SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 17, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Andrias, Gische, Kapnick, JJ.

14090 The People of the State of New York, Ind. 6292/06
Respondent,

-against-

James Brown,
Defendant-Appellant.

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Robert DiDio & Associates, Kew Gardens (Danielle Muscatello of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Gregory Carro, J. at speedy trial motion, suppression hearings and first trial; Ruth Pickholz, J. at second trial), rendered September 12, 2008, as amended November 7, 2008, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a persistent violent felony offender, to a term of 22 years to life, unanimously affirmed.

In denying defendant's speedy trial motion, the trial court excluded the period from July 17, 2007, when the People served

and filed an off-calendar certificate of readiness, until August 8, 2007, when they announced that they were not ready for trial. Because the court found this 22 day excludable period to be dispositive of defendant's speedy trial claim, it did not rule on other periods claimed by the People to be excludable.

Defendant argues that pursuant to *People v Sibblies* (22 NY3d 1174 [2014]), the court should have inquired further or conducted a hearing as to why the People were not ready on August 8, so that it could determine whether the previously filed certificate of readiness was illusory. Under the particular circumstances of this case, we find this argument unavailing.

In *Sibblies*, after filing an off calendar certificate of readiness on February 22, 2007, the People requested the medical records of the victim. At the next court date on March 28, 2007, the People stated that they were not ready to proceed because they were "continuing to investigate and [were] awaiting [the assault victim's] medical records" (22 NY3d at 1180). In a plurality opinion, the Court of Appeals, based on different rationales, agreed that the People's off calendar certificate of readiness was illusory on the record before them.

The three judge concurrence by Chief Judge Lippman "would hold that, if challenged, the People must demonstrate that some

exceptional fact or circumstance arose after their declaration of readiness so as to render them presently not ready for trial" at the next court appearance after filing the certificate (22 NY3d at 1178). Chief Judge Lippman found that the People's desire to strengthen their case did not satisfy this requirement.

The three judge concurrence by Judge Graffeo "would decide th[e] case on a narrower basis" (22 NY3d at 1179). While recognizing established precedent that the requirement of actual readiness under CPL 30.30 "will be met unless there is 'proof that the readiness statement did not accurately reflect the People's position'"(*id.* at 1180, quoting *People v Carter*, 91 NY2d 795, 799 [1998]) and that "there is a presumption that a statement of readiness is truthful and accurate" (22 NY3d at 1180), Judge Graffeo found the statement of readiness "illusory" because "[t]he People initially declared that they were ready for trial on February 22 but within days sought copies of the injured officer's medical records," admitted at the next calendar call that they "were not in fact ready to proceed because they were continuing their investigation" and that they "needed to examine the medical records to decide if they would pursue introduction of the records into evidence at trial", and then "gave no explanation for the change in circumstances between the initial

statement of readiness and the[ir] subsequent admission that the[y] ... were not ready to proceed without the medical records" (22 NY3d at 1181).

Following analogous precedent pertaining to plurality opinions by the United States Supreme Court, we apply the narrower approach of Judge Graffeo, which leaves intact well-settled law that a post-certificate assertion that the People are not ready does not, by itself, vitiate the previously filed certificate of readiness (*see Marks v United States*, 430 US 188, 193 [1977] ["when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds"] [internal quotation marks omitted]; *see also For the People Theatres of N.Y., Inc. v City of New York*, 6 NY3d 63, 79 [2005]).

The record shows that on July 9, 2007, the court stated that "defense counsel is currently on trial" and asked the prosecution about alternative dates. The prosecutor responded, "7/23 is good. The week of 7/30 is bad." The court adjourned the case to August 8, 2007. On July 17, the People filed and served the certificate of readiness.

On August 8, the prosecutor stated that the People were not ready for trial. The court noted that defense counsel was on trial and defendant voiced his dissatisfaction and requested new counsel. Noting that defense counsel was "very busy" and that he had been "on trial [the] last time" as well, the court granted defendant's request for new counsel and declared that, because of defendant's multiple requests for new counsel, his speedy trial time would stop running.

On the speedy trial motion, defendant's new counsel argued that even if the certificate of readiness had been filed and served properly on July 17, it was illusory because the People were not actually ready on the next court date. The court disagreed, stating that this was not a case where the People filed their certificate even though their witnesses were not ready. The court then denied defense counsel's request for a hearing.

On this record, unlike, *Sibblies*, there is no "proof that the readiness statement did not accurately reflect the People's position," so as to render the prior statement of readiness illusory (*Sibblies*, 22 NY3d at 1180 [Graffeo, J., concurring] [internal quotation marks omitted]). Rather, defense counsel merely speculated that the certificate of readiness was illusory

because the People announced that they were not ready at the next court appearance after it was filed, which is insufficient to rebut the presumption that the certificate of readiness was accurate and truthful (*see e.g. People v Acosta*, 249 AD2d 161, 161-162 [1st Dept 1998] [the defendant did not submit evidence to contradict court's findings and failed to demonstrate that the People's readiness statements were illusory], *lv denied* 92 NY2d 892 [1998]).

Indeed, the record supports an inference that the People made an initial strategic decision to proceed, if necessary, with a minimal prima facie case. At the calendar call on July 9, the prosecutor stated that July 23 was "good" for the People for hearing and trial. The filing of the certificate of readiness on July 17 was consistent with that statement. In contrast, in *Sibblies*, the People sought the injured officer's medical records within days of filing the certificate and admitted at the next court appearance that they were not ready to proceed without them. Thus, the prosecutor was required to explain the change in circumstances because if the People needed the medical records to be ready on March 28, then they could not have been ready on February 22 when the certificate of readiness was filed.

Defendant's conviction for first-degree robbery under Penal Law § 160.15(3) is supported by legally sufficient evidence and is not against the weight of the evidence. There is no reason to disturb the jury's determination that the hypodermic needle used to threaten one victim during the robbery was a dangerous instrument under PL § 10.00(13)(*see People v Nelson*, 215 AD2d 782 [2d Dept 1995]). Contrary to defendant's contention that some showing of actual injury was required, the needle may be a dangerous instrument, "regardless of the level of injury actually inflicted" (*Matter of Markquel S.*, 93 AD3d 505, 506 [1st Dept 2012], *lv denied* 19 NY3d 806 [2012]; *see also People v Molnar*, 234 AD2d 988 [4th Dept 1996], *lv denied* 89 NY2d 1038 [1997]). Even if the needle was uncontaminated and was threatened to be used by the non-HIV positive defendant, the jury could have found that it was capable of causing serious puncture wounds or transmitting any harmful disease.

Since defendant did not request a second independent source hearing for one of the victims, his claim that the court should have conducted a de novo hearing is unpreserved and we decline to review it in the interest of justice (*see* CPL 470.05[2]). As an alternative holding, we find it to be without merit. The trial court's finding that the victim had an independent source for his

identification is amply supported in the record. The victim viewed defendant face-to-face before and during the crime, on the street and in the store, and over an extended period of time, and gave a description that matched defendant's actual appearance. While he testified at the first trial that he was sure that he had correctly identified defendant in court because he had previously identified him in a lineup, which caused a mistrial, that testimony did not serve to negate his prior unequivocal testimony at the independent source hearing that he had an independent recollection of defendant from the crime itself.

The court did not improvidently exercise its discretion in denying defendant's request for an in-court lineup (*see People v Benjamin,* 155 AD2d 375 [1st Dept 1989] *lv denied* 75 NY2d 867 [1990]). The record demonstrates that the victims were able to make reliable in-court identifications without a lineup. Their consistent accounts of the robbery showed that they both had a good opportunity to view the robber's face at close range. Moreover, one victim never viewed any pretrial identification procedure, so his in-court identification could only have been based on his recollection from the night of the crime (*see People v Brooks*, 39 AD3d 428 [1st Dept 2007], *lv denied* 9 NY3d 873 [2007]).

Defendant's claim that the court unduly limited the time for his questioning during voir dire is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find it to be without merit. Unlike *People v Steward* (17 NY3d 104 [2011]), the facts of this case did not suggest a need to explore possible juror biases beyond the inquiry already performed by the court.

Defendant's claim that the court improperly prevented his counsel from asking jurors "whether the HIV allegations might affect their ability to deliberate fairly" is unpreserved and we decline to review it in the interest of justice. Nor did defense counsel complain that the court's inquiries were insufficient to properly assess whether the prospective jurors could be fair. As an alternative holding, we find that the court adequately explored the issue with the jurors (*see e.g. People v Dinkins*, 278 AD2d 43 [1st Dept 2000], *lv denied* 96 NY2d 828 [2001]), and the fact that the jury ultimately acquitted defendant of one of the alleged robberies involving the needle showed that the jurors were able to be fair.

Defendant's general objection failed to preserve a challenge to the procedure employed by the court in resolving his *Batson* application (*see People v Richardson*, 100 NY2d 847, 853 [2003];

People v McLeod, 281 AD2d 325 [1st Dept 2001], *lv denied* 96 NY2d 899 [2001]), and we decline to review it in the interest of justice. As an alternative holding we find that even if the court's *Batson* analysis was "less than ideal" (*People v Smocum*, 99 NY2d 418, 421 [2003]), the court did not prevent defendant from making a particularized objection. Furthermore, the court's finding that the prosecutor had given neutral, i.e., non-pretextual, grounds for the challenges, is supported by the record (*see e.g. People v Montalvo*, 293 AD2d 380, 381 [1st Dept 2002], *lv denied* 98 NY2d 699 [2002]).

Defendant's claim that the trial court failed to instruct the jury to consider the evidence separately with respect to each robbery and that the prosecutor commingled the evidence on summation, thereby depriving him of due process and a fair trial is unpreserved, since he did not object to the prosecutor's summation, and he did not request or object to the absence of a "no commingling" charge (*see People v Harris*, 29 AD3d 387 [1st Dept 2006] *lv denied* 7 NY3d 757 [2006]). We decline to review the claim in the interest of justice. As an alternative holding, we find that the court's charge as a whole "indicate[s] the independent nature of the crimes and the jury's obligation to consider them separately" (*People v Goodfriend*, 64 NY2d 695, 697

[1984]). Even though the prosecutor argued during summation that there were similarities between the two crimes, the jury acquitted defendant of one the two robberies, showing that jury was able to distinguish the evidence presented as to each incident (*see generally People v Santana*, 27 AD3d 308, 310 [1st Dept 2006], *lv denied* 7 NY3d 794 [2006]).

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

ENTERED: MARCH 17, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13814 The People of the State of New York, Ind. 5373/11
Respondent,

-against-

Murdaline Dasney,
Defendant-Appellant.

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Kirkland & Ellis, LLP, New York (Shireen Barday of counsel), and Scott A. Rosenberg, The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered October 22, 2012, convicting defendant, after a jury trial, of attempted assault in the first degree and assault in the second degree, and sentencing her to concurrent terms of five years and three years, respectively, 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 supports the conclusion that although intoxicated, defendant had the intent to cause serious physical injury when she stabbed the victim in the chest. The circumstances of the crime were indicative of a

deliberate attack. Moreover, immediately after the stabbing defendant engaged in purposeful efforts to cover up the crime, which provided additional support for the conclusion that defendant's intoxication did not render her incapable of forming the requisite intent (*see e.g. People v Sanchez*, 298 AD2d 130 [1st Dept 2002], *lv denied* 98 NY2d 771 [2002]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2015

CLERK

Friedman, J.P., Andrias, Saxe, Richter, Gische, JJ.

14129-
14130 Index 650363/14

Stairway Capital Management II L.P.,
Plaintiff-Appellant,

-against-

Ironshore Specialty Insurance Company,
Defendant-Respondent.

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Cole, Schotz, Meisel, Forman & Leonard, P.A., New York (Michael D. Sirota of counsel), for appellant.

D'Amato & Lynch, LLP, New York (Kevin J. Windels of counsel), for respondent.

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Orders, Supreme Court, New York County (Charles E. Ramos, J.), entered July 30, 2014, and September 29, 2014, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff, as lender and loss payee, is not itself an insured under the policy issued by defendant to the borrower, nonparty Eidos Partners, LLC. Since the Loss Payee Endorsement in the policy does not contain a provision that "the insurance policy shall not be invalidated by any act or neglect of the insured," plaintiff is merely "the designated person to whom the loss is to be paid" (*Wometco Home Theatre v Lumbermens Mut. Cas. Co.*, 97 AD2d 715, 716 [1st Dept 1983], *affd* 62 NY2d 614 [1984]).

The endorsement recognizes that as an ordinary loss payee, plaintiff is only entitled to payment of a loss that is due and payable by defendant, and that all the policy terms, including the broad arbitration clause, still apply.

Plaintiff is correct that the Intercreditor Agreement (among plaintiff, defendant, and Eidos) and the insurance policy are contemporaneous documents that must be read together (*see Abed v John Thomas Fin., Inc.*, 107 AD3d 578, 579 [1st Dept 2013]). However, nothing in the agreement changes plaintiff's status under the policy from ordinary loss payee to mortgagee or loss lender payee (*see generally White Rose Food Corp. v New York Property Ins. Underwriting Assn.*, 98 AD2d 614 [1st Dept 1983]). The purpose of the Intercreditor Agreement was to reconcile the priority of the liens granted by the borrower to the parties, not to provide a guaranty (which plaintiff was unable to obtain in negotiating the policy) that defendant would pay Eidos's debts to plaintiff regardless of whether there was a covered loss payable to Eidos, in whose shoes plaintiff stands. Nor does the agreement change the fact that the Loss Payee Endorsement expressly defines plaintiff's role under the policy as designated loss payee after the covered loss is determined in arbitration.

in any event, plaintiff is collaterally estopped from relitigating this issue (*see Sun Ins. Co. of N.Y. v Hercules Sec. Unlimited*, 195 AD2d 24, 31-32 [2d Dept 1993]). In granting defendant's motion to compel arbitration, the federal district court rejected plaintiff and Eidos's argument that plaintiff was the real party in interest (citing *Wometco*, 97 AD2d at 716).

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14235 The People of the State of New York, Ind. 3024/12
Respondent,

-against-

John Oduro,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 17, 2012, convicting defendant, upon his plea of guilty, of aggravated unlicensed operation of a motor vehicle in the first degree, and sentencing him to a term of probation of five years, unanimously reversed, on the law, the plea vacated and the matter remanded for further proceedings.

As the People concede, the plea was defective because the court did not inform defendant of the length of the term of probation that he would be receiving *(see People v Hartnett*, 16 NY3d 200, 205 [2011]).

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14236 Hamilton Heights Funding LLC, as Assignee of People's United Bank, as Successor by Merger to Bank of Smithtown, Plaintiff-Respondent, Index 116909/09

-against-

147 W. 129 St. Apt. Inc., Defendant-Respondent,

State of New York Department of Taxation and Finance, et al., Defendants,

Kourosh Gouyghadosh, Nonparty Appellant.

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Kourosh Gouyghadosh, appellant pro se.

Solomon & Tanenbaum, P.C., White Plains (Clifford M. Solomon of counsel), for Hamilton Heights Funding LLC, respondent.

Joseph E. Ruyack III, Chester, for 147 West 129th St. Apt. Inc., respondent.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered February 25, 2014, which vacated a prior foreclosure sale and directed that the subject property be re-sold at public foreclosure auction, unanimously affirmed, without costs.

There is no support in the record for appellant's contention that plaintiff waived appellant's default at the March 25, 2013 closing by agreeing to extend his time to close beyond March 25,

2013. The parties' agreement provided that it could not be modified orally, and the record discloses no written agreement to extend appellant's time to close beyond March 25, 2013 (*see* General Obligations Law § 15-301; *Nassau Beekman LLC v Ann/Nassau Realty LLC*, 105 AD3d 33, 39 [1st Dept 2013]). Moreover, even if the agreement permitted oral modification, it would not avail appellant, since there is no evidence that, after appellant defaulted, plaintiff orally agreed to grant him an extension of time to close.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14239 General Electric Capital Business Asset Funding Corporation of Connecticut, et al.,
Plaintiffs-Respondents,

-against-

Kazi Family LLC, et al.,
Defendants,

Zubair Kazi,
Defendant-Appellant.

Index 600785/10

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Richard A. Kraslow, P.C., Melville (Richard A. Kraslow of counsel), for appellant.

Reed Smith LLP, New York (Christopher A. Lynch of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered October 11, 2013, which denied defendant Zubair Kazi's (defendant) motion for, among other things, an evidentiary hearing to determine whether payments made by and/or on behalf of defendant and/or certain debtors were applied by plaintiffs to satisfy a judgment against defendant and to determine the amount of any overpayment of the judgment, unanimously affirmed, with costs.

The motion court properly denied defendant's motion to the extent he sought a hearing regarding his alleged overpayment of a

judgment against him. Defendant has not provided competent evidence to support his conclusory allegation that he overpaid the judgment (*see Susi Contr. Co. v Hartford Acc. & Indem. Co.*, 172 AD2d 255, 256 [1st Dept 1991], *appeal dismissed* and *lv denied* 78 NY2d 984 [1991]).

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14240 The People of the State of New York, Ind. 5001/11
Respondent,

-against-

Wilfredo Hernandez,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about January 19, 2012,

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

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

ENTERED: MARCH 17, 2015

CLERK

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

CORRECTED ORDER - MAY 12, 2015

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14241 Turner Construction Company, et al., Index 106513/09
Plaintiffs-Appellants,

-against-

The Harleysville Worcester Insurance Company,
Defendant-Respondent,

J.E.S. Plumbing & Heating Corp.,
Defendant.

_____

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas Hurzeler of counsel), for appellants.

Milber Makris Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for respondent.

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Appeal from order and judgment (one paper), Supreme Court, New York County (Joan M. Kenney, J.), entered October 3, 2013, declaring that defendant Harleysville Worcester Insurance Company is not obligated to defend or indemnify plaintiffs in the underlying personal injury action, and dismissing the complaint as against it, deemed appeal from judgment, entered November 26, 2013 (CPLR 5501[c]), dismissing the complaint as against Harleysville, and, so considered, said judgment unanimously modified, on the law, to declare that Harleysville is not obligated to defend or indemnify plaintiffs in the underlying action, and otherwise affirmed, without costs.

Even if all the plaintiffs in this action had additional insured status under the insurance policy issued by defendant Harleysville, they would not be entitled to coverage because they failed to give Harleysville notice of the occurrence as soon as practicable, as required by the policy (*see Tower Ins. of N.Y. v Amsterdam Apts., LLC*, 82 AD3d 465 [1st Dept 2011]). Plaintiffs did not notify Harleysville of the injured worker's accident until June 25, 2008, nine months after the accident occurred and more than two months after the personal injury action was commenced, on April 15, 2008.

Plaintiffs' belief that no claim would be asserted against them was not reasonable (*see e.g. Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 635 [1st Dept 2011]). They were aware that the injured claimant was **on a gurney and removed from the construction site by boat and transported to the hospital by ambulance on the day of the accident**. We have considered plaintiffs' remaining contentions and find them unavailing.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14242- Index 401336/05
14243-
14243A Stephane Cosman Connery, et al.,
Plaintiffs-Respondents,

-against-

Burton S. Sultan,
Defendant-Appellant.

_____

Michael H. Zhu, P.C., New York (Michael H. Zhu of counsel), for appellant.

Burton S. Sultan, appellant pro se.

Jacobs & Burleigh LLP, New York (Zeynel M. Karcioglu of counsel), for respondents.

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Judgment, Supreme Court, New York County (Marcy S. Friedman, J.), entered December 3, 2012, in plaintiffs' favor, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered November 28, 2012, which decided the parties' motions addressed to the report of the Special Referee, unanimously dismissed, without costs, as subsumed in the appeal from the judgment. Appeal from order, same court and Justice, entered February 6, 2013, which denied defendant's motion to reargue (denominated a motion to renew and reargue), unanimously dismissed, without costs, as taken from a nonappealable order.

As the action had not been discontinued, the court properly granted enforcement of the stipulation of settlement (*Teitelbaum Holdings v Gold*, 48 NY2d 51 [1979]). Because the court's power to do so was inherent, it was not necessary that the stipulation provide for the court to retain the power to enforce the settlement. The referee's findings, which were based largely on a finding of credibility, were properly upheld (*see Matter of Jones v Blake*, 120 AD3d 415 [1st Dept 2014], *lv denied* 23 NY3d 908 [2014]). Defendant's claim that he was denied the opportunity to present evidence at the hearing is unsupported, and his challenge to the referee's calculations was made, improperly, for the first time in the appellate reply brief.

We deny plaintiff's request for sanctions on appeal.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14244 Benigno Pol, et al., Index 305957/10
Plaintiffs-Appellants-Respondents,

-against-

City of New York,
Defendant-Respondent-Appellant.

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Lisa M. Comeau, Garden City, for appellants-respondents.

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered October 7, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the Labor Law § 241(6) cause of action insofar as predicated upon Industrial Code (12 NYCRR) § 23-3.3(c), and denied the motion as to the § 241(6) claim predicated upon 12 NYCRR 23-1.10(a), unanimously modified, on the law, the motion granted as to the claim predicated upon 12 NYCRR 23-1.10(a), and otherwise affirmed, without costs. The Clerk is directed to enter judgment in favor of defendant dismissing the complaint.

Plaintiff Benigno Pol was injured during the course of replacing a component of the subway track system that allows

trains to switch tracks. Dismissal of that part of the Labor Law § 241(6) claim predicated upon 12 NYCRR 23-3.3(c) was proper because the work plaintiff was engaged in did not constitute demolition work as defined by the Industrial Code (*see* 12 NYCRR 23-1.4[b][16]), and therefore 12 NYCRR 23-3.3(c) is inapplicable (*cf. Medina v City of New York*, 87 AD3d 907 [1st Dept 2011]; *see also Joy v City of New York*, 17 AD3d 300 [1st Dept 2005], *lv denied* 5 NY3d 707 [2005]).

The claim insofar as it is predicated upon 12 NYCRR 23-1.10(a) should have also been dismissed because the tools being used by plaintiff and his partner had flat and/or round edges, and thus, that section of the Industrial Code is inapplicable to the facts of this case.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14245 The People of the State of New York, Ind. 2467/12
Respondent,

-against-

Reina Ramos,
Defendant-Appellant.

_____

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about September 13, 2012,

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

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

ENTERED: MARCH 17, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14247 The People of the State of New York, Ind. 2479/12
Respondent,

-against-

Christian D. Woych,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Laura Springer 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 (Laura Ward, J.), rendered on or about July 15, 2013,

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

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

ENTERED: MARCH 17, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14248 Travelers Property Casualty Company of America as subrogee of Ann Taylor Retail, Inc., etc., Plaintiff-Respondent, -against- Sanco Machanical, Inc., Defendant-Appellant. Index 159207/12

_____

Havkins Rosenfeld Ritzert & Varriale, LLP, New York (Gregg S. Scharaga of counsel), for appellant.

Sheps Law Group, Melville (Robert Sheps of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 30, 2013, which denied defendant's motion to dismiss the complaint, unanimously modified, on the law, to dismiss the "res ipsa loquitur" cause of action, as well as the first cause of action only to the extent it sounds in gross negligence, and otherwise affirmed, without costs.

Plaintiff's "res ipsa loquitur" cause of action should be dismissed, because res ipsa loquitur is a not a separate theory of liability (*see Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 299 [1st Dept 2007]). However, plaintiff may invoke the doctrine of res ipsa loquitur where appropriate in this action (*see id.*). As to gross negligence, plaintiff failed to plead

facts sufficient to support said claim.

The motion court correctly denied all other aspects of defendant's motion to dismiss. The action, involving a flood at an Ann Taylor retail store, is not time-barred, as it was commenced within three years of the date of the accident (*see* CPLR 214[4]; *Town of Oyster Bay v Lizza Indus., Inc.*, 22 NY3d 1024, 1031 [2013]). Nor is the action barred by the doctrine of collateral estoppel or res judicata. The parties agreed that plaintiff would discontinue its first action against defendant without prejudice to reinstating its claims. Accordingly, it would be inequitable to preclude plaintiff from bringing this action against defendant (*see Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 14 [2008]).

We have considered defendant's remaining arguments, including its contention that plaintiff failed to state a claim against it for common law negligence, and find them unavailing.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14250-
14250A In re Kaiyeem C., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Ndaka C.,
Respondent-Appellant,

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

_____

Aleza Ross, Patchogue, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for respondent.

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

_____

Order of disposition, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about June 19, 2012, which upon a fact-finding determination that respondent mother abused and neglected her daughter and derivatively abused and neglected her sons, placed the children in the custody of the Commissioner of Social Services until completion of the next permanency hearing, unanimously affirmed, insofar as it brings up for review the fact-finding determination, and the appeal therefrom otherwise dismissed as moot, without costs. Appeal from fact-finding

order, same court and Judge, entered on or about July 27, 2011, unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Since the Family Court continued the children's placement in foster care after conducting subsequent permanency hearings, respondent's challenge to the June 19, 2012 dispositional order is moot (*see Matter of Jonathan S. [Ismelda S.]*, 79 AD3d 539 [1st Dept 2010]; *Matter of Qiana C.*, 46 AD3d 479, 480 [1st Dept 2007]). Thus, the appeal is limited to review of the fact-finding determination (*see Matter of Brianna R. [Marisol G.]*, 78 AD3d 437, 437-439 [1st Dept 2010], *lv denied* 16 NY3d 702 [2011]).

Petitioner demonstrated by a preponderance of the evidence that on December 19, 2010, respondent abused and neglected her daughter by causing the child to sustain second degree immersion burns to both feet. The testimony of petitioner's expert, who was the pediatrician who examined and treated the child when she was brought to the emergency room on the evening of the incident, established that the injuries were not sustained accidentally (*see Matter of Angelique H.*, 215 AD2d 318, 319-329 [1st Dept 1995]; *Matter of Vincent M.*, 193 AD2d 398, 402 [1st Dept 1993]). Moreover, the testimony established that the child's injuries could not have been caused as suggested by respondent (*see Matter*

of Benjamin L., 9 AD3d 153, 154-159 [1st Dept 2004]).

In light of the nature and severity of the abuse and neglect inflicted by respondent upon her daughter, the finding of derivative abuse and neglect as to the other children was proper, even absent direct evidence that respondent had actually abused and neglected them (*see Matter of Quincy Y.*, 276 AD2d 419 [1st Dept 2000]).

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: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14251 In re Eugene D.,

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

_____

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

_____

Order, Family Court, New York County (Susan R. Larabee, J.), entered on or about June 9, 2014, 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 assault in the second degree (two counts), criminal possession of a weapon in the fourth degree, menacing in the second degree, assault in the third degree, criminal mischief in the fourth degree (three counts), resisting arrest and menacing in the third degree, and placed him with the Office of Children and Family Services for a period of 18 months, unanimously modified, on the law, to the extent of vacating the finding as to resisting arrest and dismissing that count of the petition, and otherwise affirmed, without costs.

Except as indicated, the court's fact-finding determination 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 court's credibility determinations. Appellant's intent to injure his grandmother could be readily inferred from the totality of his violent conduct (*see e.g. Matter of Marie K.*, 19 AD3d 149 [1st Dept 2005]). The mop handle with which appellant struck his aunt, causing it to break, constituted a dangerous instrument under the circumstances of its use (*see People v Flowers*, 178 AD2d 682 [3d Dept 1991], *lv denied* 79 NY2d 947 [1992]). The testimony of the grandmother and aunt demonstrated that each sustained substantial pain as the result of appellant's actions, thereby establishing the element of physical injury as to each (*see People v Guidice*, 83 NY2d 630, 636 [1994]).

However, there was insufficient evidence to support the lawful duty element of resisting arrest. The presentment agency

did not call an officer with competent knowledge bearing on this issue.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14252 The People of the State of New York, Ind. 3357N/12
Respondent,

-against-

Jose Rivera,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered on or about February 6, 2013, unanimously affirmed.

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

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

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

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14253 Fidelity National Title Insurance Company, etc., Plaintiff-Respondent, Index 301293/13

-against-

Smith Buss & Jacobs, LLP, et al., Defendants-Appellants,

Edward N. Kiss, et al., Defendants.

_____

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Lisa L. Shrewsberry of counsel), for Smith Buss & Jacobs, LLP, appellant.

Steinberg & Cavaliere, LLP, White Plains (Ronald W. Weiner of counsel), for Troy G. Blomberg, appellant.

Fidelity National Law Group, New York (Eric Rosenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered June 27, 2014, which, to the extent appealed from, denied defendant Smith Buss & Jacobs, LLP's motion to dismiss the complaint as against it for failure to state a cause of action and defendant Blomberg's motion to dismiss the breach of contract claim as a time-barred legal malpractice claim, unanimously affirmed, without costs.

The complaint alleges that the sponsor of 16 apartment units in a condominium development, Empire Builders of New York Corp., and other parties defrauded the purchasers of the units by falsely representing that part of the purchase price would be used to satisfy portions of a blanket mortgage allocated proportionally to the units and by diverting the funds meant to satisfy the mortgage for their own use. Empire also allegedly failed to disclose that six of the units were encumbered by mortgages held by Al Perna. Plaintiff defended the purchaser's title and mortgagee Wells Fargo Bank's mortgage loan against foreclosures of the mortgages, pursuant to title insurance policies that its policy-issuing agent, Imagine Title, had allegedly fraudulently issued on its behalf. Proceeding individually and as subrogee of the purchasers and Wells Fargo, plaintiff asserts claims for fraud, aiding and abetting fraud, aiding and abetting conversion, and breach of fiduciary duty against Empire's attorney, defendant Smith Buss & Jacobs, LLP (SBJ) and a breach of contract claim against defendant Blomberg for breaching instructions that Wells Fargo had given him by failing to ensure that all liens of record were satisfied before disbursing Wells Fargo's funds from escrow.

The complaint alleges that SBJ misrepresented that the subject units would not be encumbered by the mortgages in the offering plan and closing statements it drafted and that it deviated from normal practice by failing to obtain the necessary payoff letters from New York Community Bank (NYCB), which had been assigned the mortgages, before preparing the closing statements (which typically set forth the payoff amounts) and by directing the purchasers to pay a party named Michael Lease, instead of NYCB. These allegations raise a reasonable inference of fraudulent intent on SBJ's part and justifiable reliance by the purchasers, and therefore state a claim for fraud against SBJ (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

The allegations of SBJ's involvement are sufficient to establish its actual knowledge of the fraud scheme, as well as its substantial assistance therein, and thus state an aiding and abetting fraud claim (*see Oster v Kirschner*, 77 AD3d 51, 55-56 [1st Dept 2010]). These allegations also state a claim for aiding and abetting Imagine's breach of fiduciary duty to Fidelity (*see Kaufman v Cohen*, 307 AD2d 113, 125-126 [1st Dept 2003]). In addition, they state a claim for aiding and abetting the conversion of funds by Empire and Imagine (*see Weisman*,

Celler, Spett & Modlin v Chadbourne & Parke, 253 AD2d 721 [1st Dept 1998]).

According plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), we find that its allegations are sufficient to establish that Blomberg was acting as an escrow agent, rather than an attorney, at the time he breached the instructions provided by Wells Fargo, and therefore that the complaint states a claim for breach of contract in its fifth cause of action, as distinguished from its sixth cause of action for legal malpractice, which claim was dismissed on statue of limitations grounds.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14254N Dr. Arturo Constantiner, et al., Index 651889/13
Plaintiffs-Appellants,

-against-

The Sovereign Apartments, Inc.,
Defendant,

Alan Kersh, etc., et al.,
Defendants-Respondents.

_____

Buchanan Ingersoll & Rooney PC, New York (Stuart P. Slotnick of counsel), for appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Steven D. Sladkus of counsel), for respondents.

_____

Order, Supreme Court, New York County (Richard Braun, J.), entered April 3, 2014, which, to the extent appealed from, as limited by the briefs, denied the portion of plaintiffs' motion seeking to compel defendants Alan Kersh and Candace Kersh to allow a bed and an area rug to be temporarily removed from the master bedroom in their apartment so that certain testing of the floor may be performed, and granted so much of the Kershes' cross motion for a protective order as to those items of discovery, unanimously affirmed, without costs.

This action involves a noise dispute between upstairs and downstairs neighbors in a cooperative apartment building located

in Manhattan. Plaintiffs allege, inter alia, that the renovations to the floor in their upstairs neighbors' master bedroom violated the Building Code and created an unreasonable amount of noise in plaintiffs' apartment. The court providently exercised its discretion in denying plaintiffs permission to remove the bed, which would require disassembly, and an area carpet from the master bedroom (*see Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003]). While this request did not involve destructive testing (*see Marty v Morse Diesel*, 161 AD2d 344 [1st Dept 1990]), plaintiffs failed to establish that the relief sought was "material and necessary" (CPLR 3101[a]), as it would not provide evidence of any noise conditions as they actually exist.

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

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14255N SMJ Associates, LLC, Index 450086/12
Plaintiff-Appellant,

-against-

Jennifer Sendax-Taubenfeld, etc.,
Defendant-Respondent.

_____

Smith Buss & Jacobs, LLP, Yonkers (John J. Malley of counsel), for appellant.

Turek Roth Mester, LLP, New York (Matthew E. Eiben of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 7, 2014, which denied plaintiff's motion for a preliminary injunction or a stay of defendant tenant's proceeding before nonparty State of New York Division of Housing and Community Renewal (DHCR) for a determination of the status of the apartment at issue, unanimously affirmed, without costs.

Plaintiff's motion to enjoin nonparty DHCR from acting on defendant's petition for a determination of the rent-regulated status of the apartment in plaintiff's building where she has lived since December 1996 was properly denied, as plaintiff failed to establish the necessary elements (*see* CPLR 6301; *Capers v Giuliani*, 253 AD2d 630, 633-634 [1st Dept 1998], *lv dismissed in part, denied in part* 93 NY2d 868 [1999]).

We have considered plaintiff's additional arguments, and find that the motion court providently exercised its discretion and that res judicata does not apply.

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

ENTERED: MARCH 17, 2015

CLERK

Mazzarelli, J.P., Sweeny, Renwick, Feinman, Kapnick, JJ.

14256 [M-6089] In re Heather K. Stifanic, Petitioner,

-against-

Hon. La Tia W. Martin, Respondent.

- - - - -

Sergio Villaverde, Nonparty Respondent.

Index 3903/09

_____

Heather K. Stifanic, petitioner pro se.

Erick T. Schneiderman, Attorney General, New York (Michelle R. Lambert of counsel), for Hon. La Tia W. Martin, respondent.

Law Offices of Sergio Villaverde, PLLC, New York (Sergio Villaverde of counsel), for Sergio Villaverde, respondent.

_____

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

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

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

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

ENTERED: MARCH 17, 2015

CLERK

Friedman, J.P., Sweeny, Saxe, Feinman, Clark, JJ.

14320-
14321 In re Alexander B.,

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

_____

George E. Reed, White Plains for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael S. Legge of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Allen G. Alpert, J. at fact-finding proceeding; Sidney Gribetz, J. at disposition), entered on or about January 22, 2013, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed him on probation for a period of 15 months, unanimously reversed, on the law, without costs, and the petition dismissed.

Appellant's admission was defective because there is no indication in the record that a "reasonable and substantial effort," or any effort for that matter, was made to notify his mother of the fact-finding proceeding at which the admission was made (*see* Family Ct Act § 341.2[3]; *Matter of Myacutta A.*, 75

AD2d 774 [1st Dept 1980]). Although appellant's mother had a history of absence, there is nothing to show that she was notified of the court appearance at issue, which occurred the day after appellant was returned on a warrant. Although, for reasons not appearing in the record, appellant's uncle was present, this was insufficient, as nothing indicates that he was "a person legally responsible for the child's care" (Family Ct Act § 321.3[1]), or that he was an acceptable substitute. Even if the uncle's presence did satisfy the statutory criteria, the court failed to obtain a proper allocution from him with regard to his understanding of the rights appellant was waiving as a result of his admission. As the statutory requirements are nonwaivable, preservation was not required (*Matter of Aaron B.*, 74 AD3d 534, 535 [1st Dept 2010]).

Since appellant has already served the 15 months of probation imposed by the court, the proper remedy is to dismiss

the petition (*see Matter of Jerome P.*, 96 AD3d 576 [1st Dept 2012]).

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

ENTERED: MARCH 17, 2015

CLERK

Tom, J.P., Friedman, Manzanet-Daniels, Feinman, JJ.

14400 In re Jay Bradshaw, Ind. 3206/04
[M-89] Petitioner,

-against-

Hon. Denis J. Boyle, etc.,
Respondent.

_____

Jay Bradshaw, petitioner pro se.

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

_____

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

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

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

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14513 The People of the State of New York, Ind. 179/09
Respondent,

-against-

Michael Smith,
Defendant-Appellant.

_____

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

Michael Smith, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Gregory Carro, J. at jury trial and sentencing), rendered February 6, 2012, convicting defendant of murder in the second degree, kidnapping in the first degree, gang assault in the first degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 20 years to life, unanimously affirmed.

We reject defendant's challenges to the sufficiency of the evidence supporting his conviction for kidnapping, which was the crime underlying the felony murder conviction. The only reasonable explanation of the chain of events, viewed as a whole, was that all the participants in the crime acted with a common

purpose, and that defendant participated in the kidnapping while acting with the requisite intent (*see* Penal Law § 20.00; *Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]). Defendant did not preserve his claim that the kidnapping charge was barred by the merger doctrine, and we decline to review it in the interest of justice. As an alternative holding, we find that this argument is unavailing both as a matter of law, because the merger doctrine is not applicable to first-degree kidnapping (*People v Aulet*, 221 AD2d 281 [1st Dept 1995], *lv denied* 88 NY2d 980 [1996]), and as a matter of fact, because under the circumstances present, the restraint of the victim was not merely incidental to the killing (*see People v Romance*, 35 AD3d 201, 203 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]). Defendant's legal sufficiency claim relating to his gang assault conviction is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we likewise find that the evidence supported an inference of accessorial liability. We also reject defendant's claim that his kidnapping and gang assault convictions were against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]).

The court properly denied defendant's motion to suppress his videotaped statement to an Assistant District Attorney. The fact that the prosecutor suggested that defendant's cooperation could result in leniency did not render the statement involuntary under the totality of circumstances (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]). The prosecutor carefully avoided making any actual promises, and the videotaped statement was very similar to statements defendant had already made to the police without any discussion of leniency. Furthermore, the prosecutor never stated or implied that if defendant chose to invoke his right to counsel, he would lose any opportunity to cooperate. In any event, any error in admission of the videotaped statement was harmless because, as noted, it was cumulative to defendant's other statements.

Defendant was not deprived of a fair trial by the court's denial of his request to redact portions of the videotaped interview in which the prosecutor expressed disbelief or skepticism regarding a particular aspect of defendant's statement. Even assuming that the prosecutor's comments should have been redacted, defendant was not prejudiced because these comments concerned a matter that was only relevant to the charge

of intentional murder, which resulted in an acquittal.

By failing to object, or by making insufficiently specific objections, defendant failed to preserve his challenges to the People's summation, 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]).

Defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that any of counsel's alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case (*see People v Cass*, 18 NY3d 553, 564 [2012]).

We have considered and rejected defendant's pro se claims.

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14514 Vicki Matos, Index 300632/11
Plaintiff-Appellant,

-against-

Allen Chefitz, M.D.,
Defendant,

Montefiore Medical Center,
Defendant-Respondent.

_____

Alexander J. Wulick, New York, for appellant.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered February 11, 2014, which granted the motion of defendant Montefiore Medical Center for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law by demonstrating that plaintiff's private attending physician, codefendant Allen Chefitz, M.D., was responsible for the supervision and management of plaintiff's care (*see generally Hill v St. Clare's Hosp.*, 67 NY2d 72, 79 [1986]).

In opposition, plaintiff failed to raise a triable issue of fact on the theory that Montefiore's staff failed to contact her private attending physician, or other surgeons, in light of her

purported symptoms of ischemic bowel disease (*cf*. *Augustin v Beth Israel Hosp.*, 185 AD2d 203, 205 [1st Dept 1992] [hospital liable, inter alia, for failure of recovery room staff to contact plaintiff's surgeon promptly when plaintiff went into shock]). The record evidence shows that Dr. Chefitz, plaintiff's attending physician, followed her care throughout her stay, including the period that allegedly encompassed the onset of her purported symptoms. Dr. Chefitz's affirmation "directly contradicts [his prior sworn deposition testimony] without any explanation accounting for the disparity" (*Telfeyan v City of New York*, 40 AD3d 372, 373 [1st Dept 2007]). Moreover, such affirmation, which supported plaintiff's discrete theory of her case, was "obviously prepared in support of ongoing litigation," (*id.*) and was submitted while Dr. Chefitz's own motion for summary judgment against plaintiff was pending, and when plaintiff elected not to

oppose his motion. Accordingly, the affirmation is insufficient to defeat Montefiore's properly supported motion for summary judgment (*Harty v Lenci*, 294 AD2d 296, 298 [1st Dept 2002]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14515 The People of the State of New York, Ind. 320/13
Respondent,

-against-

John Baker,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Ronald Zweibel, J.), rendered on or about May 9, 2013,

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

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

ENTERED: MARCH 17, 2015

CLERK

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

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14516 In re State of New York Index 30042/11
Office of Mental Health,
Petitioner-Respondent,

-against-

Dennis J.,
Respondent-Appellant.

_____

Marvin Bernstein, Mental Hygiene Legal Service, New York (Maura Martin Klugman of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Andrew Kent of counsel), for respondent.

_____

Order, Supreme Court, New York County (Laura A. Ward, J.), entered on or about August 6, 2013, which, upon a jury finding of mental abnormality, and upon a nonjury finding made after a dispositional hearing that respondent is a dangerous sex offender requiring confinement, committed him to a secure treatment facility, unanimously affirmed, without costs.

The court properly permitted one of the State's experts to testify about an email message sent to him during trial by a social worker who had recently been treating respondent in the psychiatric center at which he was confined at the time. Respondent failed to preserve his contention that the testimony violated the Health Insurance Portability and Accountability Act

of 1996 (HIPAA) (Pub L 104-191, 110 US Stat 1936) and the privacy rules promulgated by the United States Department of Health and Human Services (45 CFR parts 160, 164), and we decline to review it in the interest of justice. Respondent also waived his argument by affirmatively relying on his sex offender treatment at the same psychiatric center that employed the social worker as evidence that he no longer suffers from a mental abnormality (*see Matter of State of New York v Enrique T.*, 114 AD3d 618, 619 [1st Dept 2012], *lv dismissed* 23 NY3d 1011 [2014]). Were we to review the argument, we would find that it is without merit (*see id.* at 619-620).

The court providently exercised its discretion in admitting the expert's testimony (*see Matter of State of New York v John S.*, 23 NY3d 326, 344 [2014]). The State established the reliability of the email at issue through the expert's testimony that it was written by a social worker who had recently treated respondent (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95, 109 [2013]). Further, the probative value of the testimony at issue substantially outweighed any prejudice (*see id.*). The court minimized any prejudice by instructing the jury to consider the social worker's statements solely as the basis for the expert's

opinion, rather than for their truth (*see John S.*, 23 NY3d at 346).

Respondent's due process challenge to the admission of the expert's testimony is unpreserved, since he failed to assert a timely constitutional claim at trial, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see Floyd Y.*, 22 NY3d at 109). Moreover, we find that any error in the admission of the testimony was harmless (*see Matter of State v Charada T.*, 23 NY3d 355, 362 [2014]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Manzanet-Daniels, Gische, JJ.

14517 In re Steven Kobrick, et al., Index 102267/12
Petitioners-Appellants,

-against-

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

George David McCune,
Proposed-Intervenor-Appellant.

_____

David Rozenholc & Associates, New York (David Rozenholc of counsel), for Steven Kobrick and Gary Schwedock, appellants.

Douglas L. Fromme, P.C., New York (Douglas L. Fromme of counsel) for George David McCune, appellant.

Gary R. Connor, New York (Sandra A. Joseph of counsel), for New York State Division of Housing and Community Renewal, respondent.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for 509 W.34, L.L.C., respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 22, 2014, which denied the petition for an order annulling respondent New York State Division of Housing and Community Renewal's (DHCR) determination, dated January 27, 2012, denied the motion by the proposed intervenor to intervene as a petitioner, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously

affirmed, without costs.

DHCR's determination that the subject apartment is not subject to the Rent Stabilization Code because the subject building is not part of a horizontal multiple dwelling (HMD) was rational, was not arbitrary and capricious, and was not affected by an error of law (*see Matter of Bambeck v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 129 AD2d 51, 54-55 [lst Dept 1987], *lv denied* 70 NY2d 615 [1988]). DHCR considered the relevant factors in making its determination (*see Matter of Salvati v Eimicke*, 72 NY2d 784, 792 [1988]; *Matter of Bambeck*, 129 AD2d at 54), and the determination was based on the entire record. Although the record evidence indicates that the subject buildings have had common ownership and management since the base date of May 6, 1969, and have a shared heating system, these factors are not determinative (*see* 129 AD2d at 54). Moreover, there was sufficient evidence to support DHCR's determination, including the facts that the buildings were erected separately, conveyed under separate deeds, and have separate lot and block numbers. Further, the buildings lack similarity with respect to overall design, appearance and configuration, and appear as separate and independent structures with no common walls. The buildings also have separate electric meters, electric lines,

sewer lines, gas lines, and plumbing systems (*see Salvati*, 72 NY2d at 792).

DHCR's determination was made in compliance with lawful procedure (*see* CPLR 7803[3]). DHCR properly exercised its discretion in reopening the proceedings at the PAR level after Supreme Court had remanded the matter to it (*see* Rent Stabilization Code [9 NYCRR] § 2529.7). Petitioners fail to demonstrate any prejudice from their own ex parte communications with the DHCR inspector who carried out the inspection on the buildings. Further, petitioners were given an opportunity to take notes during the inspection and to present their views of the inspection to DHCR. DHCR was not required to hold a hearing, and it properly made its determination based on the inspection and the parties' written submissions (*see Matter of Bauer v New York State Div. of Hous. & Community Renewal*, 225 AD2d 410, 410 [1st Dept 1996], *lv denied* 88 NY2d 805 [1996]).

Supreme Court properly found that the proposed intervenor lacked standing to intervene in this proceeding (*New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). The proposed intervenor's claimed injury — that the owner may, in the future, increase his rent or seek to demolish his building — is too speculative. Further, the alleged injury does not fall

within the zone of interests sought to be protected by the Rent Stabilization Code, as the proposed intervenor's apartment is rent controlled, not rent stabilized (*see Matter of Heilweil v New York State Div. of Hous. & Community Renewal*, 12 AD3d 300 [1st Dept 2004]).

We have considered the appealing parties' remaining contentions for affirmative relief and find them unavailing.

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14518 Sky Materials Corp., Index 107450/11
Plaintiff-Respondent,

-against-

Everest Reinsurance Company, et al.,
Defendants-Appellants.

_____

Carroll, McNulty & Kull LLC, New York (Ann Odelson of counsel), for appellants.

Cole Schotz, Meisel, Forman & Leonard, P.A., New York (Jed Weiss of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 9, 2014, which granted plaintiff Sky Materials Corp.'s motion for summary judgment declaring that defendants must defend and indemnify plaintiff in the underlying third party action, and denied defendants' cross motion for a contrary declaration, unanimously reversed, on the law, with costs, plaintiff Sky Materials Corp's motion denied, defendants' cross motion for summary judgment granted, and it is declared that defendants have no duty to defend or indemnify plaintiff in the third-party action. The Clerk is directed to enter judgment accordingly.

Even if plaintiff's coverage should be reinstated under Insurance Law § 2121, and if issues of fact exist as to whether

the injured claimant's accident resulted from plaintiff's covered operation, Sky's failure to provide notice of the accident vitiated any coverage available under the Everest Indemnity Policy for the claims at issue. Based on the record evidence, Sky learned of the accident, at the latest, four days after it occurred, and thought that the Everest Indemnity Policy was still in effect. Despite this awareness, Sky failed to provide Everest with timely notice of the December 18, 2008 accident and the subsequent litigation stemming from that accident until serving its complaint in this declaratory judgment action on or after June 23, 2011, more than 2 ½ years after the accident occurred. This delay constituted a breach of the Everest Indemnity Policy's notice condition, which requires Sky to provide notice "as soon as practicable" of any occurrence which may result in a claim or upon the commencement of any lawsuit, and Sky's thirty month delay in providing notice was unreasonable as a matter of law (*see Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632, 634 [1st Dept 2011]).

The affidavit submitted by Sky's president stating that it "has always been" Sky's "custom and practice" to submit timely notice of accidents and lawsuits to its broker and insurer and that, based on this custom and practice, its former employee

would have contacted its broker, as well as Everest, to notify them of the occurrence, was insufficient to rebut defendants' prima facie entitlement to summary judgment. Where the information supposedly necessary to defeat a motion for summary judgment could have been produced by the opponent, the alleged existence of such information will not warrant denial of the motion (*see Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14519 The People of the State of New York, Ind. 5540/10
Respondent,

-against-

Damon Kleba,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered on or about May 22, 2013, as amended June 5, 2013, unanimously affirmed.

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

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

service of a copy of this order.

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

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14521 David Levene, Index 102976/11
Plaintiff-Respondent,

-against-

No. 2 West 67th Street,
Inc., et al.,
Defendants-Appellants.

_____

Mischel & Horn P.C., New York (Scott T. Horn of counsel), for appellant.

William Schwitzer & Associates, P.C., New York (Howard R. Cohen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered July 28, 2014, which denied defendants' 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.

Defendants established their entitlement to judgment as a matter of law by submitting certified weather records and a meteorologist's affidavit showing that a winter storm was in progress at the time that plaintiff slipped and fell on ice covering the sidewalk in front of defendants' building (*see Weinberger v 52 Duane Assoc., LLC*, 102 AD3d 618 [1st Dept 2013]). Plaintiff himself testified that it was sleeting at the time he

fell at approximately 8 a.m., and defendants' porter stated that it had hailed through the night and a "slow rain" was falling at the time of the accident.

In opposition, plaintiff failed to raise a triable issue of fact. He submitted an affidavit of an expert meteorologist who did not dispute that freezing rain was ongoing at the time plaintiff fell, but concluded that defendants should have cleared and treated the sidewalk during the previous afternoon, when it was only drizzling. However, defendants' porter was not required to clear the public sidewalk of snow or ice during freezing precipitation (*see Solazzo v New York City Tr. Auth.*, 21 AD3d 735, 735-736 [1st Dept 2005], *affd* 6 NY3d 734 [2005]; *Prince v New York City Hous. Auth.*, 302 AD2d 285 [1st Dept 2003]), although he was attempting to do so at the time of the accident (*see Rodriguez v New York City Hous. Auth.*, 52 AD3d 299 [1st Dept 2008]). Furthermore, plaintiff's expert did not opine that in the 30 hours preceding the accident there was ever a four-hour lull in the storm that would give rise to defendants' duty to have cleared snow and ice from the public sidewalk (*see* Administrative Code of City of NY § 16-123). Plaintiff's testimony also provided no support for the theory that the ice was old or preexisting, as he did not recall any unusual snow or

ice conditions on the sidewalk when he walked there the previous night (*compare Perez v New York City Hous Auth.*, 114 AD3d 586 [1st Dept 2014] [issue of fact as to whether snow and ice that was a "little bit black" was present for a sufficient amount of time to provide constructive notice]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14523- Ind. 2850/12
14523A The People of the State of New York, 4902/12
Respondent,

-against-

Noel M.,
Defendant-Appellant.

_____

Scott A. Rosenberg, The Legal Aid Society, New York (Denise Fabiano of counsel) for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael Sonberg, J. at plea; Bruce Allen, J. at sentencing), rendered January 2, 2013, convicting defendant of robbery in the first degree, adjudicating him a youthful offender, and sentencing him to a term of 1⅓ to 4 years, unanimously affirmed. Judgment (same court and Justices), rendered January 2, 2013, convicting defendant, upon his guilty plea, of assault in the second degree, and sentencing him to a concurrent term of one year, unanimously modified, on the law, to the extent of vacating the sentence and remanding for resentencing, and otherwise affirmed.

As the People concede, defendant is entitled to resentencing pursuant to *People v Rudolph* (21 NY3d 497 [2013]) for a youthful

offender determination on his assault conviction.

With regard to the case in which defendant has already been adjudicated a youthful offender, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14524 Karol Czajkowski, Index 301224/11
Plaintiff-Respondent,

-against-

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

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellants.

The Perecman Firm, P.L.L.C., New York (David H. Perecman of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered October 3, 2013, which granted plaintiff's motion for partial summary judgment on the issue of defendants' liability pursuant to Labor Law § 240(1), and denied defendants' cross motion for summary judgment dismissing plaintiff's complaint, unanimously modified, on the law, to dismiss plaintiff's claims pursuant to Labor Law §§ 200 and 241(6), and otherwise affirmed, without costs.

Plaintiff, following his supervisors' instructions, was using a sawzall to remove 10-foot high, 8-10-foot wide window frames by removing the bottom half first and then the top half. He was injured when the unsecured top half of the window he was removing fell out of the wall and crushed his hand. Based on the

facts in the record, we conclude that the motion court properly granted plaintiff partial summary judgment on the issue of defendant's Labor Law § 240(1) liability. The record reflects that plaintiff was not provided any safety device to brace or otherwise support the window while it was being removed in the manner that he was instructed (*see e.g. Metus v Ladies Mile Inc.*, 51 AD3d 537 [1st Dept 2008]).

The court erred, however, in not dismissing plaintiff's Labor Law § 200 and § 241(6) claims. There is no evidence that defendants controlled the means and methods of plaintiff's work to support § 200 liability, and the Industrial Code sections alleged by plaintiff in support of § 241(6) liability are inapplicable to the instant action.

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

ENTERED: MARCH 17, 2015

CLERK

Corrected Order - March 23, 2015

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14525 In re Truong Tran, etc., File 1785/12
Deceased.

- - - - -

Sang Kim Nguyen,
Petitioner-Respondent,

-against-

Margaret Tran,
Objectant-Appellant.

_____

Marc Bogatin, New York, for appellant.

Kelley Drye & Warren LLP, New York (Alison L. MacGregor of counsel), for respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered May 22, 2014, which denied objectant Margaret Tran's motion for summary judgment dismissing the petition, unanimously affirmed, without costs.

Surrogate's Court has broad discretionary authority to exercise its equity jurisdiction in fulfilling its responsibilities relating to the affairs of decedents, the probate of wills, and the administration of estates (*see* NY Const, art VI, § 12[e]; *Matter of Stortecky v Mazzone*, 85 NY2d 518, 523 [1995]; *Matter of Tarka*, 41 AD3d 345 [1st Dept 2007]).

The court did not improvidently exercise its discretion in permitting petitioner to present evidence supporting her claim

that she was decedent's surviving spouse, despite statements in her tax returns that she was "single," in that marital status is a mixed question of law and fact (*see Glenbriar Co. v Lipsman,* 11 AD3d 352, 353 [1st Dept 2004], *affd* 5 NY3d 388 [2005]; *Village Dev. Assoc. v Walker*, 282 AD2d 369 [1st Dept 2001]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14526 Briana Adler, et al., Index 650292/13
Plaintiffs-Appellants,

-against-

Ogden CAP Properties, et al.,
Defendants-Respondents.

_____

Lowey Dannenberg Cohen & Hart, P.C., White Plains (Barbara J. Hart of counsel), for appellants.

Herrick, Feinstein LLP, New York (Janice Goldberg of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about December 13, 2013, which to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiffs Lauren Shoenfeld's and Perri Steiner's breach of the warranty of habitability claim, and limited the scope of the proposed class of plaintiffs, unanimously affirmed, without costs.

The motion court correctly granted summary judgment dismissing plaintiffs' claim that defendants breached the warranty of habitability set forth in Real Property Law § 235-b because plaintiffs' respective residential apartments lacked electricity during and after Hurricane Sandy. Plaintiffs left

their apartments before they lost electricity and they did not return until after the electricity had been restored (*see Genson v Sixty Sutton Corp.*, 74 AD3d 560, 560 [1st Dept 2010]). In addition, there is no evidence that either plaintiff left their units due to a condition that rendered them uninhabitable or unusable for their intended function of residential occupation (*see Solow v Wellner*, 86 NY2d 582, 588-589 [1995]).

We have considered plaintiffs' remaining arguments, including that the court improperly limited the proposed class of plaintiffs, and find them unavailing.

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14527-
14528-
14529-
14530-
14531 In re Vivienne Bobbi-Hadiya S.,

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

Makena Asanta Malika McK., et al.,
Respondents-Appellants,

Administration for Children's Services,
Petitioner-Respondent.

- - - - -

In re Vivienne Bobbi-Hadiya S.,

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

Makena Asanta Malika McK., et al.,
Respondents-Appellants,

Catholic Guardian Society and Home Bureau,
Petitioner-Respondent.

_____

Larry S. Bachner, Jamaica (Larry S. Bachner of counsel), for Makena Asanta Malika McK, appellant.

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

Zachary W. Carter, Corporation Counsel, New York (Deborah A. Brenner of counsel), for Administration For Children's Services, respondent.

MaGovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for Catholic Guardian Society and Home Bureau, respondent.

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

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Final order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 9, 2013, which permanently terminated the mother's and father's parental rights, and committed the subject child to the joint custody of the Commissioner of Social Services and Catholic Guardian Society and Home Bureau (Catholic Guardian) for the purpose of adoption, and order of fact-finding, same court (Rhoda J. Cohen, J.), entered on or about November 4, 2011, which found that the mother and father severely abused, and abused and neglected, their child, unanimously affirmed, without costs. Appeals from orders entered on or about August 3, 2012, and on or about August 7, 2012, unanimously dismissed, without costs, as superseded by the appeal from the final order, and as abandoned, respectively.

The record supports Family Court's determination that there was clear and convincing evidence that both parents severely abused the subject child on the basis that the father recklessly caused her injuries under circumstances evincing a depraved indifference to human life, and the mother recklessly allowed such injuries to be inflicted under circumstances evincing a depraved indifference to human life (Family Ct Act § 1051[e];

Social Services Law § 384-b [8][a]).

Expert testimony established that the then three-month-old infant's four fractured ribs, fractured collarbone, fractured femur, and subdural hematomas resulted from being squeezed, shaken, and possibly thrown. It is undisputed that the father was her primary caretaker, as the mother worked outside the home, and that the child twice needed emergency assistance while in his sole care. Moreover, the father's failure to testify warranted drawing the strongest adverse inference against him (*Matter of Nassau County Dept. of Social Servs. v Denise J.*, 87 NY2d 73, 79 [1995]). Other accidental causes and diseases were ruled out as explanations for the child's severe injuries, and no other explanation was provided by the parents. The father's prior plea to manslaughter for recklessly killing his two-month-old son under similar circumstances established that he was aware of and consciously disregarded the risk that shaking the subject child could seriously injure her (*Matter of Dashawn W. [Antoine N.]*, 21 NY3d 36, 49 [2013]).

The mother knew of the father's earlier manslaughter conviction but left the child in his care. Even if she could have initially reasonably believed that he was innocent, or have placed little weight on a much earlier manslaughter conviction,

she never reevaluated her beliefs, even when he was convicted of a violent assault, and a related perjury conviction, which demonstrated his ability to misstate material facts. Nor did she reevaluate his suitability as a caregiver when the subject child twice required emergency assistance within months, while in his care, and repeatedly appeared lethargic and vomited when in his care. She thus acted recklessly by leaving the child in the father's care and allowing the abuse to be inflicted. Moreover, the Family Court properly based its findings on indirect evidence, and the parents' inability to explain the child's injuries, which were deemed nonaccidental by the expert (*see Matter of Dashawn W.*, 21 NY3d at 49; *Matter of Amirah L. [Candice J.]*, 118 AD3d 792 [2d Dept 2014]).

Where the child was already examined and her injuries documented by x-rays, an MRI, and skeletal exams, where other causes of her injuries were ruled out by tests and exams, and where she even had a hole drilled in her skull to alleviate her head injuries, the Family Court providently exercised its discretion in denying the mother's motion for yet another independent medical examination of the child (Family Ct Act § 1038[c]; *Matter of Jessica R.*, 78 NY2d 1031, 1033 [1991]; *see also* Family Ct Act § 1027[g]; *Matter of Shernise C. [Rhonda R.]*,

91 AD3d 26, 32-33 [2d Dept 2011]).

In connection with its finding of severe abuse, the Family Court properly found that diligent efforts should be excused as to the father, in light of his manslaughter conviction and inability to explain or otherwise accept responsibility for the injuries to the subject child (Social Services Law § 384-b[8][a][iv]; *Dashawn W.*, 21 NY3d at 54).

The Family Court also properly concluded that diligent efforts to reunite the mother and subject child were no longer required because the mother refused to believe the father posed any risk to the child, and she continued to leave her in his sole care, which posed a threat to the child's health and safety (Family Ct Act § 1039-b [a]; *Matter of Marino S.*, 100 NY2d 361, 372 [2003], *cert denied* 540 US 1059 [2003]; *Matter of Rayshawn F.*, 36 AD3d 429, 429-430 [1st Dept 2007]).

Finally, in the termination of parental rights proceeding, the Family Court properly granted the agency's summary judgment motion based on the prior finding of severe abuse. Such a finding is expressly admissible in a proceeding to terminate parental rights pursuant to Social Services Law § 384-b, as long as the Family Court states the grounds for its determination and makes such a finding by clear and convincing evidence, which it

did here (Family Ct Act § 1051[e]). The mother identifies no unresolved or triable issues that would have warranted denial of summary judgment on the issue of severe abuse.

Nor was a suspended judgment warranted as to the mother, as she refused to acknowledge that the father posed a threat to the child, denied any responsibility for her own role in the abuse, and testified equivocally regarding her long term intention to remain separated from him, whereas the child was placed in a stable home with the maternal grandfather (*see Matter of Jayvon Nathaniel L. [Natasha A.]*, 70 AD3d 580 [1st Dept 2010]; *see also Matter of Michael B.*, 80 NY2d 299, 311 [1992]).

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14532 The People of the State of New York, Ind. 4075/10
Respondent,

-against-

Thomas Olsen,
Defendant-Appellant.

_____

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

Thomas Olsen, appellant pro se.

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

_____

Judgment, Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered March 28, 2012, convicting defendant, after a jury trial, of attempted rape in the first degree, sexual abuse in the first degree, and assault in the second degree and sentencing him to an aggregate term of six years, unanimously affirmed.

The verdict was supported by 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 supports the conclusion that defendant intended to have sexual

intercourse with the victim, and came dangerously close to doing so.

Defendant's pro se ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant's remaining pro se claims are without merit.

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

ENTERED: MARCH 17, 2015

CLERK

Sweeny, J.P., Renwick, Saxe, Manzanet-Daniels, Gische, JJ.

14535N- Index 111102/07
14535NA Board of Managers of the 25th
Charles Street Condominium, et al.,
Plaintiffs-Respondents,

-against-

Celia Seligson,
Defendant-Appellant.

_____

Michael T. Sucher, Brooklyn, for appellant.

Ganfer & Shore, LLP, New York (Ira Brad Matetsky of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Milton A. Tingling, J.), entered September 13, 2013 (the attorneys' fees judgment), against defendant in favor of both plaintiffs in the amount of $262,639.86, representing attorneys' fees, interest, and costs, unanimously modified, on the law and the facts, to vacate the award as to plaintiff 25 Charles Owners Corporation (the Residential Unit Owner), reduce the principal amount of the award from $235,000 to $221,000, and make CPLR 5002 interest run from January 7, 2013 instead of May 24, 2012, and otherwise affirmed, without costs. Judgment, same court and Justice, entered September 16, 2013 (the common charges judgment), to the extent appealed from as limited by the briefs, awarding interest

against defendant to plaintiff Board of Managers of the 25 Charles Street Condominium (the Condo Board), unanimously reversed, on the law and the facts, without costs, CPLR 5001 interest made to run from December 1, 2009 (not April 9, 2007) through January 6, 2012 (not June 29, 2011), CPLR 5002 interest made to run from January 6, 2012 instead of June 29, 2011, and the rate of CPLR 5002 interest fixed at 1.75% instead of 9%. The Clerk is directed to enter judgments accordingly.

The award of attorneys' fees to the Residential Unit Owner should be vacated because "attorneys' fees were not authorized by agreement, statute or court rule" (*Atlantic Dev. Group, LLC v 296 E. 149th St., LLC*, 70 AD3d 528, 529-530 [1st Dept 2010]). The subject condominium's bylaws authorize the payment of attorneys' fees only to the Condo Board.

The court properly awarded attorneys' fees to the Condo Board, given the evidence at the attorneys' fees hearing that a nonparty law firm represented both plaintiffs. Although the Condo Board did not have a written retainer agreement with the law firm, such an agreement is not necessary for the Condo Board to recover legal fees for the services provided by the firm (*see e.g. Miller v Nadler*, 60 AD3d 499, 500 [1st Dept 2009]).

The attorneys' fees judgment should exclude fees for services rendered before December 1, 2009. The condominium's bylaws provide that a unit owner shall pay for legal fees incurred by the Condo Board, and the record shows that a proper Condo Board did not exist before December 1, 2009. The record also shows that of the $408,000 in legal fees claimed by plaintiffs, approximately $175,000 was billed before December 1, 2009. Accordingly, we reduce the principal amount of the attorneys' fees award to $233,000 ($408,000 minus $175,000). Defendant is correct that at least part of plaintiffs' fees incurred in a separate article 78 proceeding are not recoverable under the bylaws, and we further reduce the fee awarded to $221,000 ($233,000-$12000).

When, as here, a court orders a special referee to hear and report with recommendations, interest pursuant to CPLR 5002 runs from the date the court confirms the Referee's report, not the date of the report (*see Matter of East Riv. Land Co.*, 206 NY 545, 549 [1912]; Weinstein-Korn-Miller, NY Civ Prac ¶ 5002.03 [2d ed 2014]). *Theophilova v Dentchev* (111 AD3d 463 [1st Dept 2013]) is not to the contrary, as there is no indication that the parties argued whether interest ran from the date of the report or the date of confirmation. Accordingly, interest pursuant to CPLR

5002 should run on the attorneys' fees judgment from January 7, 2013 instead of May 24, 2012, and on the common charges judgment from January 6, 2012 instead of June 29, 2011. Given the latter determination, interest pursuant to CPLR 5001 on the common charges judgment should run through January 6, 2012 instead of June 29, 2011.

CPLR 5001 interest on the common charges judgment did not start to accrue until December 1, 2009 (as opposed to April 9, 2007). This Court previously determined that no interest on overdue common charges accrued before the Condo Board took action to collect the charges (*see* 106 AD3d 130, 136 [1st Dept 2013]), and a proper Condo Board did not take action to collect the charges until December 1, 2009.

CPLR 5002 interest on the common charges judgment should be 1.75%, not the statutory rate of 9% (*see* CPLR 5004). A contract rate rather than the statutory rate governs the prejudgment interest to be paid (*see Secular v Royal Athletic Surfacing Co.*, 66 AD2d 761, 761 [1st Dept 1978], *appeal dismissed* 46 NY2d 1075 [1979]; *see also NML Capital v Republic of Argentina*, 17 NY3d 250, 258 [2011]). Here, the condominium's bylaws provide that a unit owner who fails to pay common charges shall pay interest at 1% over the Federal Reserve discount rate, and that discount rate

has been 0.75% since February 19, 2010.

We have considered defendant's remaining arguments and plaintiffs' estoppel argument and find them unavailing.

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

ENTERED: MARCH 17, 2015

CLERK

CORRECTED ORDER - APRIL 8, 2015

Tom, J.P., Acosta, Andrias, DeGrasse, Richter, JJ.

12418 BasicNet S.p.A., et al., Index 653266/11
Plaintiffs-Appellants,

-against-

CFP Services Ltd., etc.,
Defendant-Respondent,

Corporate Funding Partners, LLC, et al.,
Defendants.

Satterlee Stephens Burke & Burke LLP, New York (James F. Rittinger of counsel), for appellants.

Noël F. Caraccio, PLLC, Mamaroneck (Noël F. Caraccio of counsel), for respondent.

Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, reversed, on the law, and the motion granted, without costs. The Clerk is directed to enter judgment in favor of plaintiffs against defendant CFP Services Ltd. d/b/a **CFP Trade Services**, in the amount of **$625,768.00**, together with interest at the rate of 9% per annum from October 6, 2011.

The Decision and Order of this Court entered herein on June 19, 2014 is hereby recalled and vacated (*see* M-30 decided simultaneously herewith).

Opinion by Andrias, J. All concur.

Order filed.

CORRECTED ORDER - APRIL 8, 2015

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

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BasicNet S.p.A., et al.,
Plaintiffs-Appellants,

-against-

CFP Services Ltd., etc.,
Defendant-Respondent,

Corporate Funding Partners, LLC, et al.,
Defendants.

x

Plaintiffs appeal from an order of the Supreme Court, New York County (Lawrence K. Marks, J.), entered on or about October 30, 2013, which denied there motion for summary judgment on their breach of contract claim against defendant CFP.

Satterlee Stephens Burke & Burke LLP, New York (James F. Rittinger of counsel), for appellants.

Noël F. Caraccio, PLLC, Mamaroneck (Noël F. Caraccio of counsel), for respondent.

ANDRIAS, J.

Plaintiffs are the beneficiaries of irrevocable standby letters of credit (SLCs) issued by defendant CFP Services Ltd. d/b/a CFP Trade Services. The SLCs were issued in connection with an amended license agreement between plaintiffs, as licensors, defendant Kappa North America, Inc., as licensee, and defendant Total Apparel Group, Inc. (TAG), as Kappa's guarantor. Although CFP allegedly issued the SLCs with the understanding that the amendment to the license agreement had already been signed, it was executed shortly after the SLCs were issued and was backdated.

After Kappa and TAG defaulted in their obligations under the amended license agreement, CFP refused to honor plaintiffs' demands for payment due to alleged discrepancies between certain documents required by the SLCs and those submitted by plaintiffs. These included the alleged failure of plaintiffs to submit, pursuant to Requirement E of the SLCs, an authenticated Society for Worldwide Financial Telecommunication (SWIFT) message from CFP confirming plaintiffs' "fulfilment of their commitment towards the account party."

Supreme Court denied plaintiffs' motion for summary judgment on their breach of contract claim against CFP on the grounds that the backdating of the amendment to the license agreement was

arguably a material misrepresentation and that plaintiffs had not established, as a matter of law, compliance with Requirement E. We now hold that plaintiffs are entitled to payment under the SLCs and that their motion for summary judgment should have been granted.

Analysis of the parties' claims requires a brief history of the events leading up to the issuance of the SLCs. By agreement dated April 24, 2009, plaintiffs granted Kappa the exclusive right to use certain of their trademarks used on sportswear apparel in the United States and Canada for a specified term. TAG, which owned Kappa, signed the agreement as Kappa's guarantor.

By June 2010, Kappa had allegedly defaulted in its obligations under the license agreement to pay minimum guaranteed royalty payments and to deliver a bank guaranty to plaintiffs. TAG defaulted on its guaranty. Consequently, plaintiffs served Kappa and TAG with default and termination notices. However, to avoid termination of the licensing agreement, in or about September 2010, plaintiffs, Kappa and TAG began negotiating an amendment to the agreement under which Kappa's and TAG's monetary obligations to plaintiffs would be extended and reduced, and Kappa and TAG would obtain SLCs for the benefit of plaintiffs in lieu of a bank guaranty. The purpose of the SLCs was to insure

that plaintiffs had a guaranteed, easily accessible recourse to funds in the event of another breach by Kappa and TAG.

Kappa applied to CFP for the SLCs. CFP provided Kappa with drafts of the SLCs, which Kappa gave to plaintiffs for review. Several of these drafts contained a clause that gave CFP the discretion to determine whether plaintiffs fulfilled their commitment to Kappa (the control clause). When plaintiffs objected to the inclusion of the control clause, Kappa advised them that it would be omitted from the SLCs. Kappa then provided plaintiffs with draft SLCs that did not include the clause, which plaintiffs approved. However, CFP asserts that it did not agree to this and that it advised Kappa that it was unwilling to issue the SLCs without the control clause unless Kappa and TAG put up a 100% margin to protect CFP in the event of Kappa's default.

On or about October 6, 2010, CFP issued two SLCs, one in favor of plaintiff BasicNet in the amount of $106,344 (SLC 765) and the other in favor of plaintiff Basic Properties in the amount of $519,424 (SLC 769). Each SLC stated "WE HEREBY ISSUE OUR IRREVOCABLE STANDBY LETTER OF CREDIT" and included the following five presentation requirements:

> "A) A SIGNED LETTER OF CLAIM FROM THE BENEFICIARY ADDRESSED TO THE ISSUER CFP ... FOR THE CLAIM AMOUNT UNDER STANDBY LETTER OF CREDIT ISSUED BY THEM IN ONE ORIGINAL AND TWO COPIES.

"B) A WRITTEN SIGNED STATEMENT FROM BENEFICIARY STATING THAT THEY HAVE DISCHARGED ALL THEIR OBLIGATIONS TOWARDS THE APPLICANT AND APPLICANT HAS FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT AND THIS SLC IN ONE ORIGINAL AND TWO COPIES.

"C) A SIGNED LETTER OF DEFAULT NOTICE FROM []THE BENEFICIARY TO APPLICANT KAPPA ... WITH A TEN BUSINESS DAY CURE PERIOD PROVISION CALLING FOR THE AMOUNT OF PAYMENT DUE AS PER THE CONTRACT SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY OF THIS DEFAULT NOTICE TO KAPPA... AT 525 SEVENTH AVENUE SUITE 501 NEW YORK, NY 10018 ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER FOR ANY REASON WHATSOEVER.

"D) AN AUDITED PAYMENT STATEMENT ISSUED AND SIGNED BY J.P. LALL, P.C. ... CERTIFYING THAT .... KAPPA... HAS DEFAULTED ON ITS MINIMUM ROYALTY PAYMENTS DUE TO [BENEFICIARY] IN A SPECIFIC AMOUNT NOT TO EXCEED THE AMOUNT STATED IN THE DEFAULT NOTICE AS PER (C) ABOVE WITHIN THE VALUE OF THIS SLC AND THAT KAPPA ... FAILED TO MAKE THE PAYMENT TO CURE THE DEFAULT DURING THE CURE PERIOD AS PER DEFAULT NOTICE SENT TO KAPPA ....

"E) AUTHENTICATED SWIFT MSG FROM CFNYUS33 [CFP] TO BENEFICIARY'S BANK CONFIRMING BENEFICIARY'S FULFILMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY AND THAT WE ARE IN FUNDS."

The SLCs provided that they were to be valid for one-year and that all claims under the SLCs were to be submitted "ONLY AFTER 345 DAYS AFTER THE DATE OF ISSUANCE." Each SLC also stated, "THIS [SLC] IS OPENED ON THE ACCOUNT OF KAPPA ... AND THE BENEFICIARY AS PER AMENDED AND RESTATED LICENSE AGREEMENT DATED 9/28/10 FOR ROYALTY AND COMMISSION AND IS SUBJECT TO STRUCTURED TERMS AND CONDITIONS ASSOCIATED WITH THIS SLC," and "WE HEREBY ENGAGE WITH THE DRAWER THAT THE DRAFT DRAWN IN COMPLIANCE WITH

THE TERMS OF THIS [SLC] WILL BE DULY HONOURED BY US UPON PRESENTATION DULY COMPLIED WITH THE TERMS AND CONDITIONS STATED IN THIS [SLC]."

Although the SLCs were issued on or about October 6, 2010, the amended licence agreement was not signed until on or about October 14, 2010, at which time plaintiffs, Kappa and TAG backdated it to September 28, 2010. Also, on or about that day, Requirement E of the SLCs was amended to delete the phrase "AND THAT WE ARE IN FUNDS."

Plaintiffs acknowledge that they were aware of the inclusion of Requirement E in the SLCs when they executed the amendment to the license agreement, but maintain that after Kappa advised them that it would be too time-consuming to delete the clause, the following language was inserted into the amendment in paragraph 2 to address their concerns:

> "Therefore the Company [Kappa] undertakes to have the issuing bank [CFP] issue a swift message to [BasicNet (BN)] and [Basic Properties America's (BPA)] advising bank confirming as per 'REQUIREMENT E' beneficiary's fulfilment of their commitment towards the account party and to provide BN and BPA with a copy of the relevant swift messages as soon as possible, and in any case not later than on 21 October 2010. Being receipt of such swift messages a condition precedent to the entering into force of this Amendment, it is expressly agreed that in case the BasicNet Group does not receive such swift messages for each of the standby letter of credit before 21 October 2010, this Amendment will be automatically null and void with no need for any formality nor for any notice."

On or about November 6, 2010, CFP sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed agreement. As discussed below, a major issue in the resolution of this appeal is whether this SWIFT message satisfied Requirement E.

On July 1, 2011, Kappa and TAG executed a waiver and release agreement in which they acknowledged that they were "in significant and material default under the terms of the [amended licensing agreement]." On September 29, 2011, plaintiff made separate draw demands on SLC 765 and SLC 769 seeking full payment from CFP. Plaintiffs assert that in their presentation for each SLC they satisfied Requirement A by submitting one original and two copies of a written signed statement addressed to CFP for the claim amount under the SLC; Requirement B by submitting one original and two signed copies of a statement signed by plaintiffs stating that plaintiffs had discharged all of their obligations to Kappa and that Kappa had failed to satisfy its obligations under the amended licensing agreement; Requirement C by submitting a signed letter from plaintiffs to Kappa providing a notice of default with a 10-day cure period and calling for the amount due under the amended licensing agreement, sent via FedEx to the address designated in the SLCs, together with proof of inability to deliver from FedEx; Requirement D by submitting an

audited payment statement from the accountant designated in the SLCs certifying that Kappa had defaulted on its minimum royalty payments in an amount that did not exceed the amount in the default notice submitted per Requirement C, and that Kappa failed to cure the default during the cure period; and Requirement E by submitting the November 6, 2010 SWIFT message from CFP confirming its receipt of the fully executed amended licensing agreement.

On October 6, 2011, CFP refused to honor the demands on the grounds that (I) both demands were discrepant for failure to produce the SWIFT message from CFP confirming plaintiffs' fulfillment of their commitments towards Kappa as per Requirement E; (ii) both demands were discrepant for failure to comport with Requirement B in that the signed statements submitted thereunder said "and of SLC [relevant number]," instead of "and this SLC"; and (iii) the demand relating to SLC 769 was discrepant for failure to comport with Requirement D because FedEx's letter stating that it had been unable to deliver Basic Properties's notice of default to Kappa was addressed to BasicNet instead of Basic Properties. As to plaintiffs' contention that they had satisfied Requirement E by submitting the November 6, 2010 SWIFT message in which CFP confirmed its receipt of the amended licensing agreement, on December 8, 2011, CFP sent a SWIFT message to plaintiffs' advising bank stating that:

> "THIS REFERS TO YOUR MSG [message] DT [dated] 5TH AUGUST 2011 REG[arding] OUR ABOVE SLC, PLS [please] NOTE THAT OUR MT 799 REFERRED TO BY YOU IN YOUR MSG [message] IS NOT THE SWIFT MSG [message] REQUIRED AS PER POINT (E) of our SLC. WE CONTACTED THE ACCOUNT PARTY AND THEY HAVE INFORMED US THAT THERE IS A DISPUTE BETWEEN THEM AND THE BENEFICIARY AND BENE[ficiary] HAS NOT FULFILLED THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY. IN VIEW OF THIS WE ARE NOT IN A POSITION TO SEND ANY SUCH SWIFT MSG [message] AS OF NOW."

Asserting that Kappa and TAG acknowledged their material default in the July 1, 2011 release and waiver agreement and that their payment demand to CFP satisfied all five documentary requirements of the SLCs, plaintiffs seek to recover the full amount of the SLCs from CFP under a breach of contract theory. CFP answered, and asserted affirmative defenses and counterclaims, including misrepresentation and fraud based on the backdating of the amended license agreement.

A SLC assures the performance of an obligation, enabling the beneficiary to make a demand for payment under the SLC upon the occurrence of certain events, such as the default of the other party in the underlying transaction (*see Mennen v J.P. Morgan & Co.*, 91 NY2d 13, 19-20 [1997]; *One Step Up, Ltd. v Webster Bus. Credit Corp.*, 87 AD3d 1 [1st Dept 2011]). Like commercial letters of credit, they are "documentary," in that the default or non-occurrence of an event is predicated on one or more prescribed documents, as set forth in the SLC itself.

We first consider whether plaintiffs' presentation complied with Requirement E. Plaintiffs contend that, pursuant to paragraph 2 of the amendment to the licence agreement, their only commitment to Kappa as per Requirement E was to execute the amendment, and that Requirement E was satisfied when, on November 6, 2010, CFP sent a SWIFT message to plaintiffs' bank confirming its receipt of the fully executed agreement. CFP disputes this, and contends that pursuant to Requirement E it was to be the sole arbiter of plaintiffs' fulfillment of their commitment towards Kappa under the amended licensing agreement.

Under New York law, in order to recover on its claim that the issuer wrongfully refused to honor its request to draw down on a letter of credit, the beneficiary must prove that it strictly complied with the terms of the letter of credit (*see United Commodities-Greece v Fidelity Int'l Bank*, 64 NY2d 449 [1985]; *see also Marino Indus. Corp. v Chase Manhattan Bank, N.A.*, 686 F2d 112 [2nd Cir 1982]). "The corollary to the rule of strict compliance is that the requirements in letters of credit must be explicit, and that all ambiguities are construed against the [issuer]" (*Marino*, 686 F3d at 115 [internal quotations omitted]); *see also Nissho Iwai Europe v Korea First Bank*, 99 NY2d 115, 121-122 [2002]; *Barclay Knitwear Co. v King'swear Enters.*, 141 AD2d 241, 246-247 [1st Dept 1988], *lv denied* 74 NY2d

605 [1989]). The reasoning is that "[s]ince the beneficiary must comply strictly with the requirements of the letter, it must know precisely and unequivocally what those requirements are" (*Marino*, 686 F2d at 115). "Where a letter of credit is fairly susceptible of two constructions, one of which makes fair, customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless" (*Venizelos, S.A. v Chase Manhattan Bank*, 425 F2d 461, 466 [2d Cir 1970]).

Requirement E is ambiguous. It obligates plaintiffs to submit an authenticated SWIFT message from CFP confirming their "FULFILMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY." However, the term "commitment," singular, is not defined, and the clause makes no reference to the amended license agreement. In contrast, Requirement B requires "A WRITTEN SIGNED STATEMENT FROM BENEFICIARY STATING THAT THEY HAVE DISCHARGED *ALL THEIR OBLIGATIONS* TOWARDS THE APPLICANT AND APPLICANT HAS FAILED TO DISCHARGE ITS OBLIGATION*S AS PER THE TERMS OF THE UNDERLYING CONTRACT* AND THIS SLC" (emphasis added). Requirement C requires a "A SIGNED LETTER OF DEFAULT NOTICE FROM [] THE BENEFICIARY TO APPLICANT KAPPA ... WITH A TEN BUSINESS DAY CURE PERIOD PROVISION

CALLING FOR THE AMOUNT OF PAYMENT DUE *AS PER THE CONTRACT*" (emphasis Added).

Construing the ambiguity as to what "commitment" Requirement E refers to, and therefore what document was required to satisfy it, in plaintiffs' favor, we find that plaintiffs' interpretation of Requirement E is the only reasonable and legally cognizable interpretation of the provision before the Court. The purpose of the amended license agreement was to restructure the debt owed and payable to plaintiffs as a result of Kappa's and TAG's default under the original licensing agreement, and plaintiffs fulfilled their commitment to Kappa and TAG to do so when they executed the amendment. When CFP issued the SWIFT message acknowledging receipt of the fully executed amended agreement, Requirement E was satisfied. This is consistent with the terms of paragraph 2 of the amendment to the licensing agreement in which Kappa undertook to have CFP issue a SWIFT message "confirming as per 'REQUIREMENT E' beneficiary's fulfilment of their commitment towards the account party and to provide [plaintiffs' bank] with a copy of the relevant SWIFT messages as soon as possible, and in any case not later than on 21 October 2010."

Furthermore, CFP's interpretation of Requirement E would impermissibly conflict with the Independence Principle, which is

the foundation on which all letters of credit are built.

There are three parties to an SLC: the applicant who requests the SLC; the beneficiary to whom payment is due upon the presentation of the documents required by the SLC; and the issuer which obligates itself to honor the SLC and make payment when presented with the documents the SLC requires. In turn, there are three corresponding agreements: the agreement between the applicant and the beneficiary, which creates the basis for the SLC; the agreement between the issuer and the applicant; and the SLC itself (*see Nissho*, 99 NY2d at 120).

> "[A] fundamental principle governing these transactions is the doctrine of independent contracts, [which] provides that the issuing bank's obligation to honor drafts drawn on a letter of credit by the beneficiary is separate and independent from any obligation of its customer to the beneficiary under the ... contract and separate as well from any obligation of the issuer to its customer under their agreement" (*First Commercial Bank v Gotham Originals*, 64 NY2d 287, 294 [1985]).

From the beneficiary's perspective, the independence principle makes a letter of credit superior to a normal surety bond or guaranty because the issuer is primarily liable and is precluded from asserting defenses that an ordinary guarantor could assert. Indeed, "a letter of credit would lose its commercial vitality if before honoring drafts the issuer could look beyond the terms of the credit to the underlying contractual controversy or performance between its customer and the

beneficiary" (*Township of Burlington v Apple Bank for Sav.*, 94 Civ 6116 (JFK), 1995 WL 384442, *5, 1995 US Dist LEXIS 8878, *4 [SD NY June 28, 1995]; *see also Voest-Alpine Intl. Corp. v Chase Manhattan Bank*, 707 F2d 680, 682-683 [2d Cir 1983]).

SLC 765 and SLC 769 each specify that "THIS LETTER OF CREDIT IS SUBJECT TO ISP [International Standby Practices] 98 ICC [International Chamber of Commerce] NO. 590 AND THE LAWS OF THE UNITED STATES OF AMERICA. PLACE OF JURISDICTION NEW YORK." Pursuant to New York Uniform Commercial Code § 5-116(a), "[t]he liability of an issuer ... is governed by the law of the jurisdiction" designated by the SLC. Pursuant to UCC 5-116(c), if an SLC governed by UCC article 5 incorporates "any rules of custom or practice," such as ISP 98, and if there is conflict between article 5 and those rules, then the rules govern "except to the extent of any conflict with the nonvariable provisions specified in subsection (c) of section 5-103."

Both ISP 98 and article 5 of the UCC recognize that the issuer's obligation to honor an SLC is independent of the rights and liabilities of the parties to the underlying contract. Rule 1.06(c) of ISP 98 states:

> "Because a standby is independent, the enforceability of an issuer's obligations under a standby does not depend on:
>
> "(i) the issuer's right or ability to obtain

reimbursement from the applicant;

"(ii) the beneficiary's right to obtain payment from the applicant;

"(iii) a reference in the standby to any reimbursement agreement or underlying transaction; or

"(iv) the issuer's knowledge of performance or breach of any reimbursement agreement or underlying transaction."

Rule 1.07 of ISP 98, titled "Independence of the issuer-beneficiary relationship," states that "[a]n issuer's obligations toward the beneficiary are not affected by the issuer's rights and obligations toward the applicant under any applicable agreement, practice, or law."

In November 2000, the independence principle was codified in a general revision of article 5 of the UCC. UCC 5-103(d) now provides that:

"[r]ights and obligations of an issuer to a beneficiary or a nominated person under a letter of credit are independent of the existence, performance, or nonperformance of a contract or arrangement out of which the letter of credit arises or which underlies it, including contracts or arrangements between the issuer and the applicant and between the applicant and the beneficiary."

The doctrine of independent contracts, as codified in UCC article 5, allows the letter of credit to provide "'a quick, economic and trustworthy means of financing transactions for parties not willing to deal on open accounts'" (*Mennen*, 91 NY2d

at 21, quoting *All Serv. Exportacao, Importacao Comercio, v Banco Bamerindus do Brazil, S.A.*, 921 F2d 32, 36 [2nd Cir 1990]). "Only staunch recognition of this principle by the issuers and the courts will give letters of credit the continuing vitality that arises from the certainty and speed of payment under letters of credit" (Official Comment, reprinted in McKinney's Cons Laws of NY, Book 62½, UCC 5-103 at 374).

As interpreted by CFP, Requirement E would conflict with the independence principle, as incorporated into both ISP 98 and UCC, and would make CFP's obligations under the SLCs truly illusory. Rather than performing a ministerial function of determining whether the documents submitted by plaintiffs complied with the requirements of the SLCs, under CFP's interpretation of Requirement E, CFP has the unfettered discretion to decide whether or not it will pay on the SLCs based on its unilateral determination that plaintiffs did or did not fulfill their undefined "commitment" to Kappa.

CFP asserts that its interpretation of Requirement E is nonetheless enforceable and must be strictly construed because the rules of ISP 98 may be varied by the terms of the SLCs (Rule 1.01[c]), and plaintiffs accepted the SLCs with Requirement E. CFP reasons that the definition of "document" in ISP 98 encompasses a "representation of fact, law, right, or opinion"

(Rule 1.09[a]), and that it had the right to express its "opinion" as to whether plaintiffs had fulfilled their commitment towards Kappa. We disagree.

Rule 1.01(c) of ISP 98 states that "[a]n undertaking subject to these Rules may expressly modify or exclude their application." Rule 1.04 states that "[u]nless the context otherwise requires, or unless expressly modified or excluded, these Rules apply as terms and conditions incorporated into a standby ...." Rule 1.11(d)(iii) states, "[A]ddition of the term 'expressly' ... to the phrase 'unless a standby otherwise states' or the like emphasizes that the rule should be excluded or modified only by wording in the standby that is specific and unambiguous." Here, the SLCs do not expressly modify or exclude the application of Rules 1.06(c) and 1.07 of ISP 98. Moreover, the UCC, which would govern in the event of a conflict (*see* UCC 5-116[c]), provides that the independence principle is mandatory and may not be varied by agreement (UCC 5-103[c]).[1]

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[1]Section 5-103 states:

"With the exception of this subsection, subsections (a) and (d) of this section [the independence principle], ..., the effect of this article may be varied by agreement or by a provision stated or incorporated by reference in an undertaking. A term in an agreement or undertaking generally excusing liability or generally limiting remedies for failure to perform obligations is not sufficient to vary obligations prescribed by this

Even assuming, arguendo, that CFP's interpretation of Requirement E is correct and that the parties could contract out of such a fundamental principle, CFP would be estopped from enforcing Requirement E based on the improper communications it had with Kappa relating to dishonoring the SLCs (*see E & H Partners v Broadway National Bank*, 39 F Supp 2d 275, 284-285 [SD NY 1998]). To evaluate plaintiffs' presentations, CFP spoke to officers of Kappa and considered Kappa's written notices of the dispute between itself and plaintiffs and its objections to payment of plaintiffs' claims. While CFP asserts that its discussions with Kappa related to whether the alleged discrepancies in plaintiffs' presentations should be waived, CFP's answer to interrogatories confirms that its discussions with Kappa predate plaintiffs' demands for payment, including "letters to [CFP], dated August 10, 2011 [] [and] September 1, 2011 ..., wherein [Kappa] clearly notified [CFP] of a dispute between [Kappa] and TAG and [plaintiffs] concerning the underlying Contract between those parties and the amounts due on [plaintiffs'] claim." "[T]o permit the payor to pressure or collude with the bank to dishonor the draft destroys the very principle upon which the commercial utility of letters of credit

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article."

rests" (*E&H Partners*, 39 F Supp 2d at 285). In this regard, as a further indication of collusion, we note that according to the amended complaint, unbeknownst to plaintiffs, on October 14, 2010, Kappa, at CFP's request, provided a notarized letter to CFP, stating:

> "We agree that these standby letters of Credit will have the following documentary requirement as a 'special clause['].
>
> "AUTHENTICATED SWIFT MSG FROM CNFUS33 TO BENEFICIARY'S BANK CONFIRMING BENEFICIARY's FULFILLMENT OF THEIR COMMITMENT TOWARDS THE ACCOUNT PARTY.
>
> "*We agree that you shall have no obligation whatsoever to send the Swift Message or issue any amendments.*"

CFP is not excused from making payment because the amendment to the license agreement was backdated. The fraud exception has been codified in the UCC, which provides that an issuing bank may refuse to honor documents that "appear on [their] face strictly to comply with the terms and conditions of the letter of credit" but are "forged or materially fraudulent," or if "honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant" (UCC 5-109[a]). However, because the smooth operation of international commerce requires that requests for payment under letters of credit not be routinely obstructed by pre-payment litigation, the fraud exception to the independence principle "is a narrow one" that is only available

on a showing of "intentional fraud" (*All Service Exportacao, Importacao Comercio, S.A. v Banco Bamerindus do Brazil, S.A.*, 921 F2d 32, 35 [2d Cir 1990]; *see also First Commercial Bank*, 64 NY2d at 295 [fraud is "[a] limited exception to this rule of independence"]; *Banque Worms, New York Branch v Banque Commerciale Privee*, 679 F Supp 1173, 1182 [SD NY 1988] [the fraud exception "is limited to situations in which the wrongdoing of the *beneficiary* has permeated the entire transaction"], *affd 849 F2d 787* [2d Cir 1988]).

The fact that plaintiffs signed the amended license agreement on or about October 14, 2010 instead of September 28, 2010 is not material to the terms of the SLCs, i.e., that plaintiffs submit signed letters of claim and audited payment statements from a licensed independent public accounting firm (*see E & H Partners*, 39 F Supp at 286). There was a valid underlying transaction, and the backdating does not excuse CFP from paying on the SLCs (*see Semetex Corp. v UBAF Arab Am. Bank*, 853 F Supp 759, 775 [SD NY 1994], *affd* 51 F3d 13 [2d Cir 1995]).

We next consider whether plaintiffs satisfied Requirements B and C of the SLCs. While CFP has not abandoned its assertion that plaintiffs' presentation did not satisfy these requirements, the discrepancies invoked by CFP do not excuse it from paying on the SLCs.

Rule 4 of ISP 98 governs the duties and responsibilities an issuing bank must undertake when examining documents. Rule 4.01(b) states that "[w]hether a presentation appears to comply is determined by examining the presentation on its face against the terms and conditions stated in the standby as interpreted and supplemented by these Rules which are to be read in the context of standard standby practice." Rule 4.09 states:

> "If a standby requires:
>
> "(a) a statement without specifying precise wording, then the wording in the document presented by must appear to convey the same meaning as that required by the standby;
>
> "(b) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, the typographical errors in spelling, punctuation, spacing, or the like that are apparent when read in context are not required to be duplicated and blank lines or spaces for data may be completed in any manner not inconsistent with the standby; or
>
> "(c) specified wording by the use of quotation marks, blocked wording, or an attached exhibit or form, and also provides that the specified wording be "exact" or "identical", then the wording in the documents presented must duplicate the specified wording, including typographical errors in spelling, punctuation, spacing and the like, as well as blank lines and spaces for data must be exactly reproduced."

According to the official UCC commentary, the strict compliance standard does not require that the documents presented by the beneficiary be exact in every detail (Official Comment 1, reprinted in McKinney's Cons Laws of NY, Book 62½, UCC 5-108, at

367) ["Strict compliance does not mean slavish conformity to the terms of the letter of credit . . . [and] does not demand oppressive perfectionism"]).

The documents provided by plaintiffs contained the information specified in Requirements B and C. Requirement B calls for a written signed statement from the beneficiary (plaintiffs) stating that the applicant (Kappa) "FAILED TO DISCHARGE ITS OBLIGATIONS AS PER THE TERMS OF THE UNDERLYING CONTRACT [THE LICENSE AGREEMENT] AND THIS SLC." Plaintiffs submitted written signed statements stating that Kappa "failed to discharge its obligations as per the terms of the License Agreement ... and of SLC [relevant number]." There is no possibility that the difference between "this SLC" and "SLC [relevant number]" "could mislead [CFP] to its detriment" (*see E & H Partners*, 39 F Supp 2d at 283-284; *Bank of Cochin, Ltd. v Manufacturers Hanover Trust Co.*, 612 F Supp 1533, 1541 [SD NY 1985], *affd* 808 F2d 209 [2d Cir 1986]).

Requirement C called for "A SIGNED LETTER OF DEFAULT NOTICE FROM [THE BENEFICIARY] ... TO ... KAPPA ... SENT VIA FEDEX OR DHL SUPPORTED BY PROOF OF DELIVERY ... ISSUED BY FEDEX/DHL OR FEDEX/DHL WRITTEN CONFIRMATION EVIDENCING INABILITY TO DELIVER." Plaintiffs submitted signed letters of default notice to Kappa, sent via FedEx, and written confirmations from FedEx evidencing

The Decision and Order of this Court entered herein on June 19, 2014 is hereby recalled and vacated (*see* M-30 decided simultaneously herewith).

All concur.

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

ENTERED: MARCH 17, 2015

CLERK