SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 23, 2012

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Andrias, J.P., Friedman, Acosta, Freedman, Richter, JJ.

7323 Liam Blainey, Index 13919/04
Plaintiff-Respondent,

-against-

Metro North Commuter Railroad, etc., et al.,
Defendants,

The City of New York,
Defendant-Appellant.

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Michael A. Cardozo, Corporation Counsel, New York (Avshalom Yotam of counsel), for appellant.

Fitzgerald & Fitzgerald PC, Yonkers (Mitchell Gittin of counsel), for respondent.

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Amended judgment, Supreme Court, Bronx County (Howard H. Sherman, J.), entered October 8, 2010, after a jury trial, awarding plaintiff damages against defendant the City of New York, the appeal from which brings up for review, inter alia, an order, same court and Justice, entered on or about July 1, 2009, which, inter alia, denied defendant City's motion for judgment notwithstanding the verdict, unanimously reversed, on the law, without costs, the amended judgment vacated, the motion for

judgment notwithstanding the verdict granted, and the complaint dismissed as against said defendant. The Clerk is directed to enter judgment accordingly.

On June 14, 2003, two police officers, one of whom was plaintiff Liam Blainey, were pursuing a fleeing suspect in the Bronx. The officers located the suspect lying, apparently injured, on the Metro North railroad tracks running through a sunken trench in the middle of Park Avenue, to the south of the bridge by which East 187th Street traversed the Metro North right-of-way. Intending to rescue the suspect, plaintiff and his partner planned to climb over the chain-link fence on the southern side of the East 187th Street bridge, then to make their way along the ledge on the other side of the fence until they found a place where they could safely descend to the tracks. Plaintiff climbed up the fence on the bridge first. Unfortunately, when he reached the top of the fence, it collapsed beneath him and he fell to the tracks approximately 40 feet below.

In this action, plaintiff asserted a claim against the City of New York, which owned the bridge and the fence from which he fell, based on General Municipal Law § 205-e, which affords a police officer a cause of action against a municipality for line-

of-duty injuries resulting from the municipality's failure to comply with a statute or regulation. Plaintiff's theory, on which the case was submitted to the jury, was that the City's alleged failure to maintain the fence in good condition violated former section 26-235 of the Administrative Code of the City of New York.[1] In unsuccessfully moving for a trial order of dismissal, for a directed verdict, and for judgment notwithstanding the verdict, the City argued that § 26-235 did not apply because "[t]he content of that code refers to buildings throughout it and not to fences on overpasses," and that § 26-235 "was not intended to apply to metal chain link fences, designed to deter individuals on bridge overpasses." On the City's appeal from the judgment plaintiff recovered against it, we reverse, grant the motion for judgment notwithstanding the verdict, and dismiss the complaint.

Since former Administrative Code § 26-235 is the only

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[1]The relevant sections of the Administrative Code are those that were in effect on the date of plaintiff's accident. Former Administrative Code § 26-235 provided in pertinent part: "Any structure or part of a structure or premises that from any cause may at any time become dangerous or unsafe, structurally or as a fire hazard, or dangerous or detrimental to human life, health or morals, shall be taken down and removed or made safe and secure." Former Administrative Code § 27-232 defined the term "structure" to include "fences."

statute or regulation that plaintiff has identified as the basis of his claim against defendant City of New York under General Municipal Law § 205-e, and plaintiff cannot prevail against the City without "identify[ing] [a] statute or ordinance with which [the City] failed to comply" (*Williams v City of New York*, 2 NY3d 352, 363 [2004]), the judgment must be reversed if § 26-235 did not govern the City's duties with respect to the fence on the bridge from which plaintiff fell. That § 26-235 did not apply to the fence on the bridge is established by former Administrative Code § 26-205, which (as in effect on the date of the accident) provided that the subchapter containing § 26-235 did not "apply . . . to bridges . . . or to structures appurtenant thereto." Plaintiff's argument that former § 26-205 did not render former § 26-235 inapplicable to the fence on the bridge is entirely without merit. Accordingly, plaintiff's judgment cannot be sustained.

Plaintiff contends that the City's argument for the inapplicability of § 26-235 is unpreserved because the City failed to cite § 26-205 in support of its position in the trial court. However, the City did raise before the trial court the precise issue it raises on this appeal, thereby discharging its responsibility to make "arguments . . . sufficient to alert

Supreme Court to the relevant question" (*Geraci v Probst*, 15 NY3d 336, 342 [2010]). The failure to cite § 26-205 in the trial court, while regrettable, does not render the issue unpreserved, inasmuch as the citation of § 26-205 on appeal changes neither the theory behind the City's position nor the relief it seeks. To be sure, it would have been far preferable for the City to have brought the dispositive statute to the trial court's attention. Nonetheless, a litigant's failure to cite a particular supporting authority when arguing for a position in the trial court does not preclude the litigant's reliance on that authority when arguing for the very same position on appeal.[2] In any event, even if the City could somehow be deemed to have failed to preserve the issue of § 26-235's inapplicability to a fence on a bridge, the issue would nonetheless be reviewable on appeal because it is a purely legal one appearing on the face of the record that plaintiff could not have avoided had it been raised at the proper juncture (as it in fact was) (*see Chateau*

[2]In a comparable situation, it has been held that the denial of relief sought pursuant to the wrong statute in the trial court may be reviewed on appeal under the standards of the appropriate statute where the record affords a basis for so doing (*see Perez v Jordan*, 37 AD3d 200, 203 [1st Dept 2007], citing *Eugene Di Lorenzo, Inc. v Dutton Lbr. Co.*, 67 NY2d 138, 143 [1986]; *Rifenburg v Liffiton Homes*, 107 AD2d 1015, 1016 [4th Dept 1985]).

D'If Corp. v City of New York, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

While we sympathize with plaintiff, who indisputably suffered serious injuries in the course of performing his duties as a police officer, General Municipal Law § 205-e precludes his recovering from the City because there is no connection between his injuries and the City's violation of any statute or regulation. Inasmuch as this Court is bound to give effect to the requirements of § 205-e, we have no choice but to reverse the judgment against the City.

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Friedman, DeGrasse, Richter, Manzanet-Daniels, JJ.

6605 Steven J. Valiquette, Index 651439/10
Plaintiff-Appellant,

-against-

BL Partners, LLC, et al,
Defendants-Respondents.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Shirley Werner Kornriech, J.), entered on or about August 4, 2011,

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 October 3, 2012,

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

ENTERED: OCTOBER 23, 2012

CLERK

CORRECTED ORDER - NOVEMBER 5, 2012

Tom, J.P., Mazzarelli, Moskowitz, Renwick, Abdus-Salaam, JJ.

7928- The People of the State of New York, Ind. 3190/08
7929- Respondent,
7930

-against-

Sharmelle Johnson,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Marcy L. Kahn, J.), rendered September 8, 2010, convicting defendant upon his plea of guilty, of rape in the second degree, and sentencing him, as a second felony offender, to a term of four years, affirmed.

Defendant encountered the victim, who was intoxicated, on the sidewalk outside a bar in upper Manhattan in the early morning hours of February 4, 2008. The victim could only recall walking home several hours later and realizing that her bag, keys and cell phone were missing. The superintendent of her building let her into her apartment, where she slept until midday. Later that day, based on her physical condition, she realized she had been forcibly raped and went to Metropolitan Hospital, where staff examined her and used a rape kit to extract DNA evidence.

On May 12, 2008, the results of DNA testing from the kit

found a match to defendant, a **prior felony** offender. Defendant was also in possession of the victim's cell phone. He initially denied that he recognized the victim, when police showed him her photograph. However, after his arrest, he admitted that he had helped her up and taken her to the lobby of a nearby building where he had sex with her.

Defendant pleaded guilty to rape in the second degree.[1] Penal Law § 130.30(2) provides that a person is guilty of rape in the second degree when he "engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated." A person is "mentally incapacitated" when she is "rendered temporarily incapable of appraising or controlling [her] conduct owing to the influence of a narcotic or intoxicating substance administered to [her] without [her] consent" (Penal Law § 130.00[6]).

During his plea allocution, defendant agreed that on February 4, 2008, he encountered the victim who was "in an intoxicated state." The court asked him to describe what happened, and he said, "[s]he was sitting there on the side and we started talking. And she walked with me down to the Projects, and that's where we had sex at, and smoked marijuana and had sex there." The court stated, "I would not accept the plea on that

[1]Defendant's indictment charged him with two counts of rape in the first degree. He pleaded guilty to this charge, but the plea court granted his subsequent motion to withdraw that plea.

basis. That would not be a crime." Defendant added, "She was drunk. I guided her into the Projects and had sex with her." The court then asked further:

> "THE COURT: Okay. Is it true, sir, that you knew she was too drunk to really make a decision about whether she did or did not want to have sex?
>
> "DEFENDANT: Yes.
>
> ***
>
> "THE COURT: You could see she was mentally incapacitated apparently from drinking, is that right?
>
> "DEFENDANT: Yes."

Defendant confirmed that he nevertheless "went ahead and had sexual intercourse with her." He further confirmed that he was pleading guilty because he was guilty of the charge. Defendant was arraigned as a second felony offender and certified as a sex offender.

Defendant now seeks to have his plea set aside. He argues that his plea violated his constitutional right to due process because it was not entered knowingly, intelligently and voluntarily. More specifically, he maintains that the allocution negated a key element of the offense of second degree rape, that the victim was "mentally incapacitated," because the allocution did not establish that the victim became intoxicated involuntarily.

Contrary to defendant's claim and the dissent's focus on an

"isolated portion" (*People v Seeber*, 4 NY3d 780, 781 [2005]) of the allocution, defendant's plea did not *negate* the "mentally incapacitated" element of rape in the second degree. "[M]erely showing that the defendant did not expressly admit a particular element of the crime in the factual allocution is not sufficient, by itself, to raise a constitutional claim" (*People v Moore*, 71 NY2d 1002, 1005 [1988]; *see also People v Lopez*, 71 NY2d 662, 666 n 2 [1988]). Rather, "all of the circumstances surrounding the plea must be considered to determine whether the defendant understood the nature of the charges against him" (*People v Moore*, 71 NY2d at 1006).

Here, the allocution's failure to address how the victim became intoxicated does not warrant vacatur of the plea. Indeed, "all of the circumstances surrounding the plea" demonstrated that defendant "understood the nature of the charges against him" (*People v Moore*, 71 NY2d 1002, 1005 [1988]). Defendant's extensive experience with the criminal justice system, the favorable terms of the plea bargain, the allocution itself and the protracted history of this case – including defendant's prior plea – all indicate that defendant entered his plea voluntarily, knowingly and intelligently (*see People v Seeber*, 4 NY3d at 780). Although the crime to which defendant pleaded guilty is not a lesser included offense of the first-degree rape counts in the indictment, it shared common elements with those counts, it

involved the same victim and "essentially the same factual circumstances" (*People v Hahn*, 10 AD3d 809, 810 [2004], *lv denied* 3 NY3d 757 [2004]). Thus, the plea was not jurisdictionally defective.

All concur except Renwick and Abdus-Salaam, JJ. who dissent in a memorandum by Abdus-Salaam, J. as follows.

Abdus-Salaam, J. (dissenting)

I would reverse, vacate the plea, and remand for further proceedings consistent herewith.

Contrary to the majority's analysis, defendant's factual recitation during his plea allocution did, in fact, negate an essential element of the crime to which he was pleading guilty. Thus, the court had a duty to inquire further to ensure that defendant understood the nature of the charge and that his plea was intelligently entered (*see People v Lopez*, 71 NY2d 662, 666 [1988]). To be guilty of second-degree rape pursuant to Penal Law § 130.30(2), the defendant must have "engage[d] in sexual intercourse with another person who is incapable of consent by reason of being . . . mentally incapacitated." The term "mentally incapacitated" has a specific definition under the Penal Law; a person is "mentally incapacitated" if she "is rendered temporarily incapable of appraising or controlling [her] conduct owing to the influence of a narcotic or intoxicating substance *administered to [her] without [her] consent*, or to any other act committed upon [her] without [her] consent" (Penal Law § 130.00[6] [emphasis added]).

The allocution and all of the pre-plea evidence in this case indicates that the victim became intoxicated when she voluntarily consumed alcohol before defendant encountered her on the sidewalk in front of a bar and they had sex in the lobby of a building.

As is amply illustrated by the colloquy between the court and defendant, as set forth in the majority opinion, the sexual encounter with the victim did not conform with the statutory definition of "mentally incapacitated." Thus, the court should not have accepted the plea "without making further inquiry to ensure that defendant [understood] the nature of the charge and that the plea [was] intelligently entered" (*Lopez*, 71 NY2d at 666).

Significantly, rather than confirming that defendant understood the elements of the offense to which he was pleading, the court indicated its own misunderstanding of the statutory definition of "mentally incapacitated" when it asked defendant whether he had encountered the victim in an intoxicated state, and then further inquired whether he knew that "she was too drunk to really make a decision about whether she did or did not want to have sex" and whether he "could see she was mentally incapacitated apparently from drinking" but "went ahead and had sexual intercourse with her anyway." The majority glosses over the court's evident misunderstanding of the elements of rape in the second degree and asserts that I have focused on an "isolated portion" of the allocution. It is difficult to understand the majority's position that defendant's plea was knowing and voluntary when the court itself did not understand the nature of the charge to which defendant was pleading. I cannot agree with

the majority's assessment that defendant's "extensive experience with the criminal justice system" and defendant's prior plea in this case show that defendant understood "the nature of the charges against him" (*People v Moore*, 71 NY2d 1002, 1005 [1988]), when the court itself lacked that understanding.

As for the majority's reference to the favorable terms of the plea bargain, that defendant had sex with someone who was very drunk does not make him guilty of first-degree rape, and thus, his plea to second-degree rape was not necessarily a favorable outcome. Even if it were, and defendant wished to plead guilty to avoid the risk of conviction of the more serious crime charged in the indictment, "[t]he fact remains, however, that, before accepting a plea of guilt where the defendant's story does not square with the crime to which he is pleading, the court should take all precautions to assure that the defendant is aware of what he is doing. Manifestly, no cautionary effort was here made" (*People v Serrano*, 15 NY2d 304, 310 [1965]).

In sum, the failure of the court to explain to defendant the critical element of "mentally incapacitated," and to make further inquiry to ensure that defendant understood the nature of the charge and the plea requires vacatur of the plea (*id.* at 310; *see*

also People v Lawrence, 192 AD2d 332, 333 [1st Dept 1993], *lv denied* 81 NY2d 1075 [1993]; *compare People v Atkins*, 92 AD3d 551 [1st Dept 2012]) *lv denied* 19 NY3d 957 [2012]) especially under these circumstances where the technical, statutory definition of the crime does not conform with its common-sense meaning.

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

ENTERED: OCTOBER 23, 2012

CLERK

Mazzarelli, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

8069-
8070 Warren Cole, Index 650100/11
Plaintiff-Appellant,

-against-

Harry Macklowe, et al.,
Defendants-Respondents.

_____

Shapiro Forman Allen & Sava LLP, New York (Robert W. Forman of counsel), for appellant.

Akin Gump Strauss Hauer & Feld LLP, New York (Sean E. O'Donnell of counsel), for respondents.

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Order, Supreme Court, New York County (Jane S. Solomon, J.), entered November 17, 2011, which granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied. Appeal from order, same court (Cynthia Kern, J.), entered March 2, 2012, which, to the extent appealable, denied plaintiff's motion for renewal, unanimously dismissed, without costs, as academic.

Like parties to any contract, partners may fix their partnership rights and duties by agreement (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Accordingly, when the agreement between partners is clear, complete and unambiguous, it should be enforced according to its terms (*id*. at 528).

Here, section 11.1 of the limited partnership agreement

between the plaintiff and defendant MAK West 55th Street Associates (MAK West) states that upon termination of plaintiff's employment "he shall sell to [defendant Harry Macklowe] . . . and [Macklowe] . . .shall purchase . . . [plaintiff's] interest in the partnership pursuant to section 11.2." Section 11.2 states that "[plaintiff's] interest shall be purchased . . . [for] the amount that he would receive if the partnership sold all of its property for amounts equal to the amounts that [Macklowe] determines it would have received for such property in arm's length sales on the date of the [t]ermination." According to section 11.3 of the agreement, closing of the transaction was to occur no later than 90 days after plaintiff's termination.

The agreement thus provides that within 90 days of the termination of plaintiff's employment, it was the intent of the parties that plaintiff, via a sales transaction, would be divested of his partnership interest in MAK West. This intent, however, by the very terms of the agreement, could only be effectuated by following the mechanism prescribed, a sales transaction. The parties agree that plaintiff never sold, and Macklowe never bought, plaintiff's partnership interest upon plaintiff's termination. However, they disagree as to result of such failures.

Contrary to the defendants' assertion, plaintiff's failure to sell his interest did not divest him of his partnership interest. Not only is the agreement void of any language mandating this result, but such interpretation of the agreement runs afoul of the well settled principle that a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties (*Matter of Lipper Holdings, LLC v Trident Holdings,* 1 AD3d 170, 171 [1st Dept 2003]). In the absence of express language divesting plaintiff of his partnership interest for his failure to sell his interest, such a result is simply contrary to basic contract law. Moreover, the interpretation of the agreement urged by defendants - allowing them to acquire plaintiff's partnership interest absent the consideration expressed in the agreement - represents a windfall to the defendants that is absurd, not commercially reasonable and contrary to the express terms of the agreement and thus the intent of the parties. Accordingly, plaintiff continues to hold his partnership interest. Therefore, the motion court erred in dismissing the complaint.

While it is certainly true that "[c]ontract damages are ordinarily intended to give the injured party the benefit of the

bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed" (*Goodstein Constr. Corp. v City of New York*, 80 NY2d 366, 373 [1992]), we nevertheless reject defendants' contention that the foregoing principle of law serves to limit plaintiff's recovery to the value of his partnership interest on the date of his termination. Were plaintiff suing for defendants' failure to buy his partnership interest, then, as defendants posit, his recovery would be capped at the value of his partnership interest on the date of his termination rather than the present value of his interest. However, plaintiff does not sue for such a breach, suing instead for defendants' breach of the agreement insofar as they failed to provide him, a partner, with his share of the distribution made

by them in 2008 when they sold the property constituting the partnership's sole asset.

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

ENTERED: OCTOBER 23, 2012

CLERK

Andrias, J.P., Sweeny, Catterson, Moskowitz, Manzanet-Daniels, JJ.

8176 The People of the State of New York, Dkt. 62286C/08
Respondent.

-against-

John Ortiz,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered May 4, 2009, convicting defendant, after a nonjury trial, of attempted criminal contempt in the second degree, and sentencing him to a term of one year's probation, unanimously reversed, on the facts, the conviction vacated, and the indictment dismissed.

The verdict was against the weight of the evidence. "[A]n acquittal would not have been unreasonable" as there was conflicting testimony and a lack of evidence establishing defendant's guilt beyond a reasonable doubt (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]; *People v Bleakley*, 69 NY2d 490, 495 [1987]). The victim claimed that, while she was in the hospital, defendant made a threatening phone call to her, in

violation of an order of protection. However, she could not identify the time defendant made the call or whether she received the call on her cell phone or on the phone in her hospital room. There was also no documentary proof establishing that defendant made the call.

Moreover, the victim's testimony was inconsistent with defendant's documented conduct during the months leading up to the incident. Notably, defendant and the victim were going through a bitter divorce. However, defendant's conduct in connection with the divorce demonstrated his intent to act lawfully, contrary to the victim's testimony.

While we afford great deference to the court's opportunity to hear testimony and observe demeanor, our review of the record finds the victim's testimony incredible.

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

ENTERED: October 23, 2012

CLERK

Saxe, J.P., Sweeny, Richter, Abdus-Salaam, Román, JJ.

8235 In re Justique R.,

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

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 26, 2011, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal sexual act in the first degree, sexual abuse in the first and third degrees and sexual misconduct, and placed him on enhanced supervision probation for a period of 18 months, unanimously affirmed, without costs.

The court's finding was supported by legally sufficient evidence. The five-year old complainant's unsworn testimony was properly permitted given that the complainant's response during the *voir dire* demonstrated a sufficient level of

"intelligence and capacity to justify the reception thereof" (Family Court Act § 343.1[2]; CPL 60.20[1]; *People v Paul*, 48 AD3d 833, 834 [2d Dept 2008]). The complainant testified that she was in her mother's bedroom watching television when the 13-year-old appellant came into the room, pulled down her pants, and "put his tail in my butt." When asked further questions about "tails," she explained that girls do not have "tails" and that boys "pee and do dee" out of their tails. She described that the "tail" felt hard and it hurt when appellant put it in her butt.

The complainant's testimony was corroborated by the testimony of her mother (Family Court Act § 343.1[3]; *People v Paul*, 48 AD3d at 834) who stated that on the evening of the incident, appellant, an extended family member who often plays with her children, was in one bedroom of her apartment playing video games with her 11-year-old son while her daughter, the complainant, was in another bedroom watching television with the door open. At one point during the evening, she looked through the open bedroom door and saw the complainant, who was on the bed, on her hands and knees in a bent over position, with her butt in the air, naked from the waist down, with appellant directly behind her. Appellant was fully clothed, his hands were at his sides, and the top button of his pants was unfastened.

The complainant's mother further testified that she asked appellant what he was doing, and he "stumbled, kind of backed away from [complainant] and started to stutter." After she repeated the question, he answered that he had entered the bedroom to ask the complainant if he could borrow a video game. She told appellant to leave, and after he left, she asked her daughter what happened. After hearing what appellant had done, she called the police and took the complainant to the hospital, where she was examined. The record indicates that a rape kit was prepared but was never sent out for testing. The medical records show that the complainant told a doctor that appellant "put his tail on [her] butt" and "stuck his tongue in [her] butt."

The presentment agency met its burden of proof beyond a reasonable doubt. We reject appellant's argument that the inconsistencies in the complainant's testimony, which we find to be minor, render the Family Court's fact-finding determination

against the weight of the evidence (*see Matter of Andre*, 282 AD2d 273 [1st Dept 2001], *lv denied* 96 NY2d 717 [2001]; *compare Matter of Arnaldo R.*, 24 AD3d 326 [1st Dept 2005]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8342-8343 The People of the State of New York, Respondent,

-against-

Isaac Morales, Defendant-Appellant.

Ind. 1152/09
07653C/09

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

Robert T. Johnson, District Attorney, Bronx (Richard J. Ramsay of counsel), for respondent.

Judgments, Supreme Court, Bronx County (John N. Byrne, J. at pleas; Steven W. Paynter, J. at sentencing), rendered August 11, 2009, convicting defendant of failing to register or verify registration information under the Sex Offender Registration Act and menacing in the second degree, and sentencing him to an aggregate term of one year, unanimously affirmed.

Nothing in the statements of defendant or his counsel at the plea, at an intervening court appearance, or at sentencing, cast doubt on defendant's guilt, negated any element of the crimes or amounted to a plea withdrawal application. As such, the court was under no obligation to make any further inquiry (*see People v*

Toxey, 86 NY2d 725 [1995]; *People v Lopez*, 71 NY2d 662, 666 [1988]). Nor does the alleged ambiguity in the factual allocution require reversal, as it does not suggest that the plea was improvident or baseless, or undermine the voluntariness of the plea (*see People v Seeber*, 4 NY3d 780, 781 [2005]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8344-
8345

In re Alexander L.,

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

Andrea L.,
Respondent-Appellant,

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Dora M. Lassinger, East Rockaway, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Jody Adams, J.), entered on or about November 16, 2011, which, upon a fact-finding determination that respondent mother neglected the subject child, placed the child in the custody of the Commissioner of Social Services of the City of New York until the date of the next permanency hearing, unanimously affirmed, without costs.

The finding of neglect based on respondent's failure to provide adequate shelter is supported by a preponderance of the evidence and is, by itself, sufficient to support the finding of

neglect (*see Matter of Tia B.*, 257 AD2d 366 [1st Dept 1999]). The record establishes that although respondent was repeatedly advised that her unstable living situation was the cause of her son's progressively deteriorating mental condition, she remained with the child in the New York City homeless shelter system for nearly five years and unreasonably refused suitable permanent housing options.

Respondent's well documented alcohol abuse as well as her erratic and often violent behavior toward her son and others, is an independent basis for a finding of impairment, and a risk thereof, to the child's mental, emotional, and physical well being (*see* FCA §1012[f][i][B]; *Matter of Jared S. [Monet S.]*, 78 AD3d 536 [1st Dept 2010], *lv denied* 16 NY3d 705 [2011]). In addition, respondent's abrupt termination of her son's weekly psychotherapy sessions after more than three years, with no available replacement, particularly at a time when his emotional state was fragile, placed him in imminent risk of emotional

impairment (*see Matter of Perry S. v Cynthia S.*, 22 AD3d 234, 235 [1st Dept 2005]; *In re LeVonn G.*, 20 AD3d 530, 530-31 [2nd Dept 2005]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8346 In re Garba Casting Co., Inc., Index 106554/11
Petitioner,

-against-

Veronica Mosquera, et al.,
Respondents.

_____

Goldstein & Handwerker, LLP, New York (Steven T. Goldstein of counsel), for petitioner.

Caroline J. Downey, Bronx (Toni Ann Hollifield of counsel), for respondents.

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Determination of respondent New York State Division of Human Rights, dated April 8, 2011, which, after a hearing, inter alia, found that petitioner had unlawfully discriminated against respondent Veronica Mosquera, unanimously confirmed, the petition denied and the proceeding brought pursuant to Executive Law § 298 and 22 NYCRR 202.57 (transferred to this Court by order of the Supreme Court, New York County [Shlomo S. Hagler, J.], entered September 13, 2011), dismissed, without costs.

Substantial evidence supports the finding that petitioner had retaliated against Mosquera for her refusal to convince another employee, her nephew, to drop his discrimination complaint against petitioner, and for her statement to petitioner that she would be a witness for her nephew (*see Matter of CUNY-*

Hostos Community Coll. v State Human Rights Appeal Bd., 59 NY2d 69, 75 [1983]). We reject petitioner's contention that Mosquera's claim must fail simply because her nephew's complaint was ultimately found to be without merit (*see Modiano v Elliman*, 262 AD2d 223 [1st Dept 1999]). Indeed, there is substantial evidence that Mosquera reasonably believed that her nephew was fired for discriminatory reasons and that she was entitled to the protections of the Human Rights Law (*see id.*).

We have considered petitioner's remaining arguments, including its contention that Mosquera was terminated for nondiscriminatory reasons, and find them unavailing.

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8347-
8347A

Algi Crawford,
Plaintiff-Respondent,

Index 114790/09

-against-

New York County District Attorney,
Defendant-Appellant,

New York City, et al.,
Defendants.

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for appellant.

Goldberger & Dubin, P.C., New York (Stacey Van Malden of counsel), for respondent.

Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered on or about March 24, 2011, which denied defendant New York County District Attorney's motion to dismiss the complaint as against him, unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, same court and Justice, entered on or about June 28, 2011, which, upon reargument, adhered to the original determination, unanimously dismissed, without costs, as academic in light of the foregoing. The Clerk is directed to enter judgment dismissing the complaint as against the District Attorney.

During a traffic stop, the police recovered a handgun from

the glove compartment of plaintiff's vehicle. After being indicted for criminal possession of a weapon in the second degree, plaintiff successfully moved to suppress the gun, resulting in the dismissal of the indictment. Plaintiff then commenced this action alleging violation of his constitutional rights under 42 USC § 1983, and malicious prosecution.

As to the § 1983 claim, to the extent discernible, plaintiff appears to allege that the District Attorney's adopted policy of "prosecut[ing] all gun charges, regardless of the circumstances," encouraged illegal searches and seizures by the police and the overzealous prosecution of illegal gun possession cases by his assistant district attorneys (ADAs), and that this policy resulted in the violation of plaintiff's constitutional rights. Plaintiff also appears to be suing the District Attorney as an official policy maker for New York County and as the supervisor and trainer of the ADAs who prosecute cases on his behalf. Plaintiff does not allege that the District Attorney was personally involved in the illegal search or the prosecution of the criminal matter.

However, plaintiff failed to allege the existence of a constitutionally offensive policy, and the news article he submitted in which the District Attorney is quoted as saying that

his office had made increased efforts to prosecute illegal gun possession cases is insufficient to show the existence of such a policy. In addition, to the extent plaintiff alleges that the District Attorney promulgated policies allowing police officers to engage in illegal searches, the allegation is unavailing, since the District Attorney does not set final policy for the New York City Police Department (*see* County Law § 700); that authority rests with the Police Commissioner (*see* New York City Charter § 434[b]).

To the extent plaintiff alleges that the District Attorney discourages ADAs from being respectful of individuals' constitutional rights when prosecuting gun possession cases, the allegation is unavailing because that managerial act, although administrative in nature, is subject to absolute immunity, since it has an intimate connection with prosecutorial activity (*see Van de Kamp v Goldstein*, 555 US 335, 344-346 [2009]).

The claim for malicious prosecution is barred by County Law § 54, since plaintiff does not allege that the District Attorney was personally involved, and the only other basis for the claim

is a respondeat superior theory (*see Shmueli v New York City Police Dept.*, 295 AD2d 271 [1st Dept 2002]; *Tucker v City of New York*, 184 Misc 2d 491 [Sup Ct, NY County 2000]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8348 In re Khaliyah Vjelytt W.-D.,

A Child Under Eighteen Years
of Age, etc.,

Jasmine W.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

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

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Andrew H. Rossmer, Bronx, attorney for the child.

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Order of disposition, Family Court, Bronx County (Jane Pearl, J.), entered on or about November 18, 2011, which, following a fact-finding determination that respondent mother had neglected the subject child, released the child to the custody of respondent, with supervision by petitioner agency for a period of six months, unanimously affirmed, without costs.

The finding of neglect is supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]), including the police officer's testimony that respondent had assaulted her in the infant child's presence (*see* Family Ct Act § 1012[f][i][B];

Matter of Eugene L. [Julianna H.], 83 AD3d 490 [1st Dept 2011]; *Matter of Gianna C.-E. [Alonso E.]*, 77 AD3d 408 [1st Dept 2010]). There is no basis to disturb the Family Court's credibility findings or to conclude that the officer's testimony was tailored to avoid constitutional concerns (*see Matter of Kelly A. [Ghyslaine G.]*, 95 AD3d 784, 784 [1st Dept 2012]).

The Family Court properly denied respondent's application for a suspended judgment, because she had not yet completed the required services (*see Matter of Shaqualle Khalif W. [Denise W.]*, 96 AD3d 698, 699 [1st Dept 2012]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8349 James A. Ziska, et al., Index 101674/12
Plaintiffs-Appellants,

-against-

Bank of America, N.A., et al.,
Defendants-Respondents.

_____

Law Office of Carl E. Person, New York (Carl E. Person of counsel), for appellants.

Bryan Cave LLP, New York (Suzanne M. Berger of counsel), for respondents.

_____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered on or about April 24, 2012, which, in this action involving allegedly fraudulent lending and loan modification practices, granted defendants' motion to dismiss the action on the ground of forum non conveniens, without prejudice, unanimously affirmed, without costs.

The court providently exercised its discretion in dismissing the action, given that plaintiffs' tort and breach of contract claims are based on real property located in California, the claims lack a substantial nexus to New York, California law governs the claims, and the documentary evidence and witnesses are primarily located in California and states other than New York (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479

[1984], *cert denied* 469 US 1108 [1985]). That defendants may have business locations in New York, and that plaintiffs' note and deed of trust were eventually securitized by a New York trust, are insufficient to create a "factual connection between New York and the dispute" (*Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 176 [1st Dept 2004]; *see Avery v Pfizer, Inc.*, 68 AD3d 633, 634 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8350-
8350A

Leverett J. Spinac,
Plaintiff-Respondent,

-against-

The Carlton Group, LTD., et al.,
Defendants,

Carlton Advisory Services, Inc.,
Defenant-Appellant.

Index 114579/07

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

Seligson Rothman & Rothman, New York (Stewart E. Rothman of counsel), for respondent.

Judgment, Supreme Court, New York County (Emily Jane Goodman, J.), entered July 18, 2011, awarding plaintiff damages against defendant employer Carlton Advisory Services, Inc. (CAS) in the amount of $596,846.25, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered April 20, 2010, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability against CAS on the sixth cause of action for commissions earned, and an order, same court and Justice, entered July 13, 2011, which, inter alia, upon renewal and reargument, adhered to the April 20,

2010 order, severed the sixth cause of action and granted plaintiff's motion for a money judgment, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motions for partial summary judgment and for a money judgment denied, and the matter remanded for further proceedings. Appeal from the April 20, 2010 order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Initially, the motion court properly granted renewal, as the interest of justice warranted such relief in light of the employer's viable argument as to the meaning of the disputed contract terms and the new facts raised in the employer's renewal affidavits concerning, inter alia, the employer's practice and policy concerning commissions paid to an originator of client business (*see generally Mejia v Nanni*, 307 AD2d 870 [1st Dept 2003]).

The relevant contract provisions setting forth the basis for a sole originating broker to earn full commissions for originating a client, reasonably construed, as a whole, required the broker to both introduce a client to the employer and satisfy certain "responsibilities" before "a full listing . . . fee" was earned. The motion court's interpretation of the contract's "origination" term as only requiring a client introduction

improperly renders other inter-related commission provisions in the contract superfluous, including the "listing" requirement (*see generally Chimart Assoc. v Paul*, 66 NY2d 570 [1986]). Agreements should be construed as a whole to avoid excessive emphasis on particular words or phrases (*see South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]). Affidavits submitted on renewal raised triable issues as to the nature and scope of an originator's responsibilities, including the listing requirement. Conflicting affidavits also raised triable issues of fact as to whether the employer offered to pay undisputed commissions deemed to be owing, and whether plaintiff's refusal to accept such offer (notwithstanding the parties' bona fide dispute as to the extent of commissions owing), undermined the motion court's finding of willfulness on the part of the employer in not actually tendering the wages claimed to be due and owing (*see generally* Labor Law § 198-a).

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

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, P.J., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8352 The People of the State of New York, Ind. 97/10
Respondent,

-against-

Kamora Buckhalter,
Defendant-Appellant.

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

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

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about April 13, 2011,

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

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

ENTERED: OCTOBER 23, 2012

CLERK

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

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8353 Mary L. Robinson, Index 110305/10
Plaintiff-Respondent,

-against-

156 Broadway Associates, LLC,
Defendant-Appellant.

Lester Schwab Katz & Dwyer, LLP, New York (Howard R. Cohen of counsel), for appellant.

Becker & D'Agostino, P.C., New York (Michael D'Agostino of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 2, 2012, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established its entitlement to judgment as a matter of law, in this action where plaintiff was allegedly injured when, while departing for work, she slipped and fell on ice located on the top step of the exterior staircase of defendant's building. The evidence shows that a snowfall of over 10 inches ended in the early morning hours, and plaintiff's fall occurred between 6:00 a.m. and 6:30 a.m. Plaintiff failed to show that an unreasonable amount of time had elapsed from the end

of the storm to defendant's efforts to clear the premises (*see Espinell v Dickson*, 57 AD3d 252 [1st Dept 2008]; *Whitt v St. John's Episcopal Hosp.*, 258 AD2d 648 [2d Dept 1999]). Moreover, plaintiff's testimony that water dripped from the accumulated snow on the ledge above the doorway does not raise a triable issue, since defendant was entitled to the same grace period before clearing the snow and stopping the drip.

Furthermore, although it is undisputed that the handrails on the stairway were too short to comply with the Building Code, this does not warrant the denial of defendant's motion. Plaintiff slipped immediately upon placing her foot on the stairway, and never attempted to find or hold the handrail. Thus, any violation of the Building Code was not a proximate cause of her fall (*see Ridolfi v Williams*, 49 AD3d 295 [1st Dept 2008]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8354 Riccardo Squicciarini, Index 114338/11
Plaintiff-Respondent,

-against-

Diana Oreiro
Defendant-Appellant.

_____

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, White Plains (Faith G. Miller and Evan Wiederkehr of counsel), for appellant.

Burger Yagerman & Green, LLP, New York (Nancy M. Green of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Gesmer, J.), entered on or about March 14, 2008, which, to the extent appealed from as limited by the briefs, granted plaintiff father's motion for an order directing defendant mother to present the parties' two minor children and turn them over to plaintiff for their return to Italy, pursuant to Article 3 of the Hague Convention and the International Child Abduction Remedies Act (42 USC §§ 11601-11611), unanimously affirmed, without costs.

Plaintiff, an Italian citizen, and defendant, a United States citizen, resided in Rome, Italy with their two children, Diego, born in New York on July 18, 2006, and Eva, born in Italy on July 26, 2008. The parties separated in March 2010 and

maintained shared custody of the children, having agreed upon this arrangement and without a court order to this effect. On November 14, 2011, defendant left Italy with the children and relocated to New York without plaintiff's knowledge or consent.

Plaintiff filed a petition in Supreme Court, seeking the return of the children to their habitual residence in Italy where they have lived all of their lives. The petition was properly granted since petitioner met his burden of establishing by a preponderance of the evidence that the children had been wrongfully removed from their country of habitual residence (42 USC § 11603[e][1][A]; *see Gitter v Gitter*, 396 F3d 124, 130-131 [2d Cir 2005]). In opposition, defendant failed to satisfy her burden of establishing by clear and convincing evidence that a grave risk of harm to the children would result by their return to Italy (42 USC § 11603[e][2][A]). Other than the allegations contained in defendant's affidavit, there is no evidence that plaintiff verbally or physically abused defendant. To the contrary, the evidence establishes that the parties had an amicable relationship prior to defendant's departure with the children.

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: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8355 Karien Pichardo, Index 110799/10
Plaintiff-Appellant,

-against-

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

Robin Johnson, et al.,
Defendants.

Ballon Stoll Bader & Nadler, P.C., New York (Rudy A. Dermesropian of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 10, 2011, which granted defendants New York City Department of Education (DOE), Joel I. Klein, and Michelle Lloyd-Bey's motion to dismiss the complaint as against them as time-barred, unanimously affirmed, without costs.

Plaintiff failed to establish that defendants' conduct contributed to her delay in commencing this action and that therefore defendants should be estopped from asserting the defense of the one-year statute of limitations applicable to her non-tort claims of gender and disability discrimination, sexual harassment, retaliation, and breach of contract (*see Nowinski v*

City of New York, 189 AD2d 674 [1st Dept 1993]). Moreover, she failed to establish due diligence on her part in ascertaining the limitations period for commencing the action (*see Walker v New York City Health & Hosps. Corp.*, 36 AD3d 509 [1st Dept 2007]). Unlike her non-tort claims, which accrued on the date of her termination as a probationary teacher, plaintiff's negligent supervision and hiring and negligent infliction of emotional distress claims accrued on the date of the last alleged underlying act (*see* Education Law § 3813[2]; General Municipal Law § 50-I; *Jarvis v Nation of Islam*, 251 AD2d 116 [1st Dept 1998]; *Dana v Oak Park Marina*, 230 AD2d 204, 210-211 [4th Dept 1997]). The last date on which it may be reasonably inferred from the complaint that an act of harassment occurred was April 24, 2009. Since plaintiff did not commence this action until August 12, 2010, her tort claims are barred by the one-year-and-90-day statute of limitations. Plaintiff's assertion in her appellate brief that the alleged harassment continued until the date she was terminated is not supported in the record. We note that, in opposition to defendants' motion, plaintiff failed to avail herself of the opportunity to submit an affidavit or other evidence to amplify the allegations in her complaint and establish the timeliness of her claims.

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: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8356 In re Diavonni G.,

A Dependent Child Under the
Age of Eighteen Years,

Vanessa G.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

Geoffrey P. Berman, Larchmont, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

Karen Freedman, Lawyers for Children, New York (Betsy Kramer of counsel), attorney for the child.

Order of disposition, Family Court, New York County (Susan Knipps, J.), entered on or about November 15, 2011, which, on motion of the attorney for the child, modified a prior order of disposition and placed the subject child in the custody of the Commissioner of Social Services, unanimously affirmed, without costs.

The record evidence demonstrates that the continuation of the subject child in respondent mother's home is contrary to her best interests (Family Ct Act § 1061; *Matter of Shinice H.*, 194 AD2d 444 [1st Dept 1993]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8357 Raouti Mangar, Index 303966/09
Plaintiff-Appellant,

-against-

Parkash 180 LLC, et al.,
Defendants-Respondents.

Michelle S. Russo, P.C., Port Washington (Michelle S. Russo of counsel), for appellant.

White & McSpedon, P.C., New York (Frances Norek Hatch of counsel), for respondents.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered September 16, 2011, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established that the half-inch height differential at the top of a two-step exterior stairway was trivial and nonactionable (*see Trincere v County of Suffolk*, 90 NY2d 976, 977 [1997]; *Morales v Riverbay Corp.*, 226 AD2d 271 [1st

Dept 1996]). In opposition, plaintiff, who had walked on the steps twice daily for years without incident, failed to raise a triable issue of fact.

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8359 The People of the State of New York, Ind. 3750/06
Respondent,

-against-

Sheldon Harris,
Defendant-Appellant.

_____

Roger Bennet Adler, P.C., New York (Roger Bennet Adler of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Judith S. Lieb, J.), rendered August 25, 2009, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, assault in the first degree, criminal possession of a weapon in the second degree and endangering the welfare of a child, and sentencing him to a term of 25 years to life on the murder conviction, to run consecutively to concurrent terms on the remaining convictions of 22 years, 22 years, 15 years and 1 year, respectively, unanimously affirmed.

Defendant challenges the legal sufficiency of the evidence supporting his murder conviction. 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. We also find

that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and its weighing of expert testimony. The evidence supports the inference that defendant shot the deceased in the chest at close range, and that he did so with homicidal intent. Furthermore, defendant failed to prove by a preponderance of the evidence his extreme emotional disturbance defense.

The court properly exercised its discretion (*see generally People v Lee*, 96 NY2d 157, 162 [2001]) in allowing the medical examiner to express an opinion that the fatal bullet did not pass through an intermediate target, testimony that tended to refute a defense theory. Defendant argues that the witness was essentially testifying as a ballistics expert, without being qualified to do so. However, the opinion at issue did not require expertise in the workings of firearms and ammunition, but in the effect of gunshots on human tissue and the conclusions to be drawn therefrom. The medical examiner's extensive training and experience qualified her to provide such an opinion (*see People v Boozer*, 298 AD2d 261 [1st Dept 2002], *lv denied* 99 NY2d 555 [2002]). Moreover, any error in the admission of such testimony would be harmless given the overwhelming evidence of

defendant's guilt under the murder count (*see e.g. People v Sorrentino*, 93 AD3d 450 [1st Dept 2012]).

The court also properly exercised its discretion in admitting a tape of a 911 call made during this incident, in which screams are heard. The tape was relevant to corroborate some of the testimony, and it was not so inflammatory that its prejudicial effect exceeded its probative value (*see e.g. People v Alvarez*, 38 AD3d 930, 932 [3d Dept 2007], *lv denied* 8 NY3d 981 [2007].

Defendant's challenges to the prosecutor's summation are unpreserved (*see People v Romero*, 7 NY3d 911, 912 [2006]), and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]).

We perceive no basis for reducing the sentence. We have considered and rejected defendant's legal arguments relating to

his sentence, and his claim that the assault count should have been dismissed as a lesser included offense of attempted murder.

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8360 Vance Steinbergin, Index 116814/07
Plaintiff-Respondent,

-against-

Safda Ali, et al.,
Defendants-Appellants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Joelson & Rochkind, New York (Geofrey Liu of counsel), for respondent.

Order, Supreme Court, New York County (George J. Silver, J.), entered November 25, 2011, which denied defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously modified, on the law, the motion granted to the extent of dismissing plaintiff's "permanent consequential limitation" and "significant limitation" claims, and otherwise affirmed, without costs.

Defendants met their prima facie burden of demonstrating that plaintiff did not suffer a permanent right shoulder injury by submitting the affirmation of an orthopedist who found that it demonstrated a full range of motion in every plane except for one, comparing plaintiff's values to normal (*see Vega v MTA Bus*

Co., 96 AD3d 506, 507 [1st Dept 2012]; *Spencer v Golden Eagle*, Inc., 82 AD3d 589, 590-591 [1st Dept 2011]). The minor diminution in a single plane was not significant enough to constitute a serious injury (*see Canelo v Genolg Tr., Inc.*, 82 AD3d 584 [1st Dept 2011]; *Sone v Qamar*, 68 AD3d 566 [1st Dept 2009]).

Plaintiff failed to raise an issue of fact in opposition. His orthopedic surgeon found, at two follow-up visits, that plaintiff's right shoulder had "excellent range of motion" after he conducted arthroscopic surgery upon it, and no other evidence of recent limitation was offered (*see Oberly v Bangs Ambulance*, 96 NY2d 295, 299 [2001]; *Dufel v Green*, 84 NY2d 795, 798 [1995]). In any event, plaintiff concedes that he did not sustain a serious injury under the "permanent consequential" and "significant limitation" categories of Insurance Law § 5102(d).

However, defendants failed to meet their prima facie burden as to plaintiff's 90/180-day claim. Their expert did not examine plaintiff until almost four years after the accident, and, therefore, could not speak to plaintiff's condition during the relevant period (*see Quinones v Ksieniewicz*, 80 AD3d 506, 506-507 [1st Dept 2011]). In any event, plaintiff submitted the affirmation of his orthopedic surgeon, who treated him on

multiple occasions during the relevant period, and found that he was disabled. Viewing the evidence in a light most favorable to plaintiff, as we must at this procedural posture (*see Cruz v Rivera*, 94 AD3d 576 [1st Dept 2012]), and considering it in conjunction with plaintiff's testimony that he did not return to work for about two years after the accident, was confined to bed for about three months, and was confined to home for about a year and a half, plaintiff raised an issue of fact in opposition (*see Gaddy v Eyler*, 79 NY2d 955, 958 [1992]; *Alexandre v Dweck*, 44 AD3d 597 [2d Dept 2007]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8361 The People of the State of New York, Respondent, Ind. 4216/07 1468/07

-against-

Lavon Giles, Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered January 3, 2008, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the third degree and assault in the second degree, and sentencing him to an aggregate term of two years, unanimously affirmed.

Defendant made a valid waiver of his right to appeal (*see People v Ramos*, 7 NY3d 737 [2006]). The court's thorough colloquy with defendant was itself sufficient to establish the validity of the waiver. In addition, the colloquy was supplemented by a written waiver.

As an alternative holding (*see People v Callahan*, 80 NY2d 273, 285 [1992]), we reject defendant's challenges to the statutes relating to possession of gravity knives (*see People v Herbin*, 86 AD3d 446, 447-48 [1st Dept 2011], *lv denied* 17 NY3d 859 [2011]).

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Andrias, Saxe, DeGrasse, Manzanet-Daniels, JJ.

8362N Rita Scaba, Index 306861/10
Plaintiff-Respondent,

-against-

Moshe Scaba,
Defendant-Appellant.

Oved & Oved LLP, New York (Edward C. Wipper of counsel), for appellant.

Elliott Scheinberg, Staten Island, for respondent.

Appeal from order, Supreme Court, New York County (Saralee Evans, J.), entered September 20, 2011, which, inter alia, granted plaintiff's motion to direct defendant to allow plaintiff access to all digital storage media containing records of defendant's businesses and financial interests, unanimously dismissed, without costs, as moot.

Following Supreme Court's order, we stayed electronic discovery, but permitted the rest of this matrimonial action to proceed (2012 NY Slip Op 63300[U] [1st Dept 2012]). It did, and it appears that defendant's businesses provided the information sought by plaintiff in non-electronic form. Indeed, Supreme Court has concluded that discovery is complete and the matter has been referred to a referee for trial. Accordingly, since

discovery is complete, there is no actual controversy for this Court to consider (*see e.g. Matter of Dreikausen v Zoning Bd. of Appeals of City of Long Beach*, 98 NY2d 165, 172 [2002]).

Were we to consider the merits of the appeal, we would affirm the court's discovery order. Defendant contends that plaintiff's motion should have been denied for her failure to comply with 22 NYCRR 202.7. However, this Court has excused compliance with that rule where, as here, any effort to resolve the dispute non-judicially would have been futile (*see Baulieu v Ardlsey Assoc., L.P.,* 84 AD3d 666 [1st Dept 2011]).

To the extent defendant argues that plaintiff was required to identify specific electronic documents that would have been responsive to her requests, plaintiff's ability to do so was hampered by defendant's obstructive tactics. Finally, defendant's argument that plaintiff was required to submit, and the court promulgate, a protocol pursuant to which electronic discovery would be conducted, is unavailing. Plaintiff did request that the court direct electronic discovery to proceed in

accordance with *Etzion v Etzion*, 7 Misc 3d 940 [Sup Ct Nassau County 2005]), and the court providently exercised its discretion in fashioning protections for defendant in the order.

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

ENTERED: OCTOBER 23, 2012

CLERK

Tom, J.P., Mazzarelli, Moskowitz, Renwick, Abdus-Salaam, JJ.

7917-
7918 In re London Terrace Gardens, L.P., Index 109121/10
Petitioner-Appellant, 109122/10

-against-

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

- - - - -

London Terrace Gardens, L.P.,
Plaintiff-Appellant,

-against-

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

_____

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Robert D. Goldstein of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Joshua M. Wolf of counsel), for The City of New York and New York City Department of Housing Preservation and Development, respondents.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan of counsel), for New York State Division of Housing and Community Renewal, respondent.

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Order, Supreme Court, New York County (Judith J. Gische, J.), entered May 6, 2011, affirmed, without costs.

Opinion by Abdus-Salaam, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Angela M. Mazzarelli
Karla Moskowitz
Dianne T. Renwick
Sheila Abdus-Salaam, JJ.

7917-
7918
Index 109121/10
109122/10

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In re London Terrace Gardens, L.P.,
Petitioner-Appellant,

-against-

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

- - - - -

London Terrace Gardens, L.P.,
Plaintiff-Appellant,

-against-

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

_____x

Petitioner/plaintiff appeals from the order of the Supreme Court, New York County (Judith J. Gische, J.), entered May 6, 2011 which, inter alia, granted respondents/defendants' motions to dismiss the petition brought pursuant to CPLR article 78 and the plenary action.

Borah, Goldstein, Altschuler Nahins & Goidel, P.C., New York (Robert D. Goldstein, Richard M. Goldstein, Harry Frischer and Paul N. Gruber of counsel), for appellant.

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Joshua M. Wolf, Paul T. Rephen and Vincent D'Orazio of counsel), for The City of New York and New York City Department of Housing Preservation and Development, respondents.

Eric T. Schneiderman, Attorney General, New York (Sudarsana Srinivasan and Michael S. Belohlavek of counsel), for New York State Division of Housing and Community Renewal, respondent.

ABDUS-SALAAM, J.

Petitioner/plaintiff London Terrace Gardens, L.P., seeks to rescind its participation in the City's J-51 tax incentives program following the Court of Appeals decision in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]). That decision held that the owners of rent-stabilized apartments in New York City "[are] not entitled to take advantage of the luxury decontrol provisions of the Rent Stabilization Law (RSL) [Administrative Code of City of NY § 26-501 *et seq*.] while simultaneously receiving tax incentive benefits under the City of New York's J-51 program" (*id.* at 280). This Court has given retroactive effect to *Roberts* (*see Roberts v Tishman Speyer Props., L.P.*, 89 AD3d 444 [1st Dept 2011]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2011]).

This proceeding and plenary action were commenced after defendant New York City Department of Housing Preservation and Development (HPD) refused London Terrace's offer to "unwind" its J-51 arrangement with HPD and to tender repayment of all J-51 benefits, in consideration for which HPD would deem the certificates granting tax abatement benefits to be void and of no effect, thereby nullifying its prior determination of eligibility for J-51 benefits. Petitioner/plaintiff proposed that HPD declare that London Terrace "is no longer subject to the

provisions of the J-51 program, including but not limited to any rent regulatory provisions contained therein." The "unwinding" agreement would be conditioned upon entry of a final order and judgment by a court of competent jurisdiction, "directing and binding DHCR to treat [London Terrace] as subject to no other rent stabilization laws and requirements than would have been applicable had [London Terrace] never been granted J-51 benefits, with said order and judgment being binding upon the tenants as well." HPD took the position that there is no provision for voluntary withdrawal, and that rescission is not effective.

London Terrace's argument in support of rescission is that the Court of Appeals decision makes it clear that the J-51 arrangement was based on a mutual mistake of the law on the part of London Terrace, the City and HPD, and that London Terrace would not have applied for such benefits if, as a result of receiving the benefits, it would be precluded from exercising luxury decontrol. There is no provision in the J-51 program for unilateral withdrawal from the program or for repaying the tax benefits in exchange for rescission from the program nunc pro tunc (*see generally* RPTL 489; Administrative Code of the City of New York § 11-243). On the contrary, the Rules of the City of New York provide that "rent regulation [requirements] shall not be terminated by the waiver or revocation of tax benefits (28

RCNY 5-03[f][3][ii]). London Terrace asserts that it is not seeking a waiver of previously accepted benefits but instead, a finding that the benefits are deemed void ab initio. Still, in practical effect, under the guise of rescission, London Terrace is seeking a waiver, which is not permitted under the Rules of the City of New York.

Putting aside the semantics of whether London Terrace is seeking a waiver under the cloak of rescission, the remedy of rescission is not available here. The J-51 program is a tax benefit program - - there is no contract or agreement to rescind (*see* RPTL 489; *Wisconsin & Michigan Ry. Co. v Powers*, 191 US 379 [1903] [Act providing tax exemption to encourage building and operation of railroads did not establish a contract between railway and state]). London Terrace's reliance on *Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.* (81 NY2d 446 [1993]) is misplaced. In *Gould*, a teacher submitted her resignation and the school board accepted it, "all premised on a mutual mistake of fact as to a critical element: that [the teacher] was only a probationary employee" (81 NY2d at 453). As explained in *Gould*, a contract is voidable and subject to rescission where there has been a mutual mistake of fact, "[t]he idea [being] that the agreement as expressed, in some material respect, does not represent the 'meeting of the minds' of the

parties" (81 NY2d at 453 [citations omitted]). Here, there is no mutual mistake of fact.

Furthermore, even though DHCR, and perhaps also HPD, were under the same mistaken interpretation of the Rent Stabilization Law as was London Terrace prior to the Court of Appeals decision in *Roberts*, that interpretation is entirely unrelated to HPD's confirmation of London Terrace's eligibility for the J-51 program. As indicated in the J-51 Certificates issued by HPD, the presence of decontrolled units was relevant to HPD in determining *the amount* of J-51 benefits to be provided. Thus, any mistake as to the law by HPD regarding whether units could be decontrolled while receiving J-51 benefits was immaterial to HPD's decision to accept London Terrace into the J-51 program. Moreover, "CPLR 3005 'does not permit a misreading of the law by any party to cancel an agreement' (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3005, at 621)" (*Symphony Space v Pergola Props.*, 88 NY2d 466, 485 [1996], citing *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418 [1957] [under Civil Practice Act section 112-f, the predecessor statute to CPLR 3005, taxpayers were denied reimbursement for taxes paid under law subsequently held to be unconstitutional]), nor is it a basis for granting London Terrace the relief of rescission from the J-51 program.

Finally, London Terrace fails to state a cause of action under the Due Process and Takings Clauses of the United States Constitution, or pursuant to 42 USC § 1983. London Terrace alleges that without rescission, "it will have surrendered a valuable statutory right [to receive luxury decontrol], without having had an opportunity to know what the law is and to conform conduct accordingly as required by the United States Constitution." However, this Court has held that the Court of Appeals decision in *Roberts* construed a statute and did not create a new legal principle (89 AD3d 444, 446 [1st Dept 2011]; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2011]). In *Roberts* (*id*. at 445-446), we agreed with the motion court's assessment that retroactive application of the Court of Appeals decision in *Roberts* would not violate due process because it was not unforeseen or an arbitrary change in the law. While London Terrace attempts to distinguish *Roberts* and *Gersten* because in those cases, in contrast to London Terrace, which entered the program in 2003, the owners had entered the J-51 program before the DHCR enacted its regulation in 2000, judicial construction of a statute which invalidates a regulation promulgated by an agency does not create a new legal principle (*Gurnee v Aetna Life & Cas. Co.*, 55 NY2d 184, 192 [1982]).

Accordingly, the order of the Supreme Court, New York County

(Judith J. Gische, J.), entered May 6, 2011, which, inter alia, granted respondents/defendants' motions to dismiss the petition brought pursuant to CPLR article 78 and the plenary action, should be affirmed, without costs.

All concur.

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

ENTERED: OCTOBER 23, 2012

CLERK