SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 7, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Acosta, Richter, Manzanet-Daniels, Gesmer, JJ.

904 The Heirs of Margaret Kainer, et al., Index 651491/15
Plaintiffs-Appellants,

-against-

Christie's Inc.,
Defendant-Respondent.

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Krauss PLLC, White Plains (Geri S. Krauss of counsel), for appellants.

Andrews Kurth LLP, New York (Joseph A. Patella of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered October 26, 2015, which, granted defendant's motion to dismiss the complaint, with prejudice, and denied as moot plaintiffs' cross motion to consolidate this action with another action, unanimously affirmed, without costs.

This appeal stems from the November 3, 2009 sale at a Christie's New York auction of a pastel drawing, entitled *Danseuses*, created by Edgar Degas in 1896. Defendant Christie's offered the drawing for sale at auction, on behalf of an undisclosed private seller. Plaintiffs allege that the

Christie's catalogue entry listed the drawing's provenance, in relevant part, as "Ludwig and Marg[a]ret Kainer, Berlin; sale Leo Spik, Berlin, 31 May 1935, lot 93" followed directly by the entry "Private Collection." Plaintiffs assert that the tracing of the drawing to a sale in Berlin in 1935 would have raised a question to a potential purchaser as to whether the drawing had been seized by the Nazis and was thereby rendered unsaleable, absent a release from Margaret Kainer's heirs. Plaintiffs allege that, to alleviate this concern, Christie's disseminated a salesroom notice stating that "[t]his work is offered pursuant to a restitution settlement agreement with the heirs of Ludwig and Marg[a]ret Kainer in 2009." Plaintiffs allege that the salesroom notice was published in the auction catalogue and announced by the auctioneer during the sale.

Plaintiffs allege that the drawing once belonged to Ludwig and Margaret Kainer, who fled Nazi Germany and moved to France in 1932. According to plaintiffs, the Nazis illegally confiscated the Kainers' substantial art collection, including the drawing. Ludwig predeceased Margaret, who died childless and intestate in France in 1968. Plaintiffs, who are individuals and the executors of five estates, claim that they are the only heirs of Margaret Kainer. Plaintiffs first learned that they were Margaret Kainer's heirs sometime in 2011 or 2012, when they also

learned of the sale and the purported restitution settlement agreement. On or about May 25, 2012, plaintiffs obtained a French "acte de notoriété," which plaintiffs describe as an inheritance certificate, determining that they were Margaret Kainer's heirs. On January 3, 2013, plaintiffs commenced an action in Supreme Court against multiple defendants, including Christie's, in which they alleged claims based on the sale. On November 4, 2014, plaintiffs filed a second amended complaint against defendants asserting additional claims, including fiduciary duty, conversion, unjust enrichment, and replevin. On May 4, 2015, plaintiffs filed the instant General Business Law § 349 action against Christie's, as the sole defendant, for injunctive relief, damages, attorneys' fees, prejudgment interest, and costs.

Generally, a cause of action accrues, thereby triggering the statute of limitations, "when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NYS2d 201, 210 [2001]). New York courts have applied CPLR 214(2)'s three-year period of limitations for statutory causes of action to General Business Law § 349 claims (*id.*). "[T]he statute runs from the time when the plaintiff was injured" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790

[2012]). A defendant is estopped from raising a statute of limitations defense to a cause of action under General Business Law § 349, where the plaintiff has alleged "both the tort that was the basis of the action and later acts of deception" that prevented the plaintiff from bringing a timely lawsuit (*id.* at 789). "[T]he later fraudulent misrepresentation must be for the purpose of concealing the former tort" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]). It is "fundamental to the application of equitable estoppel for plaintiffs to establish that subsequent and specific actions by defendant[] somehow kept them from timely bringing [a] suit" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

Christie's asserts that the alleged injury occurred at the time of the sale in November 2009, more than five years before the filing of the instant action. Plaintiffs argue that their General Business Law § 349 claim is not barred by the statute of limitations, because they could not have claimed injury as heirs until they obtained the French "acte de notoriété" on May 25, 2012. However, plaintiffs have not established that they needed to obtain the "acte de notoriété" in order to assert the General Business Law § 349 claim. Indeed, nothing prevented plaintiffs from filing their General Business Law § 349 action in New York when they learned of their status as heirs, sometime in 2011 or

2012.

Plaintiffs argue that Christie's should be estopped from raising a statute of limitations argument. Plaintiffs allege that they notified Christie's about their ownership claim sometime in 2012, but, despite their request, Christie's refused to release, and deliberately concealed, any information relating to the sale and the salesroom notice. However, plaintiffs have failed to allege that this prevented them from filing their consumer protection claim in New York in a timely way. Accordingly, the action was properly dismissed based on the statute of limitations.

This Court need not reach the issue of whether plaintiffs have a viable cause of action under GBL § 349.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Tom, J.P., Renwick, Richter, Kapnick, Webber, JJ.

1016-
1017 In re Malik S.,

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

Latangya B.,
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 (Michael Pastor of counsel), for respondent.

Andrew J. Baer, New York, attorney for the child.

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Order of disposition, Family Court, Bronx County (Carol R. Sherman, J.), entered on or about August 19, 2014, which, upon a fact-finding determination that respondent mother had neglected the subject child, released the child to the mother's custody with supervision by petitioner Administration for Children's Services (ACS) for six months, unanimously affirmed, without costs. Appeal from fact-finding order, same court and Judge, entered on or about February 10, 2014, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

ACS proved by a preponderance of the evidence that the mother had neglected the child by failing to supply the child with adequate education (*see* Family Ct Act §§ 1012[f][i][A]; 1046[b][i]). The child was absent for 134 out of 139 days during the 2012-2013 school year, and the mother presented no evidence to support her claim that she could not control the 15-year-old child, despite her best efforts. The mother claimed that she was attempting to transfer the child to a different school, but presented no specific evidence as to her efforts in this regard, the obstacles she encountered, or the amount of time she devoted to this effort (*see Matter of Danny R.*, 60 AD3d 450 [1st Dept 2009]; *Matter of Dyandria D.*, 303 AD2d 233, 233 [1st Dept 2003], *lv dismissed* 1 NY3d 623 [2004], *cert denied* 543 US 826 [2004]).

Family Court also properly based its neglect finding on the mother's failure to provide proper supervision or guardianship (*see* Family Ct Act § 1012[f][i][B]). The mother allowed the child to live for long periods of time with someone else without determining if the environment was appropriate and safe for a 15-year-old child. Further, the mother admitted that she was aware that the child was missing and elected not to telephone the police or any other authority.

Family Court properly declined to grant an adjournment in contemplation of dismissal (*see* Family Ct Act § 1039[a]), and

properly refused to allow ACS to withdraw the petition (*see* CPLR 3217[b]). Nor did Family Court err in refusing to reconsider, at the end of the fact-finding hearing, the mother's motion to dismiss the petition (*see* Family Ct Act § 1051[c]). The mother first moved to dismiss the petition at the end of ACS's case, and Family Court denied that motion. The mother then rested without presenting any witnesses or evidence. Accordingly, the record when ACS rested was identical to the record at the end of the fact-finding hearing, and Family Court properly refused to reconsider the motion to dismiss. Family Court noted that the mother could make her motion again at the dispositional hearing, but she failed to do so.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1672 The People of the State of New York, Respondent,

Ind. 3829/13

-against-

Anthony Martinez,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered August 5, 2014, convicting defendant, upon his plea of guilty, of criminal possession of a controlled substance in the third degree, and sentencing him, as a second drug felony offender previously convicted of a violent felony, to a term of 6 years, unanimously affirmed.

The court properly exercised its discretion in granting the People's motion to resubmit the charge to a second grand jury, since "[t]he fact that after the first submission there were insufficient votes to either indict or dismiss was a legitimate reason for a new submission" (*People v Pryor*, 5 AD3d 222, 223 [1st Dept 2004], *lv denied* 3 NY3d 661 [2004]; *see also People v Credle*, 17 NY3d 556, 562 [2011]). Moreover, the court's exercise of discretion was independently supported by the People's

"showing that new evidence ha[d] been discovered" (*People v Jones*, 206 AD2d 82, 86 [1st Dept 1994], *affd* 86 NY2d 493 [1995]).

Although "[e]x parte proceedings are undesirable, and they should be rare" (*People v Carr*, 25 NY3d 105, 111 [2015]), defendant was not deprived of his right to counsel by the ex parte filing of the People's affirmation in support of that motion and the court's order granting the motion, given that defense counsel received notice of the People's intention to move to resubmit the charge, and counsel repeatedly objected to the motion (*see People v Taylor*, 187 Misc 2d 321, 323–324 [Sup Ct, Kings County 2011]; *People v Ladsen*, 111 Misc 2d 374, 377 [Sup Ct, NY County 1981]).

The court properly denied defendant's suppression motion. There is no basis for disturbing the court's credibility determinations. An officer's delay in recovering a bag of

cocaine after observing it was satisfactorily explained and does not warrant a finding that the events described by the officer were inherently implausible.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1673 In re Deborah Hicks, Index 101065/13
Petitioner-Appellant,

-against-

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

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Famighetti & Weinick, PLLC, Melville (Matthew Weinick of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondents.

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Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered April 14, 2015, denying the petition to annul respondent Department of Education's determination, which upheld petitioner's unsatisfactory annual performance review rating (U-rating) for the 2010-2011 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to show that the U-rating was arbitrary and capricious, or made in bad faith. The evidence demonstrated that the U-rating was based on alleged incidents of misconduct that were substantiated after an investigation conducted by a neutral third party (*see Matter of Richards v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 117 AD3d 605 [1st Dept

2014]; *Matter of Murnane v Department of Educ. of the City of N.Y.*, 82 AD3d 576 [1st Dept 2011]).

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

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1674 In re Star Natavia B.,

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

Douglas B.,
Respondent-Appellant,

Cardinal McCloskey Community Services,
Petitioner-Respondent.

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Morgan, Lewis & Bockius LLP, New York (Mary C. Pennisi of counsel), for appellant.

Geoffrey P. Berman, Larchmont, for respondent.

Goetz L. Vilsaint, Bronx, attorney for the child.

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Order of disposition, Family Court, Bronx County (Erik S. Pitchal, J.), entered on or about February 26, 2015, which, to the extent appealed from as limited by the briefs, found that respondent father's consent is not required for the adoption of the subject child, unanimously affirmed, without costs.

Family Court's determination is supported by clear and convincing evidence that respondent failed to provide consistent financial support for the subject child and failed to visit or communicate with the child (*see* Domestic Relations Law § 111[1][d]; *Matter of Brianna L. [Brandon L.]*, 83 AD3d 501 [1st Dept 2011]; *see also Matter of Lambrid Shepherd C. [Jeffrey S.]*, 73 AD3d 496, 496 [1st Dept 2010]). Respondent was not excused

from paying child support simply because an agency caseworker allegedly told him not to do so (*see Matter of Savannah Love Joy F. [Andrea D.]*, 110 AD3d 529, 530 [1st Dept 2013]). In any event, there is no indication that respondent sought to provide the child with consistent financial support (*see Matter of Robert R.*, 30 AD3d 309 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]; *see also Matter of Dominique P.*, 24 AD3d 335, 336 [1st Dept 2005], *lv denied* 6 NY3d 712 [2006]).

Respondent's alleged provision of $1,500 worth of clothing for the child did not establish that he was a consistent or reliable source of support, and was insufficient to meet his burden of showing that he provided the child with financial assistance that was a fair and reasonable amount according to his means, as required by Domestic Relations Law § 111(1)(d)(i) (*see Matter of Maxamillian*, 6 AD3d 349, 351 [1st Dept 2004]).

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

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

ENTERED: JULY 7, 2016

Margaret Saval
DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1678-
1679 U.S. Bank National Association, etc.,
Plaintiff-Appellant,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Respondent.

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U.S. Bank National Association, etc.,
Plaintiff-Appellant-Respondent,

-against-

DLJ Mortgage Capital, Inc.,
Defendant-Respondent-Appellant,

Ameriquest Mortgage Company,
Defendant.

Index 652344/12
652644/12
653467/12
654147/12

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Kasowitz, Benson, Torres & Friedman LLP, New York (Hector Torres of counsel), for appellant/appellant-respondent.

Orrick, Herrington & Sutcliffe LLP, New York (Robert Loeb and Barry Levin of counsel), for respondent/respondent-appellant.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered March 25, 2015, which dismissed the complaint without prejudice on the ground that plaintiff did not fulfil a contractual condition precedent to suit, but found the complaint to be timely, unanimously affirmed, with costs. Order, Supreme Court, New York County (Eileen Bransten, J.), entered January 3, 2014, which held that the complaint was untimely and dismissed it with prejudice, unanimously affirmed, with costs.

I. *ABSHE 2006-HE7 Trust Action*

In the first appeal, involving the ABSHE 2006-HE7 Trust, Trustee U.S. Bank National Association sues under a Mortgage Loan Purchase and Interim Servicing Agreement (MLPA), a Reconstitution Agreement, and a Pooling and Servicing Agreement (PSA) for breach of representations and warranties made in connection with the securitization of a pool of residential mortgage-backed securities, in which the ABSHE 2006-HE7 Trust invested more than $1 billion.

Although the Trustee commenced this action within the applicable statute of limitations, it did not meet the condition precedent to enforcement of defendant DLJ Mortgage Capital, Inc.'s secondary "backstop" repurchase obligation, which required that the Trustee first provide notice of the alleged breaches to defendant Ameriquest Mortgage Company, and allow a 90-day cure period to expire. Under these circumstances, the Trustee's timely claims were properly dismissed without prejudice to refiling pursuant to CPLR 205(a) (*ACE Sec. Corp. v DB Structured Prods., Inc.*, 112 AD3d 522, 523 [1st Dept 2013], *affd* 25 NY3d 581 [2015]; *Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 104 AD3d 613 [1st Dept 2013]).

II. *HEAT Trusts Action*

The second appeal concerns three separate trusts for which

US Bank also acts as Trustee: Home Equity Asset Trust 2006-5, Home Equity Asset Trust 2006-6, and Home Equity Asset Trust 2006-7 (collectively, the HEAT Trusts). The HEAT Trusts contain 14,790 residential mortgage loans with an aggregate principal balance of about $2.8 billion. Under similar circumstances as those involved in the ABSHE 2006-HE7 Trust action, the Trustee sues based on alleged breaches of representations and warranties made in connection with the mortgages securing their investment.

This action was originally commenced within the statute of limitations period by Federal Housing Finance Agency, in its role as conservator for Freddie Mac, a certificateholder in each of the HEAT Trusts. However, pursuant to the "no action" provision in the PSAs, which limits the circumstances under which a certificateholder may commence suit under those agreements, FHFA lacked standing to sue. FHFA later substituted the Trustee as plaintiff.

Because FHFA commenced this action within the limitations period, the original claims were timely. Moreover, the fact that FHFA sued before meeting the condition precedent to suit by serving repurchase notices on DLJ, does not, in and of itself, render the claims time-barred. Rather, they would be subject to refiling by a proper plaintiff pursuant to CPLR 205(a), if they were not time-barred on standing grounds (*ACE Sec. Corp. v DB*

Structured Prods., Inc., 112 AD3d at 523; *Southern Wine & Spirits of Am., Inc. v Impact Envtl. Eng'g, PLLC*, 104 AD3d at 613).

Generally, actions dismissed on standing grounds may be refiled pursuant to CPLR 205(a)(*see Rivera v Markowitz*, 71 AD3d 449, 450 [1st Dept 2010]). However, here, the Trustee is not entitled to refile the claims under CPLR 205(a), because it is not a "plaintiff" under that statute (*Reliance Ins. Co. v PolyVision Corp.*, 9 NY3d 52, 56-58 [2007]; *ACE Sec. Corp.* at 523). Moreover, the Trustee may not rely on relation-back (CPLR 203[f]) to save its refiled claims, because there was no "valid preexisting action" to relate back to (*Southern Wine & Spirits*, 104 AD3d at 613; *see ACE Sec. Corp.* at 523). Because the Trustee cannot benefit from either CPLR 203(f) or 205(a), the refiled claims are time-barred on standing grounds.

The Court has considered the parties' remaining arguments and finds them unavailing.

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

ENTERED: JULY 7, 2016

Margaret Saval
DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1680 David Brickman, as Executor of the Estate of Shirley Golombeck,
Plaintiff,

-against-

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

Nderush Doci,
Defendant-Appellant.

Index 107976/11

_____

McCabe, Collins, McGeough, Fowler, Levine & Nogan LLP, Carle Place (Allison J. Henig of counsel), for appellant.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondents.

_____

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 20, 2016, which denied the motion of defendant Nderush Doci for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Summary judgment was properly denied in this action where plaintiff's decedent fell and was injured when the bus on which she was a passenger was caused to suddenly stop when a vehicle allegedly operated by Doci cut off the bus. Doci's own testimony raises triable issues of fact as to whether he was the driver of the offending vehicle, as his testimony placed him in the area of the incident, at or near the time of its occurrence, and was substantially consistent with the account provided by defendant

bus driver. Furthermore, since it was not the only evidence submitted in opposition to Doci's motion, Supreme Court properly considered the unauthenticated accident report purportedly prepared by the bus driver, which showed that the offending vehicle had Doci's license number, or one remarkably close to his (*see O'Halloran v City of New York*, 78 AD3d 536 [1st Dept 2010]).

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

ENTERED: JULY 7, 2016

Margaret Sowah
DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1681 Cesar Villanueva, Index 308722/12
Plaintiff-Appellant,

-against-

80-81 & First Associates, et al.,
Defendants-Respondents,

Everest Scaffolding,
Defendant.

_____

Shapiro Law Offices, PLLC, Bronx (Ernest S. Buonocore of counsel), for appellant.

Wade Clark Mulcahy, New York (Cheryl D. Fuchs of counsel), for 80-81 & First Associates, Resnick Construction Corp. and Jack Resnick & Sons, respondents.

Steinberg & Cavaliere, LLP, White Plains (C. William Yanuck of counsel), for Standard Waterproofing Corp., respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered March 11, 2015, which, to the extent appealed from as limited by the briefs, granted defendant Standard Waterproofing Corp.'s motion for summary judgment dismissing the complaint as against it, and granted defendants 80-81 & First Associates, Resnick Construction Corp., and Jack Resnick & Sons' motion to change venue, unanimously affirmed, without costs.

Defendant Standard Waterproofing Corp. established prima facie that it was not the owner or the general contractor or the statutory agent of either for the purposes of the Labor Law and

that it did not supervise or control the injury-producing work (*see Keenan v Simon Prop. Group, Inc.*, 106 AD3d 586, 589 [1st Dept 2013]). The evidence shows that Standard was, at most, a prime contractor, and therefore not liable under Labor Law § 240 or § 241 for injuries caused to the employees of other contractors with which it was not in privity of contract, since it had not been delegated the authority to supervise and control plaintiff's work (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317-318 [1981]). In opposition, plaintiff failed to raise an issue of fact. The contractual provisions in the cost breakdown letter that he relies upon refer solely to Standard's obligations in performing its contracted aluminum capping and cladding work; they do not establish that Standard had any supervisory control over the work site.

The court properly granted the motion to change venue since the complaint was dismissed as against both defendants whose principal places of business formed the basis for venue in Bronx County (*see Baulieu v Ardsley Assoc., L.P.*, 85 AD3d 554, 556 [1st Dept 2011]; *Clase v Sidoti*, 20 AD3d 330 [1st Dept 2005]).

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

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1682-
1683 In re Daniel O. and Another,

Children Under Eighteen Years
of Age, etc.,

Commissioner of Administration for
Children's Services of the City
of New York,
Petitioner-Appellant,

Jaquan O., et al.,
Respondents-Respondents.

_____

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

The Bronx Defenders, Bronx (Saul Zipkin of counsel), for Jaquan O., respondent.

Law Office of Elisa Barnes, New York (Elisa Barnes of counsel), for Sylvia F., respondent.

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

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Orders, Family Court, Bronx County (Ruben A. Martino, J.), entered on or about April 8, 2016, which, to the extent appealed from, granted respondents' motion for unsupervised visitation of the subject children during the pendency of the abuse and neglect proceedings against them, unanimously reversed, on the law and in the exercise of discretion, without costs, and the motion denied.

Family Court's determination lacks a sound and substantial basis in the record, which shows that unsupervised visitation

would not be in the children's best interests (*see* Family Ct Act § 1030[c]; *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]). The abuse and neglect petitions against respondents, the children's biological parents, are grounded in the life-threatening head injuries and rib fractures sustained by one of the children when he was only three months old and in respondents' exclusive care. Family Court granted unsupervised visitation even though a fact-finding hearing on the petitions had not yet been conducted. Given the serious allegations of abuse committed against the eldest child, it was an improvident exercise of discretion for Family Court, without the benefit of a full fact-finding hearing, to order unsupervised visitation (*Matter of Frank M.*, 44 AD3d at 495; *Matter of Bree W. [Jennifer F.]*, 98 AD3d 522 [2d Dept 2012]). It would be in the children's best interests to continue with supervised visitation pending a full fact-finding hearing and final determination of the petitions (*Matter of Bree W.*, 98 AD3d at 523).

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1684 The People of the State of New York, Respondent, Ind. 3574/13

-against-

Jerome Holloway, Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered October 8, 2014, unanimously affirmed.

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

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

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

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1686 In re Raymond Finn, et al., Index 101126/14
Petitioners-Appellants,

-against-

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

_____

Ruskin Moscou Faltischek, P.C., Uniondale (E. Christopher Murray of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for respondents.

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Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered November 9, 2015, denying the petition seeking to, among other things, annul a negative declaration, dated June 12, 2014, issued by respondent New York City Department of Homeless Services (DHS) regarding a proposed shelter (the project), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHS' determination was not arbitrary and capricious or unsupported by the evidence (*see Matter of Riverkeeper Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]). DHS took the requisite "hard look" at the project's anticipated adverse environmental impacts, and provided a "reasoned elaboration" for the negative declaration (*id.* at 231-232,

quoting *Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 417 [1986]).

In preparing the environmental assessment statement (EAS) undergirding the negative declaration, DHS properly adhered to the "accepted methodology" set forth in the City Environmental Quality Review Technical Manual (*Matter of Chinese Staff & Workers' Assn. v Burden*, 88 AD3d 425, 429 [1st Dept 2011], *affd* 19 NY3d 922 [2012]). DHS did not delegate its review responsibilities to the environmental consulting firm it properly retained to assist it with the preparation of the EAS (*see* 6 NYCRR 617.14[c]; *Matter of King v Saratoga County Bd. of Supervisors*, 89 NY2d 341, 350 n * [1996]).

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

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1687 Lincoln Patrick, et al., Index 300841/10
Plaintiffs-Appellants,

-against-

United Parcel Service, Inc., et al.,
Defendants-Respondents,

"John" and "Jane" Does, etc.,
Defendants.

_____

The Cochran Firm, New York (Norman A. Olch of counsel), for appellants.

Ansa Assuncao LLP, White Plains (Stephen McLaughlin of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered July 31, 2015, which, insofar as appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing the claim of malicious prosecution, unanimously affirmed, without costs.

The record does not support a finding that defendants initiated the criminal proceeding against plaintiff Lincoln Patrick without probable cause and with malice (*see Colon v City of New York*, 60 NY2d 78, 82 [1983]). It shows only that they provided the police with information and cooperated with authorities; there is no evidence that defendants affirmatively induced the authorities to act (*see Moorhouse v Standard, N.Y.*,

124 AD3d 1, 7 [1st Dept 2014]; *Brown v Sears Roebuck & Co.*, 297 AD2d 205, 209 [1st Dept 2002]). Further, the record establishes probable cause for plaintiff's arrest and prosecution for theft and drug possession (*see Brown*, 297 AD2d at 210). The grand jury indictment also raises a presumption of probable cause for the drug possession charge that plaintiff has not rebutted (*see Colon*, 60 NY2d at 82; *Morant v City of New York*, 95 AD3d 612 [1st Dept 2012]). Nor does the record support a finding of actual malice on defendants' part since there is no evidence that defendants initiated the arrest due to an improper motive (*see Nardelli v Stamberg*, 44 NY2d 500 [1978]).

We find plaintiff's other arguments unavailing.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1688 The People of the State of New York, Respondent, Ind. 370/08

-against-

Rudolph Keitt, Defendant-Appellant.

_____

Mischel & Horn, P.C. New York (Richard E. Mischel of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered January 13, 2011, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The evidence supported the conclusion that defendant stabbed the victim multiple times, or at least that, if the codefendant did the stabbing, defendant aided him by simultaneously striking the victim, with a shared intent to cause serious physical injury (*see generally* Penal Law § 20.00; *People v Allah*, 71 NY2d 830, 832 [1988]).

The court properly denied defendant's motion to suppress his statements (made after *Miranda* warnings) as fruits of an allegedly unlawful detention. The record supports the court's factual determination that defendant voluntarily accompanied the detectives to the precinct, where he remained voluntarily and was not placed under any restraint (*see People v Morales*, 42 NY2d 129, 137-138 [1977], *cert denied* 434 US 1018 [1978]; *see also People v Yukl*, 25 NY2d 585, 589 [1969], *cert denied* 400 US 851 [1970]).

The court properly exercised its discretion in admitting recorded phone calls, along with explanatory expert testimony, relating to defendant's continued gang affiliation while in custody on this case. Although the jury had already heard that members of the gang to which defendant belonged were motivated to commit violent acts in order to earn higher status, the phone calls were particularly probative because they suggested that defendant actually earned a promotion as the result of this homicide (*see People v Ford*, 133 AD3d 442 [1st Dept 2015]; *People v Edwards*, 295 AD2d 270 [1st Dept 2002], *lv denied* 99 NY2d 557 [2002]). Moreover, this evidence was probative of identity because it permitted a circumstantial inference that defendant was referring to the charged crime, and was thus implicating himself. The court's limiting instructions delivered immediately

after admission of the evidence and in its final charge minimized the potential for prejudice.

Defendant's challenge to a portion of the court's charge on the People's burden of proof is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see People v Jiovani*, 258 AD2d 277 [1st Dept 1999], *lv denied* 93 NY2d 900 [1999]). We perceive no basis for reducing the sentence.

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

ENTERED: JULY 7, 2016

Margaret Soval
DEPUTY CLERK

Friedman, J.P., Andrias, Webber, Gesmer, JJ.

1690 Dema Abboud, Index 150966/13
Plaintiff-Respondent,

-against-

Ludwik Pawelec, et al.,
Defendants-Appellants.

_____

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for appellants.

Gash & Associates, P.C., White Plains (Gary M. Gash of counsel), for respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered on or about October 28, 2015, which granted plaintiff's motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff established her entitlement to judgment as a matter of law on the issue of liability, in this action where plaintiff's vehicle collided with the vehicle operated by defendant Ludwik Pawelec when Pawelec, who was traveling in the opposite direction, made a left turn across the path of plaintiff's vehicle. Plaintiff submitted evidence showing that Pawelec was negligent by making a left turn without ensuring that it was safe to do so (see Vehicle and Traffic Law § 1141; *Foreman v Skeif*, 115 AD3d 568 [1st Dept 2014]), and by failing "to see that which, through the proper use of senses, should have been

seen" (*Berner v Koegel*, 31 AD3d 591, 592 [2d Dept 2006]; *see Griffin v Pennoyer*, 49 AD3d 341, 342 [1st Dept 2008]).

In opposition, defendants failed to raise a triable issue of fact. Defendants did not offer admissible evidence supporting their assertion that plaintiff could have avoided the collision (*see Sarac-Marshall v Mikalopas*, 125 AD3d 570 [1st Dept 2015]).

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1691 In re Ramona Prioleau, Index 100357/14
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal, et al.,
Respondents-Respondents.

_____

Ramona Prioleau, appellant pro se.

Adam H. Schuman, Brooklyn (Maria I. Doti of counsel), for New York State Division of Housing and Community Renewal, respondent.

Rosenberg & Estis, P.C., Brooklyn (Jeffrey Turkel of counsel), for Fifth Lenox Terrace Associates, respondent.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered January 15, 2015, denying the petition to annual a determination of respondent New York State Division of Housing and Community Renewal (DHCR), dated January 27, 2014, to the extent it granted respondent Fifth Lenox Terrace Associates's (owner) application for a major capital improvement (MCI) increase in petitioner's rent, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The determination that owner is entitled to the MCI increase in petitioner's rent based on petitioner's refusal to permit owner access to her apartment to install the new windows is not

arbitrary and capricious (*Matter of Weill v New York City Dept. of Educ.*, 61 AD3d 407 [1st Dept 2009]). In her response to owner's application for an MCI rent increase, petitioner stated that owner had requested access to her apartment to perform work listed in the application, that since the work was not required by law, she had every right to decline owner's request, and that no such work was done in her apartment.

Petitioner argues that owner failed to provide proper notice to gain access in accordance with DHCR Policy Statement 90-5, which prescribes a procedure for requesting access to conduct inspections after a tenant has filed a service complaint or an objection to a rent increase. Since she did not rely on Policy Statement 90-5 before DHCR, the argument is not properly before us (*Matter of Peckham v Calogero*, 12 NY3d 424, 430 [2009]). Policy Statement 90-5 would not avail petitioner, in any event, because petitioner had made no service complaint, and at the time owner sought access to install the windows, it had not yet filed an application for a rent increase.

The correspondence between petitioner and owner's representatives in October or November 2005, which petitioner relies on in further support of her argument that she did not deny access, is not properly before us, because it was submitted for the first time on her Petition for Administrative Review

(PAR) (*Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002]).

Petitioner was not prejudiced by any failure of DHCR to provide her with owner's response to its October 2009 request for information, which was directly responsive to her statement that windows were not installed in her apartment (*see Matter of 430 E. 86th St. Tenants Comm. v State of N.Y. Div. of Hous. & Community Renewal*, 254 AD2d 41 [1st Dept 1998]). Nor was petitioner prejudiced by any failure of DHCR to provide her with owner's supplemental responses to her PAR (*see id.*).

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

ENTERED: JULY 7, 2016

Margaret Sawal
DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1692 David Santana, Index 0021517/13E
Plaintiff-Respondent,

-against-

MTA Bus Company, et al.,
Defendants-Respondents,

United Parcel Service, Inc.,
Defendant-Appellant.

- - - - -

MTA Bus Company, et al.,
Third-Party Plaintiffs-Respondents,

-against-

United Parcel Service, Inc.,
Third-Party Defendant-Appellant.

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Porzio Bromberg & Newman, P.C., New York (Allan I. Young of counsel), for appellant.

Bader & Yakaitis, LLP, New York (Michael Caliguiri of counsel), for David Santana, respondent.

Barry, McTiernan & Moore LLC, New York (James Burbage of counsel), for MTA Bus Company and Metropolitan Transportation Authority, respondents.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered January 15, 2016, which denied defendant/third-party defendant United Parcel Service, Inc.'s motion for summary judgment dismissing the complaint, cross claims and third-party complaint against it, unanimously affirmed, without costs.

Defendant UPS argues that, although its truck was parked in a no-standing zone in violation of 34 RCNY 4-08(a)(3) at the time of the accident involving plaintiff's bicycle and defendant MTA's bus, its truck was not a proximate cause of the accident. However, the record presents issues of fact as to how far the UPS truck was protruding into the lane of travel, whether plaintiff swerved toward the bus in an effort to avoid the UPS truck, and whether plaintiff was forced to jump from his bicycle in order to avoid being slammed into the UPS truck as his bicycle was being dragged by the bus. Since a reasonable factfinder could conclude that the accident was a foreseeable consequence of UPS's illegal parking, summary judgment was properly denied (*see Pickett v Verizon N.Y. Inc.*, 129 AD3d 641 [1st Dept 2015]; *White v Diaz*, 49 AD3d 134, 139 [1st Dept 2008]).

We have considered UPS's additional arguments and find them unavailing.

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

ENTERED: JULY 7, 2016

Margaret Sowal

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1693N Salvatore Rivera, Index 303196/12
Plaintiff-Respondent,

-against-

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

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Law Offices of Jeffrey S. Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellants.

Pena & Kahn, PLLC, Bronx (Diane W. Bando of counsel), for respondent.

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Order, Supreme Court, Bronx County (Barry Salman, J.), entered April 17, 2015, which denied defendants' motion for a stay of trial, leave to conduct additional discovery, leave to amend the answer to add the affirmative defense of lack of capacity, and the appointment of a guardian ad litem for plaintiff, unanimously affirmed, without costs.

Defendants failed to present evidence that plaintiff was incapable of prosecuting or defending his rights in this action either upon its commencement or at this time (*see Roach v Benjamin*, 78 AD3d 468 [1st Dept 2010]; *Nova v Jerome Cluster 3, LLC*, 46 AD3d 292, 292 [1st Dept 2007]).

The proposed amendment adding a defense of lack of capacity is palpably insufficient as a matter of law (*see Aerolineas*

Galapagos, S.A. v Sundowner Alexandria, LLC, 74 AD3d 652, 652 [1st Dept 2010]). "[A] person of unsound mind but not judicially declared incompetent may sue or be sued in the same manner as any other person" (*Bryant v Riddle*, 259 AD2d 399, 399 [1st Dept 1999]).

In light of the foregoing, defendants' request for a stay is moot.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Andrias, Webber, Gesmer, JJ.

1694N Michael Fitzgerald, Index 304808/09
Plaintiff, 83839/10

-against-

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

International Contractors Services, LLC,
Defendant-Appellant.

- - - - -

The City of New York,
Third-Party Plaintiff,

-against-

A.H. Harris & Sons, Inc, et al.,
Third-Party Defendant-Respondent,

International Contractors Services, LLC,
Third-Party Defendant-Appellant.

_____

Baxter Smith & Shapiro, P.C., Hicksville (Sim R. Shapiro of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (William C. Lamboley of counsel), for the City of New York, respondent.

Law Office of James J. Toomey, New York (Michael J. Kozoriz of counsel), for A.H. Harris & Sons, Inc, respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 4, 2015, which, inter alia, granted the motion of defendant/third-party plaintiff City of New York and cross motion of defendant/third-party defendant A.H. Harris & Sons, Inc. for an order conditionally striking International Contractors

Services' third-party answer, unanimously affirmed, without costs.

The IAS court providently exercised its discretion in conditionally striking third-party defendant International Contractor Services' third-party answer based on its repeated failure to comply with discovery directives (*see e.g. Loeb v Assara N.Y. IL.P.*, 118 AD3d 457, 457 [1st Dept 2014]). We have considered the remaining arguments and find them unavailing.

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

ENTERED: JULY 7, 2016

DEPUTY CLERK

Sweeny, J.P., Renwick, Moskowitz, Kapnick, Gesmer, JJ.

1695 In re Zaid Zaid, Ind. 94/16
M-2830 Petitioner,

-against-

Hon. James M. Burke, etc., et al.,
Respondents.

_____

Gerald J. McMahon, New York, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. James M. Burke, respondent.

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

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

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

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

An order of a Justice of this Court dated April 11, 2016 reducing petitioner's bail to $1,000,000 bond or cash, and an order of this Court entered May 12, 2016 (M-1895) maintaining those bail conditions are vacated based on newly submitted information, and any bail or remand conditions set by Supreme Court are continued without prejudice to any further applications before that court.

ENTERED: JULY 7, 2016

Margaret Sawal
DEPUTY CLERK

Acosta, J.P., Renwick, Manzanet-Daniels, Kapnick, Webber, JJ.

765 Victor Oluwatayo, Index 304570/13
Plaintiff-Appellant,

-against-

Mariah R. Dulinayan, et al.,
Defendants-Respondents.

_____

Law Offices of Alexander Bespechny, Bronx (Alena Bespechny of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for Mariah R. Dulinayan and Jonathan R. Shaatal, respondents.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Gricelda M. Gutierrez, respondent.

_____

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered March 25, 2015, modified, on the law, to grant plaintiff's motion for summary judgment to the extent of finding no culpable conduct by plaintiff on the issue of liability and dismissing defendants' affirmative defenses of comparative negligence as against plaintiff, and otherwise affirmed, without costs.

Opinion by Renwick, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Rolando T. Acosta, J.P.
Dianne T. Renwick
Sallie Manzanet-Daniels
Barbara R. Kapnick
Troy K. Webber, JJ.

765
Index 304570/13

_____x

Victor Oluwatayo,
Plaintiff-Appellant,

-against-

Mariah R. Dulinayan, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from an order of the Supreme Court, Bronx County (Norma Ruiz, J.), entered March 25, 2015, which granted defendants' motions for an order changing venue to Richmond County, and denied his cross motion for summary judgment on the issue of liability.

Law Offices of Alexander Bespechny, Bronx (Alena Bespechny and Louis A. Badolato of counsel), for appellant.

Kelly, Rode & Kelly, LLP, Mineola (John W. Hoefling of counsel), for Mariah R. Dulinayan and Jonathan R. Shaatal, respondents.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Gricelda M. Gutierrez, respondent.

RENWICK, J.

Plaintiff Victor Oluwatayo commenced this action seeking damages for injuries he sustained during a multiple motor vehicle accident, involving his car and two other cars driven by the respective defendants Mariah Dulinayan and Gricelda Gutierrez. The primary issue in this appeal is whether plaintiff, as an innocent driver,[1] who was rear-ended by one or more cars, is by virtue of such status, per se, entitled to summary judgment on liability against any or all defendant drivers. Under the circumstances here, we find that plaintiff, an innocent driver, is not entitled to summary judgment on liability against any defendant driver because, as the party moving for summary judgment, plaintiff failed to meet his burden to eliminate triable issues of fact as to how the accident happened and which defendant driver was responsible for the rear end collision. Such an innocent plaintiff driver, however, is entitled to summary judgment on his lack of culpable conduct on the issue of liability pursuant to CPLR 3212(g).

Before addressing the denial of plaintiff's cross motion for summary judgment on liability against defendants, we examine the

[1]As will be discussed, infra, an innocent plaintiff driver/passenger exists in a case where such plaintiff did not contribute to the happening of the accident in any way.

more straightforward issue of whether Supreme Court properly granted defendants' motion to change venue to Richmond County. We find that defendants made a prima facie showing that plaintiff improperly placed venue in Bronx County, based on his own residence, by submitting plaintiff's deposition testimony that he had moved to his aunt's home in Brooklyn shortly after the accident, which was more than a year before he commenced the action. In opposition to the motions, plaintiff provided no documentary evidence whatsoever to support his testimony that the move to Brooklyn was only temporary and that the Bronx address continued to be his permanent residence *(see Castro v New York Hosp. Med. Ctr. of Queens*, 52 AD3d 251 [1st Dept 2008]; *Martinez v Semicevic*, 178 AD2d 228 [1st Dept 1991]; *cf. Farrington v Fordham Assoc., LLC*, 129 AD3d 591, 592 [1st Dept 2015] [plaintiff demonstrated through an affidavit and documentary evidence that his prolonged stay at a shelter was temporary "and that he never 'intended to abandon or surrender' his residence with his mother in Bronx County, which he viewed as his permanent home"]). Further, plaintiff's testimony that he lived with his girlfriend in the Bronx was undermined by his inability to recall her last name, and plaintiff did not submit any affidavit to explain his testimony.

Plaintiff's argument that defendants' motions to change

venue were untimely is unpreserved for appellate review, since he failed to raise it before the motion court, when defendants would have been able to explain the reasons for any delay *(see Lopez v Gramuglia*, 133 AD3d 424, 42 [1st Dept 2015]; *Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]). Were we to review the issue, we would find that the court properly considered the motion to change venue, despite defendants' noncompliance with CPLR 511(a), because plaintiff had made misleading statements in the summons and complaint, and defendants moved reasonably promptly after plaintiff's deposition was completed and a copy of the transcript had been provided to plaintiff (*Philogene v Fuller Auto Leasing*, 167 AD2d 178, 179 [1st Dept 1990]; *cf. Farrington v Fordham Assoc., LLC*, 129 AD3d at 592 [defendants' motion for change of venue three months after plaintiff signed deposition transcript denied as not made within reasonable time]).

Whether Supreme Court properly denied plaintiff's cross motion for summary judgment on liability requires a more comprehensive analysis. Intuitively, plaintiff's argument, that he should be granted summary judgment on liability as an innocent driver who was rear-ended, has some appeal. However, a careful examination of the facts before us reveals that plaintiff's position is untenable as a matter of law.

To the extent plaintiff argues that he met his burden of establishing a prima facie case of entitlement to partial summary judgment on liability, by establishing that both defendant drivers were negligent, his position is not supported by the record. In support of his motion, plaintiff submitted the deposition transcript of each defendant driver, Gutierrez and Dulinayan, in which they respectively provided conflicting versions of how the accident happened. If Gutierrez's testimony is credited, she was at a full stop when Dulinayan hit the back of her car, pushing her forward into the rear of plaintiff's car. Under this version, Gutierrez provides a non-negligent explanation for rear-ending plaintiff's car. If Dulinayan's testimony is credited, Gutierrez hit the rear of plaintiff's car before Dulinayan hit the rear of Gutierrez's car. Under Dulinayan's version, his conduct did not cause any collision between Gutierrez's car and plaintiff's car. Thus, by submitting the deposition transcripts setting forth conflicting accounts of how the accident happened, plaintiff failed to meet his burden, as the party moving for summary judgment, of eliminating all triable issues of fact.

Plaintiff's alternative argument that he should not be denied summary judgment, even though there may be potential issues of which defendant's vehicle was at fault, is also

flawed. Under plaintiff's reasoning, defendants' conflicting versions of the accident fail to raise an issue of fact because neither defendant's account places any liability on the part of plaintiff. In effect, plaintiff wishes us to hold that since he was an innocent driver, who was rear-ended by another car and did not contribute to the happening of the accident, he is entitled to partial summary judgment against defendant drivers on the issue of liability. Plaintiff's argument conflates his claim of freedom from culpability with defendants' alleged negligence.

This conflation apparently stems from a misapplication of this Court's holding in *Garcia v Tri-County Ambulette Serv., Inc.* (282 AD2d 206 [1st Dept 2001]). In *Garcia*, this Court, in effect, held that in an automobile negligence action, an "innocent plaintiff" must be granted summary judgment on the resolved issue of his lack of culpable conduct, irrespective of the unresolved issue of a defendant driver's negligence. *Garcia*, however, requires a closer look. In *Garcia*, the plaintiff was a passenger in the rear seat of an ambulette when it was involved in an intersection accident with another vehicle. Both drivers maintained that they had a green light to enter the intersection. In the lower court, the plaintiff's motion for partial summary judgment on the issue of liability against the two drivers was denied. This Court, however, reversed, finding that the

"[p]laintiff, as an innocent rear-seat passenger in one of the vehicles who cannot possibly be found at fault under either defendant's version of the accident, [was] entitled to partial summary judgment" (*id*. at 207).

The confusion in *Garcia* stems from the fact that in the body of the decision, this Court explicitly stated that the "plaintiff should have been granted partial summary judgment on the issue of liability" (id. [emphasis added]), suggesting that this Court found the defendants negligent as a matter of law. A closer reading reveals, however, that this Court only found that the plaintiff was free from culpable conduct on the issue of liability. The decretal paragraph of the *Garcia* decision clarifies that the "plaintiff's motion [is] granted to the extent of finding no culpable conduct by plaintiff on the issue of liability ..." (*id*. at 207 [emphasis added]).

In *Garcia*, this Court granted summary judgment to the plaintiff on the resolved issue of her lack of culpable conduct pursuant to CPLR 3212(g). This section permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action (*see e.g. Siewert v Loudonville Elementary Sch*ool, 210 AD2d 568, 569 [3rd Dept 1994]). The provision "recognizes that, notwithstanding the

denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers" (Philip M. Halpern, *Unlocking a Valuable Tool*: *Summary Judgment Hearings on Issues of Fact*, 33 Westchester B.J. 98, 100-101 [2006] citing David D. Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR C3212:35). Thus, as *Garcia* illustrates, when facts are established, "there is no need to examine further such facts and those facts found to be without dispute should be enumerated in the order disposing of the motion and be usable without further litigation" *(id.; see e.g. Cooper v Mallory*, 51 Misc 2d 749 [Sup Ct Suffolk County 1966]; *Trager v Trager*, 43 Misc 2d 829, 832-833 [Sup Ct Queens County 1964]).

There is a significant distinction between granting a plaintiff summary judgment on her lack of culpable conduct on liability and granting a plaintiff summary judgment on a defendant's negligence. A grant of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by its negligence, and such breach proximately caused the plaintiff injury (*see Ortega v Liberty Holdings*, LLC, 111 AD3d 904, 905-906 [2d Dept 2013]). In contrast, a grant of partial summary judgment on the

issue of the plaintiff's lack of fault or culpability is a much narrower finding. Such a finding merely establishes as a matter of law that the plaintiff is free of any negligence, as would be the case of an innocent passenger or driver.

As the aforementioned discussion illustrates, the pronouncement in *Garcia* stands only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence. This Court's recent holding in *Mello v Narco Cab Corp*. (105 AD3d 634 [1st Dept 2013]) underscores the point. In *Mello*, the plaintiff established that, as a back-seat passenger in a taxicab that rear-ended a second vehicle, she was free of negligence as a matter of law. Specifically, the plaintiff testified that just before the accident occurred, her friend, who was with her in the back seat, was in the process of instructing the driver to slow down. The driver testified he did not hear the plaintiff's friend. Under the circumstances, this Court found that "there is no basis for finding that the plaintiff or her friend did anything to cause the accident or could have prevented it." Citing *Garcia*, this Court found that "[s]ince plaintiff was an innocent rear-seat passenger who cannot be found at fault under any version of how

the accident occurred, the motion [for summary judgment] should have been granted to the extent indicated," that is, a "finding [of] no culpable conduct by plaintiff on the issue of liability" (*id.* at 634-635).

While the pronouncement in *Garcia* and its progeny, that an innocent plaintiff is entitled to a determination that she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence, was applied in vehicle accident cases involving innocent plaintiff passengers, its reasoning applies with equal force to innocent plaintiff drivers. An innocent plaintiff driver exists in a case where the plaintiff driver did not contribute to the happening of the accident in any way. A typical example is the case at bar where plaintiff driver, while stopped, was rear-ended by the following driver.

The *Garcia* factual scenario, however, must be distinguished from the factual scenario where the innocent plaintiff has met her burden of establishing a defendant driver's negligence. For example, in *Johnson v Phillips* (261 AD2d 269 [1st Dept 1999]), this Court held that the plaintiff, an innocent passenger in a vehicle that was rear-ended, was entitled to partial summary judgment on liability against the driver who was following too closely even though there were "potential issues of comparative

negligence as between defendant and the driver of the vehicle in front" (id. at 272). In *Johnson*, the plaintiff proved entitlement to summary judgment on liability by submitting evidence establishing that the automobile accident happened as follows:

> "Plaintiff was a passenger in a vehicle heading southbound on Route 9 in Irvington. The driver of that vehicle stopped in the left lane at an intersection to make a left-hand turn. The southbound side of Route 9 is a two-lane roadway. As this car, over the course of about five seconds, waited to make its turn while northbound traffic cleared, the vehicle driven by defendant, also driving in a southerly direction, struck it in the rear. . . . [A] Police Accident Report . . . recorded that the accident occurred at 2:15 p.m. on a sunny day . . . " (*Johnson*, 261 AD2d at 269-270).

In *Johnson*, this Court rejected the defendant's alleged non-negligent explanation for the rear-end collision. The defendant alleged that "he entered the left lane as a consequence of tree-trimming activity in the right lane, that his vision was obstructed by glare and hence he had not seen the car in front of him and, in any event, the turning car had neither brake lights nor turn signal on" (*id.* at 270). Instead, this Court found the defendant negligent as a matter of law for failing to observe traffic conditions and maintaining a safe distance (*id.* at 271-272). Finding the following driver negligent, this Court determined that the plaintiff's right, as an innocent passenger, was not in any way restricted by any potential issue of

comparative negligence between such driver and the driver of the vehicle in front of him (id. at 172).

Here, we find that the facts of this case are analogous to the *Garcia* scenario and distinguishable from the *Johnson* scenario. Plaintiff has established his lack of culpable conduct as an undisputed innocent driver, which entitles him to summary judgment on lack of fault pursuant to CPLR 3212(g) (*see e.g. Medina v Rodriguez*, 92 AD3d 850 [2nd Dept 2012]; *Mello v Narco Cab Corp.*, 105 AD3d 634; *Garcia v Tri-County Ambulette Serv., Inc.*, 282 AD2d 206). However, unlike in *Johnson*, plaintiff has not established entitlement to summary judgment on liability against either defendant driver because of the conflicting and unresolved facts concerning the accident and which vehicle was responsible for the accident.

Accordingly, the order of Supreme Court, Bronx County (Norma Ruiz, J.), entered March 25, 2015, which granted defendants' motions for an order changing venue to Richmond County, and denied plaintiff's cross motion for summary judgment on the issue of liability, should be modified, on the law, to grant plaintiff's motion for summary judgment to the extent of finding

no culpable conduct by plaintiff on the issue of liability and dismissing defendants' affirmative defenses of comparative negligence as against plaintiff, and otherwise affirmed, without costs.

All concur.

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

ENTERED: July 7, 2016

Margaret Saval
DEPUTY CLERK