for appellants.

Jaroslawicz & Jaros LLC, New York (Michelle Holman of counsel), for respondents.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered May 28, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for a directed verdict on their conversion claim and dismissing defendants Mendez Moskowitz and BMW Diamonds, Inc.'s counterclaim for slander, and denied defendants' motion to dismiss the conversion claim, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered August 5, 2014, which, upon reargument, adhered to the prior determination, unanimously dismissed, without costs, as academic.

In his trial testimony, defendant Mendez Moskowitz admitted

to the elements of the conversion claim (*see* CPLR 4401). The spoliation/preclusion order had no bearing on the conversion claim. The counterclaim for slander failed to set forth "the particular words complained of" (*see* CPLR 3016[a]).

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: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15034 Maryanne Kovach, Index 103892/11
Plaintiff-Appellant,

-against-

PJA, LLC, et al.,
Defendants-Respondents.

_____

Law Office of M. Douglas Haywoode, Brooklyn (M. Douglas Haywoode of counsel), for appellant.

Gannon, Rosenfarb & Drossman, New York (Lisa L. Gokulsingh of counsel), for PJA, LLC, respondent.

Russo & Toner, LLP, New York (Mitchell A. Greene of counsel), for New York City Hardware & Supplies, Inc., respondent.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered February 26, 2014, which granted defendants' motions for summary judgment and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, to deny defendants' motions, and otherwise affirmed, without costs.

Plaintiff alleges that she fell and broke her nose when she tripped over a raised sidewalk in front of the hardware store operated by defendant New York City Hardware & Supplies, Inc., which is in a building owned by defendant PJA. At her deposition, plaintiff testified that she fell because her foot hit a bump in the sidewalk. Defendants moved for summary judgment on the ground that plaintiff's inability to identify the

bump or defect in photographs shown to her at her deposition prevented her from being able to prove that her accident was proximately caused by a sidewalk defect for which they were responsible (*see Siegel v City of New York*, 86 AD3d 452 [1st Dept 2011]). Under the circumstances, plaintiff's testimony was sufficient to demonstrate a causal "nexus" between a defect in the sidewalk in front of PJA's property and her fall, and she was not required to prove "precisely which particular" defect in the sidewalk caused her to fall in order to avoid summary judgment (*Cherry v Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007]; *see also Figueroa v City of New York*, __ AD3d __ , 2015 NY Slip Op 01861 [1st Dept Mar. 5, 2015]).

Defendant New York City Hardware also presented an employee's affidavit in support of its position that plaintiff fell in front of the adjacent building where the sidewalk was raised near a manhole cover. However, the affidavit is contradicted by plaintiff's testimony that she fell in front of the hardware store and that she did not recall a manhole cover.

We note that, in opposition to the motions, plaintiff submitted a police-aided report that stated that her accident occurred in front of the hardware store and involved an uneven sidewalk that was raised 1 1/4 inch. Although hearsay, the police report may be considered, together with the admissible

evidence of plaintiff's deposition testimony concerning the cause of her accident, in opposition to the motions for summary judgment (*see Jara v Salinas-Ramirez*, 65 AD3d 933 [1st Dept 2009]; *Zimbler v Resnick 72nd St. Assoc.*, 79 AD3d 620 [1st Dept 2010]). Plaintiff's evidence, however, was insufficient to warrant the grant of partial summary judgment in her favor since issues of fact exist.

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15035 The People of the State of New York, Ind. 2046N/12
Respondent,

-against-

Norman Cloud,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered on or about July 31, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: MAY 7, 2015

CLERK

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15036 The People of the State of New York, Ind. 3153/11
Respondent,

-against-

Jacob Lawton,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Laura A. Ward, J.), rendered on or about October 2, 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: MAY 7, 2015

CLERK

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

Mazzarelli, J.P., Renwick, Manzanet-Daniels, Clark, JJ.

15037N Ressler & Ressler, et al., Index 305971/12
Plaintiffs-Appellants,

-against-

Theodore H. Friedman, et al.,
Defendants-Respondents,

Eve Preminger,
Defendant.

_____

Ressler & Ressler, New York (Bruce J. Ressler of counsel), for Ressler & Ressler, appellant.

Bruce J. Ressler, New York, appellant pro se.

Law Office of Theodore H. Friedman, New York (Theodore H. Friedman of counsel), for Charles Mirotznik and Arthur Friedlander, respondents.

Theodore H. Friedman, New York, respondent pro se

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 14, 2014, which, to the extent appealed from as limited by the briefs, upon reargument of defendants' prior motion, granted defendants' motion to transfer this action to New York County Surrogate's Court and to consolidate it with a prior proceeding pending in the Surrogate's Court, vacated its prior order entered February 19, 2013, and denied plaintiffs' cross motion to transfer the New York County Surrogate's Court proceeding to Bronx County and to consolidate the proceeding with this action, unanimously affirmed, without costs.

The record shows that by petition filed on January 20, 2011 in New York County Surrogate's Court, plaintiff Ressler & Ressler sought, among other things, disbursements and legal fees for services rendered to defendant Friedlander in a contested probate proceeding. This action, commenced in Bronx County on or about July 11, 2012, also seeks disbursements and legal fees arising out of plaintiffs' representation of Friedlander in the probate proceeding.

The Supreme Court providently exercised its discretion in deeming defendants' motion as one to reargue a prior motion to, among other things, transfer the action to Surrogate's Court, and upon reargument, properly vacated its order entered February 19, 2013, which had denied defendants' prior motion (*see Sheridan v Very, Ltd.*, 56 AD3d 305, 306 [1st Dept 2008]). Venue generally lies where the first action was commenced — in this case, in New York County Surrogate's Court (*Lopez v Chaliwit*, 268 AD2d 377 [1st Dept 2000]), and the convenience of witnesses and the ends of justice would be promoted by transferring this action to New York County, where the alleged legal services, the files and the witness are all located (*see id.; see also* CPLR 510[3]). Further, consolidation is warranted because this action and the Surrogate's Court proceeding have common questions of law and fact (*see* CPLR 602; *see also Geneva Temps, Inc. v New World*

Communities, Inc., 24 AD3d 332, 334-335 [1st Dept 2005]).

Plaintiffs have not shown that an impartial trial could not be obtained in New York County Surrogate's Court (*see* CPLR 510[2]). Defendant Eve Preminger retired as the New York County Surrogate in 2005, approximately six years before the 2011 petition was filed in that court (*see Dontzin v Digital Rain Partners I*, 295 AD2d 140 [1st Dept 2002]).

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

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15038 The People of the State of New York, Respondent, Ind. 3288/08

-against-

Charles McInnis, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Rachel T. Goldberg of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Noah Chamoy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Martin Marcus, J.), rendered June 14, 2012, convicting defendant, after a jury trial, of manslaughter in the first degree and assault in the first degree, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's accomplice liability could be reasonably inferred from the events leading up to the crime, as well as his conduct during and after the shooting (*see e.g. People v Cabey*, 85 NY2d 417 [1995]). In particular, at the time of the crime defendant made a hand movement or gesture toward his wrist that lacked any innocent explanation.

The court properly denied defendant's mistrial motion based

on the People's allegedly belated disclosure of the fact that two of their witnesses had made photographic identifications of the jointly tried codefendant's brother as present at the scene of the shooting. Defendant was on notice of these identifications, which were mentioned in a written decision, provided to defense counsel before trial, on the codefendant's application to present expert testimony on identification. In any event, at the latest, defendant learned of the identifications before cross-examination of the first of the two witnesses in question. The court granted defendant ample time to prepare for cross-examination, as well as offering additional remedies that defendant declined. Defendant has not demonstrated that his trial strategy would have been significantly different had he known before trial that witnesses would place the codefendant's brother at the scene. We have considered and rejected defendant's ineffective assistance of counsel argument relating to this issue.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15039 Karon B. Porter, Index 104271/06
Plaintiff-Appellant,

-against-

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

_____

Maduegbuna Cooper LLP, New York (Samuel O. Maduegbuna of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Margaret A. Chan, J.), entered November 19, 2013, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment, unanimously affirmed, without costs.

Defendants established their entitlement to judgment as a matter of law by demonstrating that they engaged in a good faith interactive process through which they provided plaintiff with a reasonable accommodation to address her vision and reading disabilities (*see* Executive Law § 296; Administrative Code of City of NY § 8-107). Defendants were not required to provide plaintiff with the specific accommodation she preferred (*Pimentel v Citibank, N.A.*, 29 AD3d 141, 148 [1st Dept 2006], *lv denied* 7 NY3d 707 [2006]). In any event, they established that

plaintiff's preferred additional accommodation would not have addressed the non-visual disabilities that were impacting her job performance and preventing her from satisfying the essential requisites of her job (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 834, 838 [2014]).

In opposition, plaintiff failed to raise a triable issue of fact. Accordingly, defendant's motion was properly granted.

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

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15040-
15040A-
15040B In re Kassierma Earline J.,
etc., and Others,

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

Kim J., etc.,
Respondent-Appellant,

Graham-Windham Services to
Families and Children,
Petitioner-Respondent.

_____

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Ralph R. Carrieri, Mineola, for respondent.

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

_____

Orders, Family Court, Bronx County (Linda Tally, J.), entered on or about November 25, 2013, which, inter alia, upon a finding that respondent mother suffers from a mental illness, terminated the mother's parental rights to the subject children, and transferred custody and guardianship of the children to petitioner agency and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The finding that the mother suffers from a mental illness

that impairs her ability to properly care for the children presently and for the foreseeable future was supported by clear and convincing evidence (*see* Social Services Law § 384-b[4][c]; [6][a]). The testimony and evaluation report of the psychologist showed that the mother was provisionally diagnosed with schizophrenia and bipolar disorder, and possibly with schizoaffective disorder, post-traumatic stress disorder and cannabis abuse. The psychologist opined, based on the mother's extensive psychiatric history and medical records, that the condition was chronic, and included auditory and visual hallucinations, paranoid ideation and disorganized thinking. She was also not consistently compliant with medication and treatment, and lacked insight into her illness *(see Matter of Roberto A. [Altagracia A.],* 73 AD3d 501 [1st Dept 2010], *lv denied* 15 NY3d 703 [2010]; *Matter of Robert K.*, 56 AD3d 353 [1st Dept 2008], *lv denied* 12 NY3d 704 [2009]; *Matter of Aridyse Ashley J.,* 242 AD2d 438 [1st Dept 1997], *lv denied* 91 NY2d 803 [1997]).

A separate dispositional hearing was not required to terminate the mother's parental rights, and the record supports the court's determination that this disposition was in the best interests of the children *(see Matter of Joyce T.,* 65 NY2d 39, 49 [1985]; *Matter of Jeremiah M. [Sabrina Ann M.],* 109 AD3d 736, 737

[1st Dept 2013], *lv denied* 22 NY3d 856 [2013]).

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

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15041 In re C.I. Contracting Corp., Index 100701/13
Petitioner-Appellant,

-against-

New York Business Integrity Commission,
Respondent-Respondent.

_____

Lawrence B. Goldberg, P.C., New York (Lawrence B. Goldberg of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Margaret A. Chan, J.), entered January 15, 2014, denying the petition to annul the determination of respondent New York City Business Integrity Commission (BIC), dated January 14, 2013, which denied petitioner's application for an exemption from licensing requirements and a registration to operate a trade waste business, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

BIC has broad discretion to grant or refuse licensure or registration based upon its evaluation of an applicant's "good

character, honesty and integrity" (Administrative Code of City of NY § 16-509[a]; *see Canal Carting, Inc. v City of N.Y. Bus. Integrity Commn.*, 66 AD3d 609, 610 [1st Dept 2009], *lv denied* 14 NY3d 710 [2010]). Here, BIC's denial of petitioner's application had a rational basis as it was based, inter alia, on the criminal conviction for second-degree manslaughter of the former company of petitioner's principal. Petitioner's principal was a controlling shareholder of that entity and, as such, had a responsibility to ensure that the company performed its work safely and within the bounds of law.

BIC was also entitled to consider petitioner's history of unlicensed hauling, environmental violations, and untruthful statements on its application, in addition to the unpaid taxes and labor law violations attributed to petitioner's principal and his former company (*see e.g. Matter of Breeze Carting Corp. v City of New York*, 52 AD3d 424 [1st Dept 2008]). Contrary to petitioner's contention, the investigations were not reopened, and no final decision was questioned. Rather, BIC properly considered the fact of the criminal and administrative charges

that are part of the background of petitioner's principal.

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

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15042 The People of the State of New York, Ind. 1456/11
Respondent,

-against-

William Cain,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered February 27, 2014, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 22 ½ years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15043 Janna Bullock, Index 653042/12
Plaintiff-Appellant,

-against-

Giancarlo Alhadeff,
Defendant-Respondent.

_____

Law Offices of Stuart A. Smith, New York (Stuart A. Smith of counsel), for appellant.

Domenick J. Porco, Scarsdale, for respondent.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered November 21, 2013, which denied plaintiff's motion to dismiss the breach of contract counterclaims for lack of standing, unanimously affirmed, without costs.

On this CPLR 3211 motion, the court correctly concluded that, liberally construed, the counterclaims for breach of contract do not demonstrate conclusively that defendant was not a party to the contracts at issue and therefore has no standing to sue on them.

We have considered all other issues raised and find them unavailing.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15044 The People of the State of New York, Ind. 3128/12
Respondent,

-against-

Edward Keeley,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about December 20, 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: MAY 7, 2015

CLERK

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

Friedman, J.P., Acosta, Richter, Gische, JJ.

15046 Board of Managers of the Netherlands Condominium, etc., Plaintiff-Respondent, Index 102418/12

-against-

Mildred Trencher, Defendant-Appellant,

JP Morgan Chase Bank, N.A., et al., Defendants.

_____

Rosen Livingston & Cholst LLP, New York (Deborah B. Koplovitz of counsel), for appellant.

Pollack & Sharan, LLP, New York (Richard S. Sharan of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered August 20, 2013, which, to the extent appealed from, denied defendant unit owner's motion for summary judgment dismissing the complaint and for summary judgment on her counterclaim for declaratory relief, unanimously modified, on the law, to grant defendant's motion to the extent of declaring that plaintiff Condominium Board is not permitted to collect late fees, nor is it entitled to collect legal fees and disbursements incurred or paid before the commencement of this action, and otherwise affirmed, without costs.

In this action, plaintiff seeks to foreclose on a lien for outstanding common charges and fees allegedly owed by defendant.

The bylaws of the condominium do not provide for the charging of late fees for unpaid common charges. When reading the bylaws as a whole (*see W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]), it is clear that section 2.2-2.8 does not provide plaintiff with the authority to charge defendant for such fees. Section 6.4 is the only section that provides such authority, and that section was left blank with respect to the amount of those fees. Nor was section 6.4 properly amended to provide for such amounts. Pursuant to section 13.1 of the bylaws, an amendment can only be accomplished by an affirmative vote of at least 66⅔% of all unit owners, and it is undisputed that no vote took place.

Pursuant to 6.4 of the by-laws, plaintiff can recover legal fees incurred in any proceeding to collect unpaid common charges or in an action to foreclose on a lien arising from unpaid common charges. Since the underlying action to foreclose the lien has not yet been fully resolved, the motion court properly denied any summary relief on this issue.

In support of her motion for summary judgment, defendant demonstrated only that she had satisfied the specific amount claimed in the lien. However, except as indicated above, plaintiff is entitled to not only the amount claimed in the lien, but also the amount of unpaid common charges and fees that have accrued since the filing of the lien (*Board of Mgrs. of Soho*

Greene Condominium v Clear, Bright & Famous LLC, 2012 WL 5877658, 2012 NY Misc LEXIS 6237, *13 [Sup Ct, NY County, Nov. 5, 2012, No. 8500252010], *affd on other issues* 106 AD3d 462 [1st Dept 2013]). In opposition to defendant's motion, plaintiff demonstrated that defendant continued to owe arrears, and it was only in reply that defendant submitted evidence showing that she had recently tendered full payment of all amounts claimed by plaintiff. Under these circumstances, defendant did not show that she is entitled to dismissal of the complaint at this time. Payments and credits consistent with this decision must still be reconciled.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15048 HRC Fund III Pooling Domestic, LLC, Index 603817/08
Plaintiff-Respondent,

-against-

Tamach Real Estate Management, Inc., et al.,
Defendants-Appellants.

_____

Buchanan Ingersoll & Rooney, P.C., Miami, FL (Jennifer Olmedo-Rodriguez of the bar of the State of Florida, admitted pro hac vice, of counsel), for appellants.

Polsinelli PC, New York (Jason A. Nagi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ira Gammerman, JHO), entered October 17, 2013, awarding plaintiff $6,845,249.11, unanimously affirmed, with costs.

Defendants signed a guaranty in connection with a $6 million mezzanine loan pursuant to which they waived any defenses or objections to their payment obligations (*see International Plaza Assoc., L.P. v Lacher*, 104 AD3d 578, 579 [1st Dept 2013]; *Reliance Constr. Ltd. v Kennelly*, 70 AD3d 418, 419 [1st Dept 2010], *lv dismissed* 15 NY3d 848 [2010]; *Sterling Natl. Bank v Biaggi*, 47 AD3d 436 [1st Dept 2008]). Contrary to defendants' argument, the subsequent forbearance agreement, to which defendants were not parties, and which specifically stated that they were not being released by it, did not extinguish their

payment obligations under the guaranty.

With respect to the amount owed under the guaranty, defendants offer no evidence to rebut the determination that the value of certain condominium units has already been credited. Accordingly, there is no basis upon which to disturb that determination or to find that defendants are also entitled to credit for deposits that may have been made on those units (*see Matter of Silverstein v Goodman*, 113 AD3d 539 [1st Dept 2014]).

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15049 In re Dahan S.,

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

Sheila McL.,
Respondent-Appellant,

Administration for Children's Services
of the City of New York,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about June 2, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about April 9, 2014, which found that respondent mother neglected the subject child, unanimously affirmed, without costs.

The Family Court's finding of neglect is supported by a preponderance of the evidence (*see* Family Ct Act §§ 1012[f][i][B], 1046[b][i]). Among other things, respondent, who had tested positive for cocaine in 2011 and completed a drug treatment program in early 2012, tested positive for marijuana in

May 2012, while four months pregnant with the subject child.

In addition to respondent's drug use, the Family Court properly relied on her failure to appear for at least one-third of the twice monthly random drug screenings and to find adequate housing pursuant to court orders issued as recently as 2012, as a result of earlier neglect findings, in 2001 and 2006, involving her other three children. By the time of the subject child's birth, respondent had yet to resolve the conditions that led to those earlier neglect findings (*see e.g. Matter of Jayden C.*, __ AD3d __, 2015 NY Slip Op 01762 [1st Dept 2015]).

Moreover, respondent's failure to testify warranted drawing the "strongest adverse inference" against her (*Matter of Vivienne Bobbi-Hadiya S.*, __ AD3d __, 2015 NY Slip Op 02077 [1st Dept 2015]; *Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]).

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15052 Marisol Rosado, Index 114581/10
Plaintiff-Appellant,

-against-

C.J. Wadolowski, et al.,
Defendants-Respondents.

_____

O'Dwyer & Bernstien, LLP, New York (M. Gladys T. Oranga of counsel), for appellant.

DeSena & Sweeney, LLP, Bohemia (Mark G. Vaughan of counsel), for C.J. Wadolowski and Krystian Banach, respondents.

Sweetbaum & Sweetbaum, Lake Success (Marshall D. Sweetbaum of counsel), for Elba Alicia and Efren Reyes, respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered January 22, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing the complaint for failure to satisfy the serious injury threshold pursuant to Insurance Law § 5102(d) with respect to plaintiff's right knee, unanimously modified, on the law, to deny the motions insofar as plaintiff claims a significant limitation of use of her right knee, and otherwise affirmed, without costs.

Plaintiff alleges that she suffered a right knee injury requiring arthroscopic surgery as a result of the subject motor vehicle accident. Defendants made a prima facie showing that

plaintiff did not sustain permanent consequential or significant limitation injuries to her right knee a result of the accident by submitting the affirmed report of an orthopedist who found full range of motion in her knee and a neurologist who, upon review of her medical records, opined that her knee condition related to preexisting tendinitis (*see Boateng v Ye Yiyan*, 119 AD3d 424, 425 [1st Dept 2014]).

In opposition, plaintiff submitted an affirmed report of her orthopedic surgeon who found objective medical evidence that she suffered a partial tear of her meniscus and other injuries to her right knee and opined that those injuries were causally related to the accident. Although he found no limitation in range of motion upon recent examination (*see Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]), his findings of qualitative limitations that persisted despite conservative treatment and required surgical treatment raise an issue of fact as to whether she suffered a serious injury involving a significant, but not permanent, limitation in use (*see Kang v Almanzar*, 116 AD3d 540, 540-541 [1st Dept 2014]; *Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]).

The court properly dismissed plaintiff's 90/180 claim, as she failed to allege in her bill of particulars that she was

incapacitated for at least 90 of the first 180 days following the accident (*see Chaston v Doucoure*, 125 AD3d 500, 501 [1st Dept 2015]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]).

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15053 Alexander J. Gerschel, et al., Index 651561/10
Plaintiffs-Appellants,

-against-

Craig G. Christensen, et al.,
Defendants-Respondents,

Land Base LLC, et al.,
Defendants.

_____

Philippe J. Gerschel, New York, for Alexander J. Gerschel, Andre F. Gerschel and Daniel A. Gerschel, appellants, and appellant pro se.

Himmel & Bernstein, LLP, New York (Andrew D. Himmel of counsel), for respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered January 9, 2014, which, upon reargument, granted defendants Craig G. Christensen, Christensen Capital Law Corp., Christensen & Barrus, Inc., Jeffrey M. Moritz, Nature Issues, Inc., Sterling Peak, Inc., Zamworks, LLC, and Proprietary Media, Inc.'s (defendants-respondents) motion to dismiss the complaint, and denied plaintiffs' cross motion for a default judgment as moot, unanimously modified, on the law, to deny the motion to dismiss except as to Christensen & Barrus, Inc.,[1] to grant the

[1]The motion court dismissed the complaint as against defendants Univest and Christensen Law Group in its original decision because plaintiffs failed to serve those defendants. Plaintiffs did not appeal from that decision.

cross motion for a default judgment against Mr. Christensen, Christensen Capital Law Corp., Nature Issues, Sterling Peak, Zamworks, and Proprietary Media, and to order an assessment of damages as to those defendants, and otherwise affirmed, without costs.

Regardless of how CPLR 1003 is interpreted, we find that the tolling agreements between plaintiffs on the one hand and Mr. Christensen, Christensen Capital Law Corp., Moritz, Sterling Peak, Zamworks, and Proprietary Media on the other tolled CPLR 1003. Thus, plaintiffs' addition of those defendants was timely.

Defendants-respondents admit that they breached their contractual obligation to pay plaintiffs $100,000 by April 15, 2011. They contend that their material breach of the amended tolling agreement relieved plaintiffs of their obligation to forbear from suit until July 1, 2001, i.e. plaintiffs could have sued them on April 16, 2011. Defendants-respondents' attempt to take advantage of their own breach will not be condoned by this Court. Moreover, "resort to the doctrine [of anticipatory breach] is generally at the plaintiff's option" (*Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 [1st Dept 1995]). As the injured parties, plaintiffs were within their rights to keep the amended tolling agreement in effect until July 1, 2011.

Christensen & Barrus was not a party to either tolling

agreement. Therefore, its addition as a defendant was untimely, and personal jurisdiction over it was not obtained (*see e.g. Britt v Buffalo Mun. Hous. Auth.*, 43 AD3d 1443 [4th Dept 2007]; CPLR 1003). Plaintiffs' argument that relief from CPLR 1003 can be granted under CPLR 2001 is unpreserved and in any event without merit. Before the court can exercise its discretion to correct an irregularity it must have personal jurisdiction over the parties (*Matter of Common Council of City of Gloversville v Town Bd. of Town of Johnstown*, 144 AD2d 90, 92 [3d Dept 1989]).

Plaintiffs' argument that they should be granted leave to add new defendants nunc pro tunc is also unpreserved (*cf. Gavigan v Gavigan*, 123 AD2d 823, 826 [2d Dept 1986] [Lazer, J., dissenting] [plaintiff moved Supreme Court to add defendant nunc pro tunc]). In any event, it is unavailing. As indicated, failure to comply with CPLR 1003 when adding defendants is a jurisdictional defect (*see Britt*, 43 AD3d at 1444), which renders the supplemental summons and amended complaint a legal nullity (*Yadegar v International Food Mkt.*, 306 AD2d 526 [2d Dept 2003]). Thus, plaintiffs may not serve those papers nunc pro tunc (*id.*).

Plaintiffs are not entitled to a default judgment against Moritz. He showed that he did not default, and they failed to oppose his arguments.

Plaintiffs served defendant Land Base LLC with the original

summons with notice in December 2010. In its original decision, the motion court found that plaintiffs' time to move for a default judgment against Land Base had expired in January 2012. Plaintiffs did not move until February 2012. Plaintiffs did not appeal from that decision.

Plaintiffs served Nature Issues with the original summons with notice in December 2010 and with the summons and amended complaint in July 2011. Hence, the motion for a default judgment as against it in February 2012 was timely (*see* CPLR 3215[c]).

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

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15054 The People of the State of New York, Respondent, Ind. 3413/11 3629/11

-against-

Lawrence Francis, also known as Francis Lawrence, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Ramandeep Singh of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Margaret Clancy, J. at plea; Ann M. Donnelly, J. at sentencing), rendered October 2, 2012, convicting defendant, upon his plea of guilty, of robbery in the first and third degrees, and sentencing him to an aggregate term of seven years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15055 The People of the State of New York, SCI 5799/12
Respondent,

-against-

Paul Zullo,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Larry Stephen, J.), rendered on or about February 14, 2013,

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

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

ENTERED: MAY 7, 2015

CLERK

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

Friedman, J.P., Acosta, Richter, Gische, JJ.

15056 Tiffany Beard, Index 113057/11
Plaintiff-Appellant,

-against-

Themed Restaurants Inc. doing
business as Lucky Cheng's,
Defendant-Respondent.

_____

John V. Decolator, Garden City, for appellant.

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered on or about August 27, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff sues for injuries allegedly incurred when she lost her footing and fell while descending a staircase in defendant's restaurant. Supreme Court properly granted defendant's motion for summary judgment dismissing the complaint because plaintiff made no claim in her testimony that she fell because of a lack of illumination.

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

ENTERED: MAY 7, 2015

CLERK

Friedman, J.P., Acosta, Richter, Gische, JJ.

15059 In re James Melvin Lee, Ind. 428/74
[M-1285] Petitioner, 1163/74

-against-

People of the State of New York, et al.,
Respondents.

_____

James Melvin Lee, petitioner pro se.

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

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: MAY 7, 2015

CLERK