SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 24, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16197-
16197A-
16197B Index 6751/07

Marlene Rodriguez,
Plaintiff-Respondent,

-against-

2526 Valentine LLC,
Defendant-Appellant,

Magnaw Management, LLC,
Defendant.

- - - - -

Michael B. Doyle,
Nonparty Respondent.

_____

Doyle & Broumand, LLP, Bronx (Michael B. Doyle of counsel), for appellant.

Joshua Annenberg, New York, for respondents.

_____

Judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered February 18, 2014, awarding plaintiff's counsel costs and fees against defendant 2526 Valentine LLC and its counsel, unanimously affirmed, without costs. Appeal from orders, same court and Justice, entered January 13, 2014 and on or about January 29, 2014, unanimously dismissed, without costs,

as subsumed in the appeal from the aforesaid judgment.

Defendant 2526 Valentine and its counsel engaged in frivolous conduct by moving to vacate a default judgment that had been reinstated by this Court in a prior appeal (58 AD3d 530 [1st Dept 2009]) and raising the same issues that they had had a full and fair opportunity to litigate in that appeal (*see NAMA Holdings, LLC v Greenberg Traurig, LLP*, 92 AD3d 614 [1st Dept 2012]). On their second motion to vacate, Valentine neither submitted previously unavailable evidence nor identified a change in the applicable law since our decision was issued. Further, under oath, Valentine's managing members made contradictory statements about a material issue, and its counsel certified falsely that no prior application for the same relief had been sought. We agree with the motion court's conclusion that Valentine and its counsel brought the second motion primarily to prolong or delay the litigation (*see* 22 NYCRR 130-1.1[c][2]).

Contrary to Valentine's argument, plaintiff was not required to pay an additional filing fee when she filed her amended cross motion (*see* CPLR 8020[a]). Moreover, in light of their own litigation tactics, Valentine and its counsel can hardly claim prejudice from the passage of nearly two years between the initial motion, which sought sanctions against Valentine, and the

amendment, which added an application for sanctions against counsel.

Under the circumstances of this protracted litigation, which include the failure of the court's e-file system to recognize the existence of the amended cross motion, the court properly found that plaintiff demonstrated good cause for her two-month delay in filing a proposed settlement order (22 NYCRR 202.48[b]; *see Platt v Parklex Assoc.*, 234 AD2d 115 [1st Dept 1996]).

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16196 The People of the State of New York, Ind. 3916/12
Respondent,

-against-

Ronell Burgess,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about July 11, 2013,

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16198 In re Barack Darnell B.,

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

Chera B.,
Respondent-Appellant,

-against-

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

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

_____

Order, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about December 1, 2014, which denied respondent mother's motion to vacate an order of disposition, entered upon her default, terminating her parental rights to the subject child and freeing the child for adoption, unanimously affirmed, without costs.

Family Court properly denied the mother's motion to vacate, as she failed to present a reasonable excuse for her failure to appear at an adjourned dispositional hearing date, and she failed

to provide a meritorious defense to the petition to terminate her parental rights (CPLR 5015[a][1]; *Matter of Chelsea Antoinette A. [Anna S.]*, 88 AD3d 627 [1st Dept 2011]). The mother failed to provide any details or documentation to support her claim that she was incarcerated on the date of the hearing (*Matter of Devon Dupree F.*, 298 AD2d 103, 103 [1st Dept 2002]). Nor did she provide any explanation as to why she did not contact the court until the filing of her motion to vacate, nearly three months after her default (*see id.*).

The mother also failed to show that it was not in the child's best interests to terminate her parental rights and free the child for adoption by his foster mother, who has long cared for him and wants to adopt him (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). The mother had abandoned the child and had four children previously removed from her care, and she failed to substantiate her assertions that she had completed a

drug treatment program, had begun a domestic violence program, and had been participating in supervised visits with the child (*Matter of Gloria Marie S.*, 55 AD3d 320, 321 [1st Dept 2008], *lv dismissed* 11 NY3d 909 [2009]).

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16199 The People of the State of New York, Ind. 5103/08
Respondent,

-against-

Andre Fields,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered November 12, 2009, convicting defendant, after a jury trial, of assault in the first degree (two counts), attempted robbery in the first degree (two counts), criminal possession of a weapon in the second degree (two counts) and attempted robbery in the second degree, and sentencing him to an aggregate term of 10 years, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

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

Defendant's ineffective assistance of counsel argument involves matters not reflected in, or fully explained by, the record, and thus requires a CPL 440.10 motion. Although defendant raised his present claim in such a motion, the motion was denied and a justice of this Court denied leave to appeal. Accordingly, our review is limited to the trial record (*see People v Evans*, 16 NY3d 571, 575 [2011]), and to the extent that record permits review, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see Strickland v Washington*, 466 US 668 [1984]).

Defendant is entitled to an express determination of whether, notwithstanding his conviction of an armed felony, he is still eligible for youthful offender treatment based on the factors set forth in CPL 720.10(3), and, if so, whether such treatment should be granted (*see People v Middlebrooks*, 25 NY3d 516 [2015]).

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16200 Terry Lane, Index 155708/14
Plaintiff-Respondent,

-against-

Lydell Tyson,
Defendant-Appellant.

_____

Lydell D. Tyson, appellant pro se.

Belkin Burden Wenig & Goldman, LLP, New York (Steven Kirkpatrick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered September 30, 2014, which granted plaintiff's motion for summary judgment on his claim for partition and sale of the shares of stock in the subject cooperative apartment, unanimously affirmed, without costs.

Certain legal arguments raised by pro se defendant Lydell Tyson for the first time on appeal are properly before the court, as they are determinative and the record is sufficient to permit appellate review (*Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013]). We nevertheless reject these arguments on the merits.

No accounting is required prior to partition and sale of the apartment, and defendant's arguments regarding the still-unknown amount of his share of the proceeds from a future sale of the apartment are premature.

Plaintiff is entitled as a matter of law to the partition and sale of the apartment under Real Property Actions and Proceedings Law (RPAPL) § 901. The record supports a finding that the parties are tenants in common, and defendant has not raised an issue of fact contesting the assertion that the apartment's value is maximized by remaining undivided, or as to the prejudice to the parties that would result from dividing it.

Defendant may not invoke the notice provision in RPAPL § 1304, and is not entitled to a court-supervised settlement conference under CPLR 3408, since the definitions of "home loan" and "lender" under RPAPL § 1304 have not been met.

For the purposes of RPAPL § 901(1), plaintiff is in "possession" of the apartment, despite not having lived in it (*Garland v Raunheim*, 29 AD2d 383, 388-389 [1st Dept 1968]).

We reject defendant's argument that plaintiff has unclean hands for failing to provide defendant a copy of the parties' agreement, noting that "[a]bsent fraud or other wrongful conduct...parties are presumed to know the contents of the

agreements they have signed" (*Superior Officers Council Health & Welfare Fund v Empire HealthChoice Assur., Inc.*, 85 AD3d 680, 682 [1st Dept 2011], *affd* 17 NY3d 930 [2011]). While the pro se defendant purports to make allegations of "constructive fraud," these arguments are, in fact, allegations of a purported breach of fiduciary duty. In any event, we reject these allegations as having no basis, and find them insufficient to undermine the presumption that defendant is familiar with the contents of the agreement he signed.

Defendant also contends that the parties' agreement was modified when plaintiff failed to respond to his letter requesting a temporary stoppage of defendant's obligation to make payments. This argument lacks merit because paragraph 13 of the agreement expressly provides that the agreement could only be amended in a writing signed by the party against whose interest the amendment was sought to be enforced. There is no indication, or even allegation, that such a writing, signed by plaintiff, was ever made.

Defendant has established only an arm's length transaction, without special circumstances which might give rise to a fiduciary relationship (*V. Ponte & Sons v American Fibers Intl.*, 222 AD2d 271 [1st Dept 1995]).

Defendant's allegations that the court pre-judged this case are wholly unsupported by the record.

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16202 The People of the State of New York, Ind. 2459/11
Respondent,

-against-

Javon Wynn,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

_____

Judgment, Supreme Court, Bronx County (Troy Webber, J.), rendered on or about October 3, 2012, 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: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16204 The People of the State of New York, Ind. 2854/07
Respondent,

-against-

Paul Colon, etc.,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, Bronx County (William L. McGuire, J.), rendered May 1, 2012, convicting defendant, after a jury trial, of murder in the first and second degrees, robbery in the first degree, burglary in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 40 years to life, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences be served concurrently, resulting in a new an aggregate term of 25 years to life, and otherwise affirmed.

The court properly granted the People's challenge for cause to a prospective juror, a decision that is entitled to

considerable deference (*see People v Panchon*, 93 AD3d 446, 447 [1st Dept 2012], *lv denied* 19 NY3d 866 [2012]). The record supports the court's ruling that the prospective juror's ability to communicate in English was not sufficient for jury service. The court was able to rely on its own observations of the panelist's demeanor and difficulty in giving responsive answers (*see People v Harris*, 63 AD3d 480 [1st Dept 2009], *lv denied* 13 NY3d 796 [2009]).

Defendant's claim that burglary was improperly used as an aggravating factor to elevate murder in the second degree to first-degree murder is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we find that the claim is without merit.

Defendant's public trial claim is unpreserved (*see People v Alvarez*, 20 NY3d 75, 81 [2012], *cert denied* 569 US __, 133 S Ct

2004 [2013]), and we decline to review it in the interest of justice.

We find the sentence excessive to the extent indicated.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16205-
16206 Lehr Associates Consulting Engineers, LLP,
Plaintiff-Appellant,

-against-

Daikin AC (Americas) Inc., et al.,
Defendants-Respondents.

Index 651369/13

Whiteford Taylor & Preston LLP, Washington, DC (C. Allen Foster of the bar of the District of Columbia and the State of North Carolina, admitted pro hac vice, of counsel), for appellant.

Mintz Levin Cohn Ferris Glovksy & Popeo, P.C., New York (Kevin N. Ainsworth of counsel), for Daikin AC (Americas) Inc., respondent.

Sinnreich Kosakoff & Messina LLP, Central Islip (David B. Kosakoff of counsel), for Leonard Colchamiro, P.C., respondent.

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered April 15, 2014, which granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(3) and (7), unanimously affirmed, with costs.

Plaintiff has no standing to maintain this suit, because after it assigned its claims against defendants to nonparty Timber Falls Foundation, it was "no longer the real party in interest" (*see James McKinney & Son v Lake Placid 1980 Olympic Games*, 61 NY2d 836, 838 [1984]).

It would not avail plaintiff to amend the complaint to substitute Timber Falls as the plaintiff (*see MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313 [1st Dept 1992]). As of the commencement of this action, Timber Falls could not have asserted claims against defendants, because its 270-day deadline to do so (per its settlement with plaintiff and plaintiff's insurer) had already passed.

Even if plaintiff had standing or Timber Falls could be substituted as the plaintiff, neither contribution nor indemnification would be available to plaintiff. "[P]urely economic loss resulting from a breach of contract does not constitute 'injury to property' within the meaning of New York's contribution statute" (CPLR 1401) (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 26 [1987]). Plaintiff's reliance on *Sommer v Federal Signal Corp.* (79 NY2d 540 [1992]) and *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.* (259 AD2d 75 [1st Dept 1999]) is unavailing (*see Children's Corner Learning Ctr. v A. Miranda Contr. Corp.*, 64 AD3d 318, 324 [1st Dept 2009]; *Structure Tone, Inc. v Universal Servs. Group, Ltd.*, 87 AD3d 909, 911 [1st Dept 2011]).

Indemnification would not be available because plaintiff failed to show that it was without fault (*see Rosado v Proctor & Schwartz*, 66 NY2d 21, 24-25 [1985]). Timber Falls alleged in its demand for arbitration that plaintiff violated its contractual and professional duties to Timber Falls; it did not merely seek to impose vicarious liability on plaintiff for defendants' misdeeds (*see e.g. Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311 [1st Dept 2009]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]).

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: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16207-
16208-
16208A In re Darren S.,

A Child Under Eighteen
Years of Age, etc.,

Darren S.,
Respondent-Appellant,

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

- - - - -

In re Shyqueena C.,
Petitioner-Respondent,

-against-

Darren S.,
Respondent-Appellant.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Drake A. Colley of counsel), for The Administration for Children's Services, respondent.

Andrew J. Baer, New York, for Shyqueena C., respondent.

Daniel R. Katz, New York, attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about June 27, 2014, which, upon a fact-finding determination that respondent father had neglected

the subject child, directed the father to, among other things, complete batterer's intervention, anger management and parenting skills programs, and issued a temporary order of visitation providing for once-a-month supervised visits between the father and the child at Rikers Island Correctional Facility, unanimously affirmed, without costs. Appeal from order of fact-finding, same court and Judge, entered on or about March 3, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition. Order of fact-finding and disposition (one paper), and order of protection, same court and Judge, entered on or about March 3, 2014, which, upon a fact-finding that respondent father had committed the family offenses of assault in the third degree and assault in the second degree and that there were aggravating circumstances warranting a five-year order of protection against the father, directed the father to, among other things, stay away from the child and the mother for a period of five years, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence, including the mother's testimony that the father had engaged in repeated and serious acts of domestic violence against her in the presence of the child, and had inflicted harm against the child, including hitting him with an extension cord

and punching him in the face (*see* Family Ct Act § 1012[f][i][B]; *see also Matter of Lonell J.*, 242 AD2d 58 [1st Dept 1998]; *Matter of Deandre T.*, 253 AD2d 497, 498 [2d Dept 1998]). The court's credibility determinations are entitled to deference (*Matter of Irene O.*, 38 NY2d 776, 777-778 [1975]; *Matter of Brianna R.* [*Maribel R.*], 115 AD3d 403, 408 [1st Dept 2014]).

The Family Court's determination that visitation should be limited to once a month, and that the father should complete programs to address his history of violence, even if those programs were not available to him during his incarceration, were in the best interest of the child (*see Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]; Family Court Act § 1057). The court noted that petitioner agency's supervision of the father would be extended until the father completed the required services, either at a different correctional facility or upon his release from incarceration.

The Family Court properly determined that the fact-finding order in the neglect proceeding had collateral estoppel effect, and precluded the father from relitigating the same issues in the family offense proceeding. The parties agreed on the record that the specific allegations of domestic violence set forth in the neglect petition, and testified to by the mother at the neglect

fact-finding hearing, were identical to the allegations set forth by the mother in her family offense petition. The father had a full and fair opportunity to litigate the allegations during the neglect proceeding, but chose to defend only by cross-examining the mother (*see Matter of Abady*, 22 AD3d 71, 81 [1st Dept 2005]). Further, the Family Court took judicial notice of the fact-findings in the neglect proceeding, including the physical injuries suffered by the mother, which supported the finding of aggravated circumstances in the family offense proceeding (*see* Family Ct Act § 842).

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16209 Rhonda Brooks-Torrence, Index 305549/10
Plaintiff-Appellant,

-against-

Twin Parks Southwest,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac, & DeCicco, LLP, New York (Jillian Rosen of counsel), for appellant.

Casone & Kluepfel, LLP, Garden City (Ajay C. Bhavnani of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered on or about June 6, 2014, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was descending a staircase in a building owned by defendant when she slipped and fell on urine that was dripping off of the stairwell's handrails. Plaintiff testified that she did not see urine on the step before she fell, but that she saw a puddle of urine on the landing area and the step after she returned to the accident location about 20 minutes after the accident.

Defendant made a prima facie showing that it neither created the urine condition, nor had actual or constructive notice of its

existence (*see Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *see also Pfeuffer v New York City Hous. Auth.*, 93 AD3d 470, 471 [1st Dept 2012]). Defendant showed that it lacked actual notice of the condition by submitting the deposition testimony of a security guard who was stationed at the building at the time of the accident; she testified that she did not recall receiving a complaint about the staircase on the day of the accident before the incident occurred. Defendant showed that it lacked constructive notice of the urine on the staircase, by submitting plaintiff's deposition testimony, which shows that the urine that caused her to fall "could have been deposited there only minutes or seconds before the accident[,] and any other conclusion would be pure speculation" (*DeJesus v New York City Hous. Auth.*, 53 AD3d 410 [1st Dept 2008] [internal quotation marks omitted], *affd* 11 NY3d 889 [2008]).

In opposition, plaintiff failed to raise a triable issue of fact.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16210 The People of the State of New York, Ind. 554/10
Respondent,

-against-

Shawn Nelson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Frances A. Gallagher of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Cassandra M. Mullen, J.), rendered April 4, 2011, convicting defendant, after a jury trial, of robbery in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 16 years to life, unanimously affirmed.

The court properly denied defense counsel's challenge for cause to a prospective juror, a physician who at first indicated that he might share his expertise regarding emergency room medical records with other members of the jury. The panelist's subsequent assurance to the court that he would do his best to adhere to the court's instructions was sufficiently unequivocal to justify the denial of the challenge (*see People v LaValle*, 3 NY3d 88, 104 [2004]; *People v Arnold*, 96 NY2d 358 [2001]).

The admission on the People's direct case of evidence that defendant refused to give his name in response to pedigree questioning, refused to be fingerprinted, and was agitated upon being arrested did not violate his constitutional right against self-incrimination (*see People v Rodney*, 85 NY2d 289 [1995]; *People v Johnson*, 253 AD2d 702 [1st Dept 1998], *lv denied* 92 NY2d 1034 [1998]). None of this behavior can be viewed as postarrest silence, and, unlike the ambiguous smile in *People v Basora* (75 NY2d 992, 994 [1990]) it was sufficiently probative of defendant's consciousness of guilt. In any event, in light of the overwhelming evidence of guilt, any error in the receipt of this evidence was harmless under the standards for both constitutional and nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant did not preserve his claims that he was constructively absent (although physically present) during a portion of the suppression hearing, and that certain identification testimony should have been excluded, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

The court properly adjudicated defendant a persistent violent felony offender. He claims that one of the predicate

felony convictions relied on to enhance his sentence was unconstitutionally obtained because the court, which imposed a sentence including postrelease supervision, did not inform him of that aspect of his sentence during the plea allocution (*see People v Catu*, 4 NY3d 242 [2005]; *People v Smith*, __AD3d__, 2015 NY Slip Op 07565 [1st Dept Oct 15, 2015]). Because the plea minutes have been irretrievably lost, defendant attempts to establish the deficiency based on the sentencing minutes, other related court appearances, and on all the surrounding circumstances. However, we find that defendant has failed to meet his burden "to allege and prove the facts underlying the claim that the conviction was unconstitutionally obtained" (*People v Harris*, 61 NY2d 9, 15 [1983]), and that, given the lack of information to support defendant's assertion, there is no reason to order a hearing.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16211 In re Empire State Building Associates, Index 654456/13
L.L.C. Participant Litigation

- - - - -

Marc Postelnek, as Trustee of the
Mabel Abramson Irrevocable Trust #2,
et al.,
Plaintiffs-Appellants,

-against-

Anthony E. Malkin, et al.,
Defendants-Respondents.

_____

Bernstein Litowitz Berger & Grossmann, New York (John J. Rizio-Hamilton and Edward G. Timlin of counsel), for appellants.

Dewey Pegno & Kramarsky LLP, New York (Thomas E.L. Dewey of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 21, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the cause of action for breach of fiduciary duty, unanimously affirmed, with costs.

The motion court correctly found that the release and the covenant not to sue in the agreement settling a prior lawsuit were broad enough to bar plaintiffs' current claim that defendants breached their fiduciary duty by failing to consider offers for sale of the Empire State Building and proceeding

instead with their earlier plan to place the building in a real estate trust for public offering. Although the offers for purchase were received after the settlement in the first action was finalized, the settlement encompassed plaintiffs' allegations in that action that defendants beached their fiduciary duty by failing to proceed with any reasonable alternatives to the transaction at issue, such as marketing the building for sale (*see e.g. Edelman v Emigrant Bank Fine Art Fin., LLC*, 89 AD3d 632 [1st Dept 2011]). The covenant not to sue is circumscribed by the released claims and therefore also bars this action (*see McMahan & Co. v Bass*, 250 AD2d 460 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1013 [1998]). In addition, this action is barred by the doctrine of res judicata, since the court dismissed the first action with prejudice following the settlement (*Matter of Hunter*, 4 NY3d 260 [2005]).

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: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16212- Ind. 1128/12
16212A- 555/12
16212B The People of the State of New York, 1720/12
Respondent,

-against-

Vincent Medina,
Defendant-Appellant.

_____

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

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

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, Bronx County (Judith Lieb, J.), rendered on or about February 21, 2013,

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16213 In re William T. Esrey, et al., Index 651530/12
Petitioners-Appellants,

-against-

Ernst & Young, L.L.P.,
Respondent-Respondent.

_____

Mishcon De Reya New York LLP, New York (Timothy J. McCarthy and Benjamin Taibleson of counsel), for appellants.

Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL (Sean W. Gallagher of the bar of the State of Illinois, admitted pro hac vice, of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (O. Peter Sherwood, J.), entered October 28, 2014, which, inter alia, denied petitioners' motion to modify or vacate the final award by an arbitration panel, dated February 17, 2014, to the extent that the arbitration panel awarded petitioners a rate of prejudgment interest that was lower than New York's statutory interest rate of 9%, unanimously affirmed, with costs.

The court properly found that the arbitration panel's decision to enforce the provision of the letter agreement between the parties, which limited the prevailing parties' damages to the actual damages suffered, did not evince a manifest disregard of the law, which requires a court to "find both that (1) the

arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*Wien & Malkin LLP v Helmsley-Spear, Inc.*, 6 NY3d 471, 481 [2006] [internal quotation marks omitted], *cert dismissed* 548 US 940 [2006]). Here, the panel, while correctly declining to enforce the provision of the agreement that would have limited petitioners to the fees they paid to respondent (*see e.g. Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 [2012]), distinguished the provision that limited the prevailing party to actual damages, on the ground that the actual damages, as measured by the reduced prejudgment interest in this case, fully compensated petitioners. The panel's analysis distinguishing the actual-damages provision, was, at least, "a *barely colorable justification* for the outcome reached" (*T.Co Metals, LLC v*

Dempsey Pipe & Supply, Inc., 592 F3d 329, 339 [2d Cir 2010] [internal quotation marks omitted]), and, thus, is entitled to "extreme deference" (*Wien & Malkin, LLP*, 6 NY3d at 481).

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16214 Tower Insurance Company of New York, Index 153578/12
Plaintiff-Respondent,

-against-

John Anderson, Jr., et al.,
Defendants,

Morton Duke, et al.,
Defendants-Appellants.

_____

Giuffré Law Offices, P.C., Garden City (S. Joonho Hong of counsel), for appellants.

Law Office of Steven G. Fauth, LLC, New York (Suzanne M. Saia of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 18, 2014, which granted plaintiff's motion for summary judgment declaring that it has no duty to defend or indemnify defendants John Anderson, Jr., John Anderson, Sr., and Grace Anderson in the underlying personal injury action, and so declared, and denied defendants Morton Duke and Charmaine Bennett's motion to dismiss the complaint as against them and for sanctions, unanimously modified, on the law, plaintiff's motion denied and the declaration in its favor vacated, and it is declared that plaintiff must provide coverage in the underlying action, and otherwise affirmed, without costs.

Contrary to plaintiff's argument with respect to the motion court's June 10, 2013 order, the doctrine of law of the case does not bind this Court (*Levitt v Lenox Hill Hosp.*, 184 AD2d 427, 428 [1st Dept 1992]).

The issue on appeal is, as of what date did plaintiff have "sufficient knowledge of potential material misrepresentations" by its insureds, the Anderson defendants, in their policy or renewal applications, to rescind the policy (*see United States Life Ins. Co. in the City of N.Y. v Blumenfeld*, 92 AD3d 487, 490 [1st Dept 2012]). The critical sequence of events began when plaintiff's examiner conducted a recorded interview of Anderson, Jr., on February 14, 2012. On March 5, 2012, plaintiff disclaimed coverage, and it commenced this declaratory action on June 4, 2012. Thus, as early as March 5, 2012, plaintiff suspected a material misrepresentation. Yet it continued to accept the Andersons' premium payments, and it renewed the policy on December 8, 2012. By accepting the premium payments after learning of the Andersons' material misrepresentation, plaintiff waived its right to rescind the policy (*id.* at 489). This is so even if its reason for accepting the payments was to "'protect'" its insureds pending a determination of this action (*id.*).

The motion court properly declined to sanction plaintiff for its failure to produce its witness for a deposition, since no further testimonial evidence from plaintiff was necessary to a determination whether plaintiff's undisputed actions gave rise to an estoppel or whether the Andersons resided at the premises. Sanctions under Part 130 are also unwarranted.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16215 The People of the State of New York, Ind. 1251/13
Respondent,

-against-

Charles Whitfield,
Defendant-Appellant.

_____

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

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

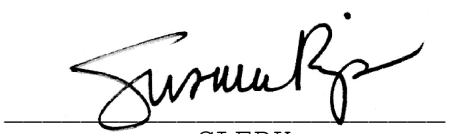
_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about September 4, 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: NOVEMBER 24, 2015



CLERK

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

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16216 Ruo Mei Cai, Index 309888/09
Plaintiff-Respondent,

-against-

Victor Fai Lau,
Defendant-Appellant.

_____

Victor Fai Lau, appellant pro se.

Robert G. Smith, PLLC, New York (Robert G. Smith of counsel), for respondent.

_____

Order, Supreme Court, New York County (Matthew F. Cooper, J.), entered June 30, 2014, which, after a trial, denied defendant husband any award for enhanced earning capacity and maintenance, unanimously affirmed, without costs.

The court properly exercised its discretion in denying the husband any award of a portion of the wife's enhanced earning capacity stemming from her United States medical license (*see Holterman v Holterman*, 3 NY3d 1, 8 [2004]; Domestic Relations Law §§ 236[B][5][c] and [d]; *see also Del Villar v Del Villar*, 73 AD3d 651 [1st Dept 2010]). The husband failed to show that he contributed to the wife's attainment of her license. Prior to the marriage, the wife completed medical school in China and had a medical license in China. Thus, the only marital property was

her US medical license, and while the wife did not work from May 2004 to May 2007, as she studied for the exam, she supported herself with her own savings and financial support from her mother, and paid for the exam review course herself. Furthermore, even if the husband were entitled to an award based on the wife's enhanced earning capacity, he never established the value of such enhanced earning capacity, through expert testimony (*see e.g. Heydt-Benjamin v Heydt-Benjamin*, 127 AD3d 814, 815 [2d Dept 2015]).

The court providently exercised its discretion in denying the husband an award of maintenance after citing the relevant statutory factors and considering the parties' pre-divorce standard of living (*see* Domestic Relations Law § 236[B][6][a]; *Alexander v Alexander*, 116 AD3d 472, 473 [1st Dept 2014], *appeal dismissed* 24 NY3d 1050 [2014]). In particular, the wife works part-time while caring for her child from a subsequent marriage, and although the husband has been unemployed for several years,

he has a degree in engineering and was previously employed by numerous companies, and appears capable of supporting himself.

The husband's remaining contentions lack any support in the record.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16217 The People of the State of New York, Ind. 2355/10
Respondent,

-against-

Bruce Perkins,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (C. Scott McAbee of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about June 11, 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: NOVEMBER 24, 2015

CLERK

Gonzalez, P.J., Tom, Mazzarelli, Manzanet-Daniels, JJ.

16218-
16219N Index 302331/11

Anron Heating and Air Conditioning, Inc.,
Plaintiff,

-against-

AMCC Corp., et al.,
Defendants-Appellants,

New York City School Construction Authority,
Defendant,

Franco Belli Plumbing and Heating and Sons, Inc.,
Defendant-Respondent,

J.C. Ryan Ebco/H&G LLC, et al.,
Defendants.

_____

Patterson Belknap Webb & Tyler LLP, New York (Frederick B. Warder III of counsel), for appellants.

Michael Lichtenberg, Brooklyn, for respondent.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered February 3, 2015, which granted defendants AMCC Corp., Liberty Mutual Insurance Company and Charles Marino's (together, AMCC), motion for renewal and, upon renewal, adhered to its prior order, entered November 26, 2013, striking the reply to cross claims of AMCC and granting a default judgment against AMCC in favor of defendant Franco Belli Plumbing and Heating and Sons,

Inc. (Franco Belli), unanimously affirmed, without costs. Appeal from the prior order, unanimously dismissed, without costs, as academic.

The IAS Court's entry of default judgment against AMCC and the striking of its responsive pleading was not a clear abuse of discretion (*Fish & Richardson, P.C. v Schindler*, 75 AD3d 219, 220 [1st Dept 2010]). It is uncontested that AMCC violated three discovery orders over the course of more than a year, one of which was conditional and explicitly warned that failure to comply could lead to sanctions, including having its pleadings stricken. This Court has affirmed striking a party's pleading on the basis that the party's noncompliance was "willful, contumacious or due to bad faith" in similar situations (*Loeb v Assara N.Y. I L.P.*, 118 AD3d 457 [1st Dept 2014]). We agree with the IAS Court that AMCC has not provided a sufficient basis to support its purported excuse of its lawyer's mental illness as a justification for noncompliance (*compare 219 E. 7th St. Hous.*

Dev. Fund Corp. v 324 E. 8th St. Hous. Dev. Fund Corp., 40 AD3d 293, 294-295 [1st Dept 2007]).

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

Tom, J.P., Acosta, Saxe, Moskowitz, Feinman, JJ.

14031 The People of the State of New York, Ind. 4615/10
Respondent,

-against-

Jose Rojas,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 16, 2012, convicting defendant, after a jury trial, of assault in the first degree, and sentencing him to a term of 15 years, unanimously affirmed.

Since defendant's claim under *People v O'Rama* (78 NY2d 270 [1991]) involves jury notes that the court read into the record before responding, thereby providing counsel with notice of their contents, defendant's claim requires preservation (*see People v Nealon*, __ NY3d __, 2015 NY Slip Op 07781 [2015]; *People v Williams*, 21 NY3d 932, 934-935 [2013]), and we decline to review this unpreserved claim in the interest of justice.

The prosecutor's summation argument suggesting a possible motive for defendant's otherwise senseless attack on the victim

does not warrant reversal (*see generally People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1992]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1998], *lv denied* 81 NY2d 884 [1993]). It was permissible for the prosecutor to draw a reasonable, evidence-based inference that defendant, while in an intoxicated state, may have mistaken the victim for another woman who had been connected to a prior altercation.

The court did not err in allowing the deliberating jury to view a surveillance video, already in evidence, on a laptop computer supplied by the prosecutor. Under the circumstances, this was the functional equivalent of providing a DVD player for use in the jury room, and there is nothing to indicate that the use of a computer resulted in any prejudice.

Defendant did not preserve his challenge to the procedure by which the court adjudicated the second of his two applications

under *Batson v Kentucky* (476 US 79 [1986]), and we decline to review it in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: NOVEMBER 24, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Moskowitz, Gische, JJ.

15893 Anthony Corrado, Index 102002/10
Plaintiff-Respondent,

-against-

Metropolitan Transit Authority,
et al.,
Defendants-Appellants,

Savage Services Corporation, et al.,
Defendants,

Canac Railway Services, Inc.,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Carol Edmead, J.), entered on or about September 30, 2014,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 12, 2015,

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

ENTERED: NOVEMBER 24, 2015

CLERK

Friedman, J.P., Acosta, Renwick, Andrias, Moskowitz, JJ.

16109 The People of the State of New York, Ind. 3923/09
Respondent,

-against-

Aljulah Cutts,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J. at suppression hearing; Juan M. Merchan, J. at jury trial and sentencing), rendered June 20, 2012, convicting defendant of murder in the first and second degrees and robbery in the first degree, and sentencing him to an aggregate term of 25 years to life, unanimously affirmed.

The suppression court properly concluded that the People established the voluntariness of a defendant's oral, written, and videotaped statements beyond a reasonable doubt. The circumstances of the interrogation, when viewed in totality, were not coercive (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). A detective's suggestions that evidence at the crime scene might

implicate defendant did not rise to the level of deception that would induce defendant to falsely confess, and there is no evidence that any interrogator made improper statements of the type discussed in *People v Dunbar* (24 NY3d 304 [2014]). The videotape refutes defendant's claim of being exhausted, and it shows that he wanted to continue talking even when the prosecutor ended the interview. Defendant never unequivocally invoked his right to counsel during the videotaped statement; rather, he merely queried whether he should speak to a lawyer, at which point the prosecutor reexplained that he had a right to an attorney and gave him time to consider whether he wanted one (*see Davis v United States*, 512 US 452, 459 [1994]; *People v Glover*, 87 NY2d 838, 839 [1995].

The court properly exercised its discretion in imposing reasonable limits on defendant's elicitation of evidence of the violent propensities of a separately prosecuted codefendant, because this evidence had little or no probative value regarding issues actually raised at trial. To the extent that defendant is raising a constitutional claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Crane v Kentucky*, 476 US 683, 689-690 [1986]), and we likewise reject

defendant's claim of ineffective assistance of counsel (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. Defendant's guilt was established by his voluntary confession, as well as corroborating evidence.

The court properly denied a challenge for cause to a prospective alternate juror whose husband previously worked as a prosecutor. The juror gave numerous unequivocal assurances that she "absolutely" could be impartial. When she at one point stated she would do her "best" not to be predisposed to convict based on her relationship with her husband, the court followed up and asked whether she could "decide this case on the evidence as

you find it," to which she replied, "Yes." Thus, her statements as a whole establish her unequivocal assurance of impartiality (*see People v Chambers*, 97 NY2d 417, 419 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16221 Judy Goldberger, Index 652404/14
Plaintiff-Appellant,

-against-

Ilya Magid, et al.,
Defendants-Respondents.

_____

Heller Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellant.

Mehler Law PLLC, New York (Daniel Rothstein of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered February 3, 2015, which denied plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, with costs.

Plaintiff made a prima facie case by submitting the promissory note and the guaranty with her moving papers and explaining that the maker of the note (defendant Ilya Magid) had failed to make the payments required thereunder (*see e.g. Acadia Woods Partners, LLC v Signal Lake Fund LP,* 102 AD3d 522, 522-523 [1st Dept 2013]; *Zyskind v FaceCake Mktg. Tech., Inc.,* 101 AD3d 550, 551 [1st Dept 2012]). Defendants' claim that the note does not qualify for CPLR 3213 treatment is unavailing: "invocation of defenses based on facts extrinsic to an instrument for the

payment of money only do[es] not preclude CPLR 3213 consideration" (*Solomon v Langer,* 66 AD3d 508 [1st Dept 2009] [internal quotation marks omitted]).

However, defendants raised triable issues of fact as to whether the note was, at least in part, a sham transaction (*see e.g. Polygram Holding, Inc. v Cafaro,* 42 AD3d 339, 340 [1st Dept 2007]) and whether part of the amount which plaintiff seeks is "the fruit of a crime" (*McConnell v Commonwealth Pictures Corp.,* 7 NY2d 465, 470 [1960] [internal quotation marks omitted]).

Notwithstanding that Flora Magid's signature of the guaranty is notarized, defendants raised an issue of fact regarding whether it was forged. In addition to Flora Magid denying it was her signature, Ilya Magid admits to forging her signature and describes the circumstance surrounding the execution of the guaranty. In any event, "[a] guaranty ... is a contract of

secondary liability" (*Weissman v Sinorm Deli*, 88 NY2d 437, 446 [1996]). Since the court properly denied summary judgment as to the note (the primary obligation), it also properly denied summary judgment as to the guaranty (the secondary obligation).

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16222 In re Jourdan S.,

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

_____

Andrew J. Baer, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Emma Grunberg of counsel), for presentment agency.

_____

Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered March 28, 2014, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal facilitation in the fourth degree, and placed him on probation for a period of one year, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis in the record to disturb the court's credibility determinations. The evidence refuted appellant's claim of being merely present while others engaged in criminal activity.

Probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's

need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]), given, among other things, the seriousness of the offense, which involved the threatened use of a firearm by an accomplice.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16223 The People of the State of New York, Ind. 3242/12
Respondent,

-against-

David Santana,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Heidi A. Bota 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 (Thomas Farber, J.), rendered on or about June 25, 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: NOVEMBER 24, 2015

CLERK

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

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

16224 Mirta Esponda, Index 305186/12
Plaintiff-Respondent,

-against-

Ana Ramos-Ciprian,
Defendant-Appellant,

The City of New York
Defendant.

_____

Smith Mazure, New York (Mitchell Studley of counsel), for appellant.

Law Office of Michael S. Lamonsoff, PLLC, New York (Joseph E. Gorczyca of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 16, 2014, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as against defendant Ramos-Ciprian, and denied said defendant's cross motion for summary judgment dismissing the complaint as against her, unanimously modified, on the law, to deny plaintiff's motion, and otherwise affirmed, without costs.

Plaintiff established prima facie that defendant's single-family residential real property was not used exclusively for residential purposes and therefore that defendant was not entitled to the exemption from tort liability for injuries to

third persons on the sidewalk abutting the property (*see* Administrative Code of City of NY § 7-210[b]). However, in opposition, defendant raised an issue of fact whether the part-time business she ran from her home was "merely incidental to [her] residential use of the property" (*see Coogan v City of New York*, 73 AD3d 613, 614 [1st Dept 2010]).

Plaintiff established that defendant had known about a certain condition of the sidewalk abutting her property for several years preceding plaintiff's accident (*see Sacco v City of New York*, 92 AD3d 529 [1st Dept 2012]). However, defendant raised an issue of fact whether the subject condition was a defective condition (*see Hutchinson v Sheridan Hill House Corp.*, __NY3d__, 2015 NY Slip Op 07578 [2015]; *Pena v Women's Outreach Network, Inc.*, 35 AD3d 104, 109 [1st Dept 2006]).

Defendant failed to establish that plaintiff was unable to identify the cause of her fall (*see e.g. Tomaino v 209 E. 84th St. Corp.*, 72 AD3d 460 [1st Dept 2010]).

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16227 The People of the State of New York, Ind. 1566/12
Respondent,

-against-

Sentell Smith,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Alan S. Axelrod of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 13, 2013, convicting defendant, after a jury trial, of conspiracy in the fourth and fifth degrees, criminal sale of a firearm in the first degree, criminal possession of a weapon in the third degree, 10 counts of criminal sale of a firearm in the third degree and 7 counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 42 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court failed to meet its core responsibilities under *People v O'Rama* (78 NY2d 270, 277 [1991]) to provide defense counsel with "meaningful notice" of a jury note and to provide

the jury with a "meaningful response." The note requested "copies of all the telephone conversations recorded and copies of all the video recordings" and "a copy of the transcript of the court proceedings that we are allowed to see."

As to its duty to provide notice to counsel, while the court stated that defense counsel was "aware" of the note, it made that statement at a time when counsel was out of the courtroom. Prior to the lunch recess, the court instructed the court officer to apprise the jury "that the written documents they request are not available to a jury under any circumstances," without consulting with defense counsel about this response, and without defense counsel being present.

While the court did read the full substance of the note after the lunch recess, the record fails to show that defense counsel had returned by that time. In fact, the transcript strongly suggests counsel was not there because the court had allowed defense counsel additional time for lunch. "Where a trial transcript does not show compliance with *O'Rama*'s procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to" (*People v Walston*, 23 NY3d 986, 990 [2014]).

The court also failed to give the jury a "meaningful response" to its request. First, when the jury returned to the courtroom, the court did not read the note into the record, and instead stated, "Unless anybody has forgotten what you've asked for, I will not read the notes now in order to save time." Then, while the court correctly informed the jury that it could not receive a transcript of court proceedings, and also provided it with a video playback of at least some of the matter requested in the note, there is no record that the jury was ever supplied with "copies of all of the telephone conversations recorded," and the court never addressed this aspect of the request anywhere in the record.

Although not all the *O'Rama* violations are mode of proceedings errors, here, where the exact wording of the juror note was never read in the presence of counsel so an objection could be made, preservation is not required (*People v Nealon*, __ NY3d__, 2015 NY Slip Op 07781 [2015]). Since we are ordering a

new trial, we find it unnecessary to reach any other issues except for defendant's challenge to his predicate status, which we reject.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16228- Index 312689/12
16228A-
16228B-
16228C-
16228D-
16228E Elinor R. Tatum,
Plaintiff-Respondent,

-against-

Curtis R. Simmons,
Defendant-Appellant.
- - - - -
Grimes & Zimet, et al.,
NonParty Appellants.

_____

Catafago Fini LLP, New York (Jacques Catafago of counsel), for Curtis R. Simmons, appellant.

Grimes & Zimet, Chappaqua (John J. Grimes of counsel), for Grimes & Zimet and John J. Grimes, appellants.

Aronson Mayefsky & Sloan, LLP, New York (Alyssa Rower of counsel), for respondent.

_____

Judgment of divorce, New York County (Matthew F. Cooper, J.), entered June 12, 2014, which, inter alia, awarded defendant husband $30,006 in equitable distribution, awarded the parties joint legal custody of their child with separate decision-making zones and a near 50/50 parental access schedule, and denied the husband's request for an award of counsel fees, unanimously affirmed, without costs. Appeals from orders, same court and

Justice, entered February 7, 2013, May 29, 2013, December 18, 2013, and March 24, 2014, and entered on or about December 13, 2012, which, inter alia, denied the husband's motions for interim awards of counsel fees, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court's distribution of marital property was amply supported by the record and was not an abuse of discretion (*see* Domestic Relations Law § 236 [B][5][d]; *Holterman v Holterman*, 3 NY3d 1 [2004]). The court properly found that the husband was not entitled to a portion of the appreciation in the value of the wife's real estate properties, which were her separate property, because the husband failed to demonstrate that the property in question increased in value or that he contributed to any alleged appreciation (*see Embury v Embury*, 49 AD3d 802, 804 [2nd Dept 2008]). The husband also never sought to have the wife's pension distributed at trial and never provided any evidence as to its increase in value.

The wife also established that she obtained ownership of the Amsterdam News as part inheritance from her father and part gift from her mother, which makes it her separate property (see DRL § 236 [B][1][d][1]; *see Feldman v Feldman*, 194 AD2d 207, 215 [2nd Dept 1993]). In any event, the husband failed to meet his burden

to prove its value or to show that he contributed directly or indirectly to the Amsterdam News so as to entitle him to the appreciation in its value (*see Morrow v Morrow*, 19 AD3d 253 [1st Dept 2005]).

Nor did the husband put forth any proof at trial to support his claims that the wife dissipated marital assets to pay her counsel fees, to maintain her upstate properties, or to make loans to the Amsterdam News (*see Epstein v Messner*, 73 AD3d 843, 846 [2nd Dept 2010]).

The court properly awarded the parties' shared legal custody of the child with each party having final authority over separate decision-making zones (*see Eschbach v Eschbach*, 56 NY2d 167 [1982]). The court's determination that it was in the child's best interest for the parties not to have a 50/50 access schedule had a sound and substantial basis in the record (*Matter of James Joseph M. v Rosana R.*, 32 AD3d 725, 726 [1st Dept 2006], *lv denied* 7 NY3d 717 [2006]). The temporary 50/50 schedule in place during the pendency of the action had too many transitions and too much opportunity for conflict.

Nor was the court bound to follow the recommendation of the court-appointed forensic evaluator (*see Matter of John A. v Bridget M.*, 16 AD3d 324, 332 [1st Dept 2005], *lv denied* 5 NY3d

710 [2005]). While the court found the forensic evaluator's clinical observation about the parties to be accurate and convincing, the court also concluded that she was overly optimistic about the parties' ability to work together in the future. The court's conclusion was based upon consideration of the evidence of hostility and strife between the parties, which the court did not believe would subside after the divorce.

The court providently exercised its discretion in denying the husband's requests for interim awards of counsel's fees, as well as his request for fees made after trial, after considering the financial positions of the parties and the circumstances of the case (see Domestic Relations Law § 237; *Johnson v Chapin*, 12 NY3d 461, 467 [2009]; *see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]). Specifically, the court found that the difference in the parties' incomes was not that great, that both parties had significant separate property they could utilize to pay counsel, and that the husband's positions in the litigation were not meritorious. Even if the court had accepted the contention that the wife was the monied spouse and, thus, that there was a rebuttable presumption that the husband should be awarded counsel fees (*see Saunders v Guberman*, 130 AD3d 510, 511 [1st Dept 2015]), the court did not abuse its discretion in

finding that such presumption would be overcome by various factors, including the husband's significant real estate holdings and the lack of merit to his positions.

We have considered the husband's and nonparty appellants' remaining claims and find them unavailing.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16229- Ind. 5958/11
16229A The People of the State of New York, 1930/11
Respondent,

-against-

Lanair Milton,
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 (Patricia Curran of counsel), for respondent.

_____

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Renee White, J.), rendered on or about May 22, 2012,

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

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

16230 Doris Wahl, Index 100662/12
Plaintiff,

-against-

JCNYC, LLC,
Defendant-Appellant,

Citibank, N.A.,
Defendant-Respondent.

_____

Office of Nicholas C. Katsoris, New York (Emily Pankow of counsel), for appellant.

White & McSpedon, P.C., New York (Joseph W. Sands of counsel), for respondent.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about June 6, 2014, which, to the extent appealed from as limited by the briefs, denied defendant JCNYC, LLC's cross motion for summary judgment on its cross claim for contractual indemnification from defendant Citibank, N.A. (Citi), granted Citi's motion for summary judgment dismissing JCNYC's cross claim, and conditionally granted Citi summary judgment on its cross claim for contractual indemnification, unanimously reversed, on the law, without costs, JCNYC's cross motion granted, and Citi's motion denied.

Plaintiff seeks damages for personal injuries she sustained in 2011, when she tripped and fell on the sidewalk in front of a Citibank branch building located in Manhattan. Plaintiff testified that she tripped over a raised portion of the sidewalk and that the defect had existed for at least 10 years. On the date of the incident, JCNYC was the owner and landlord of the building, and Citi was the tenant, pursuant to a lease dated April 9, 2008. Citi had been the prior owner of the building.

JCNYC and Citi each moved for summary judgment on their cross claims against each other for, among other things, contractual indemnification, arguing that the other was responsible for maintenance and repair of the sidewalk. We find that JCNYC is entitled to summary judgment, and Citi is not.

Although the "Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of the abutting premises to maintain and repair the sidewalk" (*Collado v Cruz*, 81 AD3d 542, 542 [1st Dept 2011]), a "tenant may be held liable to the owner for damages resulting from a violation of . . . [a] lease, which imposed on the tenant the obligation to repair or replace the sidewalk in front of [the property]" (*id.*).

Here, section 10.1 of the lease required Citi to comply with

"all Laws which shall be applicable to the Premises, or any part thereof, . . . including, without limitation, Laws requiring the sidewalk adjacent to the Premises to be kept clear of obstructions or hazards (e.g., snow)." That section also provided that Citi "shall, at its sole cost and expense, be responsible for curing any violations of Law applicable to the Premises that existed on or prior to the Term." This language obligated Citi to fix any defects in the sidewalk that existed on or prior to the beginning of the lease term, including the defect at issue here.

Although section 9.1 of the lease required JCNYC to "maintain and repair the structural elements of the Premises, both exterior and interior," and although sidewalks are considered structural elements (*see e.g. Cucinotta v City of New York*, 68 AD3d 682, 684 [1st Dept 2009]), when reading the lease as a whole and giving meaning to all of its terms (*see 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]), it is clear that JCNYC was only responsible for fixing defects in the sidewalk that arose after the beginning of the lease term.

Because plaintiff's accident arose out of Citi's failure to fulfill its obligations under the lease, pursuant to section 12.5 of the lease, Citi must indemnify JCNYC, but JCNYC is not required to indemnify Citi.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16231 The People of the State of New York, Ind. 3507N/09
Respondent,

-against-

Gary Madison,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Zachary Garrett of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Robert M. Stolz, J. at speedy trial and jury panel motions; Analisa Torres, J. at jury trial and sentencing), rendered November 21, 2011, convicting defendant of criminal possession of a controlled substance in the fifth degree, unlawfully dealing with a child in the first degree (two counts) and unlawful possession of marihuana, and sentencing him to an aggregate term of five years' probation, unanimously affirmed.

Defendant did not preserve his claim that his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community was violated by his trial, in this citywide Special Narcotics case, before a New York County jury, although the crime was committed in Kings County. Before the

motion court, defendant made only the distinct claim that the jury selection procedure leading to his trial before a Manhattan jury constituted purposeful discrimination that violated his right to equal protection. Thus, he has failed to preserve his Sixth Amendment fair cross-section claim, which the court did not expressly decide, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

The Sixth Amendment guarantee of trial before an impartial jury guarantees a criminal defendant a jury selected from a fair cross-section of the community (*Taylor v Louisiana*, 419 US 522, 530 (1975). "In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process" (*Duren v Mississippi*, 439 US 357, 364 [1979]).

Defendant's claim is premised on the assertion that residents of Brooklyn would constitute the relevant "distinctive" group for a fair cross-section analysis under the first prong of

the *Duren* analysis. We reject that analysis, as the exclusion of Brooklyn residents from the Manhattan jury venire cannot establish underrepresentation of a distinctive group in the community because Brooklyn residents do not constitute such a "distinctive group." In any event, even accepting defendant's census-based data concerning racial disparities between the counties of New York City, the claim still fails because the relevant comparison is between New York County, where the case was tried, and the City as a whole, given the undisputedly lawful citywide jurisdiction of the centralized narcotics parts (*see People v Taylor*, 39 NY2d 649 [1976]). Defendant's census data do not show a significant racial disparity between the County and City of New York.

The court properly denied each of the applications made by defendant pursuant to *Batson v Kentucky* (476 US 79 [1986]). Defendant failed to preserve his contentions that on his first *Batson* motion he was deprived of an opportunity to be heard on the issue of pretext regarding one panelist, and that on his subsequent *Batson* motions the court was obligated to treat its initial finding of a prima facie case of discrimination as still in effect, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the

merits. We also find, with regard to the three subsequent *Batson* motions, that the circumstances that led the court to find prima facie discrimination in an earlier round had changed, and that there was no basis for finding a prima facie case. Since the record does not disclose the racial composition of the venire, and since defendant relies only on surmise from census data, defendant has failed to establish that the People's challenge rate was disproportionate (*see People v Childress*, 81 NY2d 263, 268 [1993]), and defendant has not provided any other evidence to support an inference of discrimination.

The court properly denied defendant's CPL 30.30 speedy trial motion, and found only 83 days of delay chargeable to the People. Defendant claims that the period from October 14, 2009 to February 4, 2010 should have been charged to the People for unreasonable delay in producing a redacted search warrant. However, neither the minutes of the October appearance, nor anything else in the record, indicates that the court actually ordered the prosecutor to disclose the warrant to defendant's new counsel at that time. Moreover, such an order would have been superfluous and unnecessary, because the prosecutor had already given the warrant to defendant's prior counsel, who was ethically obligated to turn over her entire file to successor counsel, and

any failure to do so should not be attributed to the People. In any event, if the period defendant claims to be chargeable is reduced by either a reasonable period for producing the requested materials (*see People v Harris*, 82 NY2d 409, 414 [1993]), or by a 42-day period that was independently excluded because defendant was without counsel (*see* CPL 30.30[4][f]), or both, the speedy trial motion still fails.

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16232-
16232A-
16233 In re Alijah S., and Others,

Children Under the Age
of Eighteen Years, etc.,

Daniel S.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for appellant.

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

George E. Reed, Jr., White Plains, attorney for the children Alijah S. and Juan T.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child Alexander T.

_____

Orders of disposition, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about May 6, 2014, to the extent they bring up for review an order of fact-finding, same court and Judge, entered on or about May 2, 2014, which, after a hearing, found that respondent-appellant had sexually abused the oldest subject child, his adoptive brother, and derivatively abused the two other subject children, unanimously affirmed, without costs.

Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the orders of disposition.

Respondent failed to preserve his argument that he was not a person legally responsible for two of the subject children, and we decline to consider it (*see Matter of Keydra R.* [*Robert R.*], 105 AD3d 588, 589 [1st Dept 2013]). As an alternate holding, we reject it on the merits (*see* Family Ct Act § 1012[g]; *Matter of Keoni Daquan A.* [*Brandon W.—April A.*], 91 AD3d 414, 415 [1st Dept 2012]).

The findings of sexual abuse and derivative abuse were supported by a preponderance of the evidence (*see* Family Ct Act § 1046[b][i]; *Matter of Dayanara V.* [*Carlos V.*], 101 AD3d 411, 412 [1st Dept 2012]). There is no basis to disturb Family Court's credibility determinations crediting the testimony given by the oldest child and discrediting the testimony given by respondent (*Dayanara*, 101 AD3d at 412). The child's testimony was competent evidence that respondent sexually abused him on about 20 occasions, "and the fact that [he] did not have a physical injury or that there was no corroboration of [his] testimony does not require a different result" (*Matter of Jani Faith B.* [*Craig S.*], 104 AD3d 508, 509 [1st Dept 2013]). Family Court providently exercised its discretion in limiting the scope

of cross-examination on collateral matters related to the child's credibility (*People v Antonetty*, 268 AD2d 254, 254 [1st Dept 2000], *lv denied* 94 NY2d 945 [2000]).

Given the nature and severity of the abuse inflicted by respondent upon the oldest child, Family Court properly found derivative abuse as to the other children (*Matter of Kaiyeem C.* [*Ndaka C.*], 126 AD3d 528, 529 [1st Dept 2015]).

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16234 In re Michael Gargano, Index 100441/14
Petitioner,

-against-

New York State Office of Children
and Family Services, et al.,
Respondents.

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Law Offices of Sandra M. Radna, P.C., New York (Sandra M. Radna of counsel), for petitioner.

Eric T. Schneiderman, Attorney General, New York (Philip V. Tisne of counsel), for State respondents.

Zachary W. Carter, Corporation Counsel, New York (Susan Paulson of counsel), for New York City Administration for Children's Services, respondent.

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Determination of respondent State of New York Office of Children and Family Services (CFS), dated December 16, 2013, which, after a hearing, denied petitioner's request that respondent New York City Administration for Children's Services' (ACS) report against him for maltreatment of his children be sealed and amended from "indicated" to "unfounded," unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Carol E. Huff, J.], entered October 10, 2014), dismissed, without costs.

CFS' determination that ACS proved by a fair preponderance of the evidence that petitioner had maltreated his children is supported by substantial evidence, including NYPD domestic violence incident reports and the testimony and progress notes of an ACS caseworker (*see Matter of Parker v Carrion*, 90 AD3d 512, 512 [1st Dept 2011]). The evidence shows that petitioner committed acts of domestic violence against one child and against the children's mother in the children's presence, thereby causing imminent or actual harm to the children's physical and emotional health (*see Nicholson v Scoppetta*, 3 NY3d 357, 371-372 [2004]; *see also Matter of Jeaniya W.* [*Jean W.*], 96 AD3d 622, 623 [1st Dept 2012]). There is no basis to disturb the Administrative Law Judge's credibility determinations, as they are supported by the evidence (*see Matter of Jeaniya*, 96 AD3d at 623; *see also Matter of Baker v Koehler*, 166 AD2d 240, 240-241 [1st Dept 1990]).

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: NOVEMBER 24, 2015

CLERK

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

16235 The People of the State of New York, Ind. 1650/09
Respondent,

-against-

Sikorski Wojecich,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about April 6, 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: NOVEMBER 24, 2015

CLERK

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

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

16236 Jacques G. Simon, et al., Index 13901/13
Plaintiffs-Respondents-Appellants,

-against-

Bellmore-Merrick Central High School District, et al.,
Defendants-Appellants-Respondents.

_____

Congdon, Flaherty, O'Callaghan, Uniondale (Christine Gasser of counsel), for appellants-respondents.

Jacques G. Simon, Merrick, for respondents-appellants.

_____

Order, Supreme Court, Nassau County (Thomas Feinman, J.), entered May 16, 2014, which, insofar as appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action alleging common-law negligence and violation of state civil rights law, and denied the motion to dismiss the cause of action under the Dignity for All Students Act (Education Law § 10 *et seq.*) or, pursuant to CPLR 3211(c), for summary judgment dismissing the complaint for failure to comply with General Municipal Law § 50-h, unanimously reversed, on the law, without costs, and the motion for summary judgment dismissing the complaint pursuant to General Municipal Law § 50-h granted. The Clerk is directed to enter judgment dismissing the complaint.

By refusing to produce for an examination under General Municipal Law § 50-h the minor child on whose behalf they are suing, plaintiffs failed to comply with a condition precedent to commencing the action (*id.* subd [5]; *see Ward v New York City Health & Hosps. Corp.*, 82 AD3d 471 [1st Dept 2011]). Nor did they demonstrate exceptional circumstances so as to excuse their noncompliance (*see Steenbuck v Sklarow*, 63 AD3d 823 [2d Dept 2009]; *Twitty v City of New York*, 195 AD2d 354 [1st Dept 1993]).

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16237 The People of the State of New York, Ind. 4167/11
Respondent,

-against-

Dian Chen,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek 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 (Analisa Torres, J.), rendered on or about April 12, 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: NOVEMBER 24, 2015

CLERK

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

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

16238 Emerald Investors Limited, Index 150359/14
Plaintiff-Respondent,

-against-

Newby Toms,
Defendant-Appellant.

_____

Newby Toms, appellant pro se.

Albert PLLC, New York (Craig J. Albert of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about July 2, 2014, which to the extent appealed from as limited by the briefs, granted plaintiff's motion for summary judgment in lieu of complaint awarding it renewal judgments pursuant to CPLR 5014, unanimously affirmed, with costs.

More than 10 years have elapsed since the first docketing of plaintiffs' two money judgments (CPLR 5014[1]). We reject defendant's contention that under CPLR 5014, the lien on real property resulting from the docketing of a renewal judgment cannot extend beyond the 20-year statute of limitations applicable to the original judgment. A renewal judgment provides a judgment creditor with both a new 20-year judgment and a

corresponding 10-year lien (*see Gletzer v Harris*, 51 AD3d 196 [1st Dept 2008], *affd* 12 NY3d 468 [2009]).

Defendant failed to raise a triable issue of fact as to a bona fide defense to the action. He offered no more than unsubstantiated, conclusory allegations of fraud with respect to the validity of the assignments of the original money judgments (*see Banesto Banking Corp. v Teitler*, 172 AD2d 469 [1st Dept 1991]). His remaining affirmative defenses are barred by the doctrine of collateral estoppel, since they were rejected in prior litigation, where he had a full and fair opportunity to litigate them (*see Cantor Fitzgerald Sec. v Port Auth. of N.Y. & N.J.*, 107 AD3d 510 [1st Dept 2013], *lv denied* 22 NY3d 856 [2013]).

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

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

ENTERED: NOVEMBER 24, 2015

CLERK

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

16239 The People of the State of New York, Ind. 5751/12
Respondent,

-against-

Rasheen Shomo,
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 (Michael J. Obus, J.), rendered on or about July 18, 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: NOVEMBER 24, 2015

CLERK

Tom, J.P., Acosta, Richter, Kapnick, JJ.

15869 In re Arbitration of Certain Controversies Between Social Service Employees Union, Local 371,
Petitioner-Respondent,

-against-

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

- - - - -

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

-against-

Social Service Employees Union Local, 371, et al.,
Respondents-Respondents.

Index 451071/13
652168/13

_____

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

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kresiberg of counsel), for respondents.

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Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered May 16, 2014, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

15869
Index 451071/13
652168/13

_____x

In re Arbitration of Certain Controversies Between Social Service Employees Union, Local 371,
Petitioner-Respondent,

-against-

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

- - - - -

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

-against-

Social Service Employees Union Local, 371, et al.,
Respondents-Respondents.

_____x

Respondents/petitioners appeal from the judgment of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 16, 2014, confirming the arbitration award dated April 5, 2013.

Zachary W. Carter, Corporation Counsel, New York (Devin Slack and Richard Dearing of counsel), for appellants.

Kreisberg & Maitland, LLP, New York (Jeffrey L. Kresiberg and Jill Mendelberg of counsel), for respondents.

ACOSTA, J.

At issue in this case is an arbitration award that ordered the City to reinstate laid-off employees with back pay, upon finding that the City had failed to comply with the "meet-and-confer" requirement of the parties collective bargaining agreement. That provision mandated that, prior to any layoffs, the City meet and confer with the designated representatives of the appropriate union with the objective of considering feasible alternatives to all or part of the projected layoffs. We find that the arbitration award merely compels the City to follow the procedure delineated in the citywide collective bargaining agreement, and was therefore properly confirmed.

Background

In 2006, respondent City of New York transferred 18 community coordinators (CCs) from the Department of Aging to respondent Department of Information Technology & Telecommunications' (DoITT) 311 Call Center. In November 2010, the City's Office of Management and Budget (OMB) directed DoITT to reduce its budget for the 311 Call Center by $4 million for fiscal year 2012. After considering various options, DoITT determined that the only way to meet OMB's budget demands was to lay off the CCs.

The 18 CCs facing potential layoff by DoITT were all members

of petitioner, the Social Service Employee Union, Local 317 (the Union). This meant that they were covered not only by the terms of the union's collective bargaining agreement with the City and DoITT, but also by the citywide collective bargaining agreement between the Union's parent body, District 37, American Federation of State, County and Municipal Employees, AFL-CIO, and the City of New York (citywide CBA).

Article XVII of the citywide CBA outlines various requirements the City must meet before laying off employees. First, the City must provide the appropriate union or unions with notice of layoffs "not less than thirty days (30) before the effective dates of projected layoffs." Second, during the notice period, "designated representatives of the [City] will meet and confer with the designated representatives of the appropriate union with the objective of considering feasible alternatives to all or part of such scheduled layoffs." This mandatory "meet-and-confer" provision is not a mere formality; it lays out a non-exhaustive list of potential "feasible alternatives":

> "i. the transfer of employees to other agencies with retraining, if necessary, consistent with Civil Service law but without regard to the Civil Service title,
>
> "ii. the use of Federal and State funds whenever possible to retain or re-employ employees scheduled for layoff,
>
> "iii. the elimination or reduction of the amount of work contracted out to independent contractors, and

> "iv. encouragement of early retirement and the expediting of the processing of retirement applications."

Article XV, Section 2, of the citywide CBA provides for dispute resolution by arbitration, that the arbitrator's award shall be "final and binding," and that the arbitrator may direct "such relief as the arbitrator deems necessary and proper, subject to the limitations set forth above and any applicable limitations of law."

There is no dispute that the City gave proper notice to the Union about the layoffs. However, in October 2011, the Union commenced arbitration in the City's Office of Collective Bargaining, alleging that the City and DoITT terminated the CCs without satisfying the citywide CBA's meet-and-confer requirement. The crux of the disagreement concerns a meeting between the parties on September 22, 2011, the day before the grievants received letters advising them that they were being laid off effective October 7, 2011. Brett Robinson, Deputy Commissioner of Financial Management and Administration, testified that at the meeting, the City did not offer any alternatives for the 18 employees to be laid off, there were no discussions about other alternatives to layoffs, and the Union was not asked to submit proposals to avoid the layoffs.

The arbitrator analyzed the record of the meeting and

determined that meeting did not satisfy the meet-and-confer requirement, because "feasible alternatives" to layoffs were not properly discussed. As a remedy, the arbitrator ordered the reinstatement of the grievants to their former position with full back pay.

The Union, on behalf of the grievants, filed a petition pursuant to CPLR article 75 seeking to confirm the arbitration award. The City and DoITT filed a petition to vacate the award. Supreme Court confirmed the award, and the City and DoITT appeal from that order.

Discussion

It is well settled that courts review arbitration awards with a high level of deference (*see Maross Constr. v Central N.Y. Regional Transp. Auth.*, 66 NY2d 341, 346 [1985]; *see also Matter of Allen [New York State]*, 53 NY2d 694[1981]). An arbitration award thus may not be vacated unless "it violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power" (*Matter of United Fedn. of Teachers, Local 2, AFT, AFL-CIO v Board of Educ. of City School Dist. of City of N.Y.*, 1 NY3d 72, 79 [2003], quoting *Matter of Board of Educ. of Arlington Cent. School Dist. v Arlington Teachers Assn.*, 78 NY2d 33, 37 [1991]).

Contrary to the City's assertion, the arbitrator's finding

that the City did not meet its meet-and-confer obligation was rational. Specifically, the City suggests that because, as the arbitrator found, the City and the Union met on September 22, and the Union had the opportunity to, and in fact did propose alternatives to the layoffs during the meeting, and the agreement does not require the City to propose alternatives, or require the parties to come to agreement, there was no violation of the meet-and-confer requirement.

However, an arbitrator's award will not be vacated when there is "some basis in the record for each of the arbitrator's findings" (*Branciforte v Levey*, 222 AD2d 276, 276 [1st Dept 1995]). In this case, there is no doubt that arbitrator's determination had a basis in the record. The record presented to us shows that the Union's Vice-President for Negotiations testified that "in prior layoffs, *as distinguished from these layoffs*, there had been discussion between the parties about alternatives to layoffs" (emphasis added). Deputy Commissioner Robinson testified that there was no discussion about alternatives to the layoffs at the September 22 meeting and that the Union was not asked to submit proposals to avoid the layoffs. The Executive Director of the 311 Call Center, while claiming that "alternatives to avoiding the layoffs were considered," admitted that any such alternatives "were not discussed with the

Union." Moreover, some grievants received layoff letters on September 23, the day after the meeting, which the arbitrator noted suggested that the City had already made up its mind about the layoffs before the meeting. This evidence constitutes a rational basis for the arbitrator's determination that the September 22 meeting did not fulfill the meet-and-confer requirement.

The City also argues that the remedy of reinstatement with back pay violated a strong public policy by infringing upon the "managerial prerogative" reserved to the City and DoITT to decide which positions to eliminate. The City situates its claim in NYC Administrative Code of the City of NY § 12-307(b), which "specifically and clearly removes from collective bargaining considerations the right of the public employer to retire its employees from duty because 'of lack of work or for other legitimate reasons'" (*DeLury v City of New York*, 51 AD2d 288, 294 [1st Dept 1976]). According to the City, the arbitrator's reinstatement directive reads a "job security" provision into the citywide CBA, thereby conferring a benefit upon the grievants that they did not contract for, and therefore should be seen as an impermissible intrusion into the sphere of municipal authority.

"[T]he scope of the public policy exception to an

arbitrator's power to resolve disputes is extremely narrow" (*Matter of DeMartino v New York City Dept. of Transp.*, 67 AD3d 479, 480 [1st Dept 2009]). "A public policy whose violation warrants vacatur of an arbitration award must entail 'strong and well-defined policy considerations embodied in constitutional, statutory or common law [that] prohibit a particular matter from being decided or certain relief from begin granted by an arbitrator'" (*Matter of Local 333, United Mar. Div., Intl. Longshoreman's Assn., AFL-CIO v New York City Dept. of Transp.*, 35 AD3d 211, 213 [1st Dept 2006], *lv denied* 9 NY3d 805 [2007]). "'Judicial restraint is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements'" (*DeMartino*, 67 AD3d at 480).

The crux of the City's argument is that the directive to reinstate the grievants infringed on the discretion of the City to make firing decisions. The directive does no such thing. Nothing in the arbitrator's award precludes the City from following the citywide CBA procedure to which it agreed and ultimately laying off the grievants. There is no managerial prerogative to violate the contract. As a proper meet-and-confer must precede any layoff, the arbitrator's remedy simply restored the status quo pending a proper meet-and-confer.

For this reason, the City's argument that the arbitrator's

reinstatement directive exceeded her enumerated powers also lacks merit. Article XV, Section 2, of the citywide CBA states, in pertinent part, that "[a]n arbitrator may provide for and direct such relief as the arbitrator deems necessary and proper, subject to the limitations set forth above and any applicable limitations of law." Reinstatement awards are "well fixed in the remedial arsenal to which public employment arbitrators may resort in order to make grievants whole" (*North Syracuse Cent School Dist. v North Syracuse Educ. Assn.*, 45 NY2d 195, 202 [1978]). The arbitrator's award "merely returned [the grievants] to the status they would have occupied had they not been wrongfully dismissed" (*id.*). Article XVII requires the meet-and-confer to occur within the 30 days before the impending layoffs. Proper performance of the contract would therefore result in the meet-and-confer between the City and the Union taking place while the employees were still in their respective positions. By ordering reinstatement, the arbitrator made it possible for the contract to be executed as intended.

The City casts the arbitrator's remedy as conferring upon the grievants a "job security" benefit that they did not contract for. To be sure, the citywide CBA is not a blanket guarantee that union members will never be laid off. But nor are the Article XVII procedures simply formalities to be checked off in

the firing process. Rather, they constitute substantive protections for employees facing layoff. The goal is to bring the leverage of the parties as near as equal as possible, and so the procedures must be taken seriously.

The City's reliance on *Dalton v Educational Testing Serv.* (87 NY2d 384 [1995]) is misplaced. The provision of the contract at issue there required the defendant testing firm to review materials produced by students whose test scores the firm believed were a result of fraud, and not merely cancel the scores. Upon its finding that the defendant did not properly review the plaintiff student's materials, the trial judge ordered the defendant to release the plaintiff's score. The Court of Appeals held that specific performance of the contract did not require the defendant to release the plaintiff's scores, only to review his proffered materials in good faith. As the Court said, "[T]he validity of Dalton's November SAT score has yet to be determined" (87 NY2d at 393). Similarly, in this case, the reinstatement directive does not preclude the City from terminating the grievants after it has conferred with the Union.

Accordingly, the judgment of the Supreme Court, New York County (Michael D. Stallman, J.), entered May 16, 2014, confirming the arbitration award dated April 5, 2013, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 24, 2015

CLERK