SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 30, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7500 Mohammed Aziz, Index 29205/17E
Plaintiff-Appellant,

-against-

Anna Development LLC, et al.,
Defendants-Respondents.

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Agulnick & Gogel, LLC, Great Neck (William A. Gogel of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered January 26, 2018, which granted in part defendants' motion to dismiss, unanimously affirmed, without costs.

Plaintiff Aziz commenced this action against defendants' Anna Development and Khaled, asserting causes of action for a declaratory judgment that he owned certain Bronx properties, to quiet title to those properties, to set aside the deeds to those properties, for unjust enrichment, and for a constructive trust. Aziz alleged that he and Khaled had entered into an oral agreement to purchase unspecified real property in the Bronx

through Anna Development and that he financed the purchases in reliance on Khaled's promise to hold the properties in Anna Development's name for his benefit. Defendants moved to dismiss the complaint under CPLR 3211(a)(2), (5), and (7), and GOL § 5-703, arguing that the complaint failed to state a cause of action because any oral agreement regarding the properties was void under the statute of frauds.

We find that the motion court properly dismissed plaintiff's causes of action for a declaratory judgment, to quiet title, and to set aside the deeds, as barred by the statute of frauds because there was no writing evidencing plaintiff's ownership of the properties at issue. Contrary to plaintiff's argument, any alleged confidential and fiduciary relationship between he and defendant Khaled would not preclude the application of the statute of frauds to his causes of action for a declaratory judgment, to quiet title, and to set aside deeds.

While the doctrine of promissory estoppel may be an exception to the statute of frauds, under the facts of this case, the doctrine of promissory estoppel does not apply (*Matter of*

Hennel, 29 NY3d 487, 494 [2017]). Further, plaintiff has not shown that any other exception to the statute of frauds applies.

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7501 In re Noah I.T.,

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

Argenis C.,
Respondent-Appellant,

Catholic Guardian Services,
Petitioner-Respondent.

____

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

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), attorney for the child.

____

Order, Family Court, Bronx County (Linda B. Tally, J.), entered on or about June 29, 2017, which determined that respondent father’s consent was not required for the adoption of the subject child and that even if his consent were required it may be dispensed with since he abandoned the child, and committed the custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

The rights of respondent, as a notice father, were limited to notice of the proceeding and an opportunity to be heard concerning the child’s best interests (*see* Domestic Relations Law

111-a; Social Services Law § 384-c; *Matter of Skyla Lanie B. [Jonathan Miranda B.]*, 116 AD3d 589 [1st Dept 2014]).

Respondent’s argument that he was denied his right to be heard as to the best interests of the child at a separate dispositional hearing, is unavailing since the record shows that respondent received the required notice of the fact-finding hearing on the termination of parental rights petition, but failed to testify or present any evidence. Furthermore, given the court’s alternate finding that respondent abandoned the child, the decision as to whether to conduct a dispositional hearing rested within the sound discretion of the court; such a hearing is not required (*see Matter of Asia Sabrina N. [Olu N.]*, 117 AD3d 543 [1st Dept 2014]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7502-
7502A Meri Marabyan,
Plaintiff-Respondent,

Index 153717/16

-against-

511 West 179 Realty Corp.,
Defendant,

DirecTV, LLC, et al.,
Defendants-Appellants.

____

Lynch Rowin LLP, New York (Marc Rowin of counsel), for DirecTV, LLC, appellant.

Thorn Gershon Tymann & Bonanni, LLP, Albany (Matthew H. McNamara of counsel), for Dish Network L.L.C., appellant.

Law Office of Yuriy Prakhin P.C., Brooklyn (Yuriy Prakhin of counsel), for respondent.

____

Orders, Supreme Court, New York County (Gerald Lebovits, J.), entered February 22 and 23, 2018, which denied defendant DirecTV, LLC's motion for summary judgment dismissing the complaint as against it and defendant Dish Network L.L.C.'s motion to dismiss for failure to state a cause of action and for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs, without prejudice to renewal after further discovery.

We agree with Supreme Court that defendants' respective motions for summary judgment should have been denied; not because

issues of fact exist, but rather as premature, no employee of either movant has been deposed, and installation, repair, and/or maintenance records may also shed light on what work, if any, defendants undertook at the accident location, and when. Plaintiff therefore satisfied her burden of demonstrating that facts essential to oppose defendants' motions may lie within defendants' exclusive knowledge and/or control (*see* CPLR 3212[f]; *Figueroa* at 439; *Brooks v Somerset Surgical Assoc.*, 106 AD3d 624 [1st Dept 2013]).

We also agree with the motion court's denial of that branch of Dish Network's motion which was to dismiss for failure to state a cause of action, since Dish Network failed to meet its burden of establishing that the amended complaint does not adequately plead a claim against it (*see Connolly v Long Is. Power Auth.*, 30 NY3d 719, 728-730 [2018]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7503 Brean Murray, Carret & Co., 651024/16
Plaintiff-Appellant,

-against-

Morrison & Foerster LLP,
Defendant-Respondent.

____

Olshan Frome Wolosky LLP, New York (Kyle Kolb of counsel), for appellant.

Williams & Connolly LLP, New York (John S. Williams of counsel), for respondent.

____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered March 30, 2017, which granted defendant's motion to dismiss the complaint for legal malpractice and fraud, unanimously affirmed, without costs.

According to the February 2016 complaint, plaintiff was co-lead underwriter of a public offering of stock by Puda Coal, Inc., whose principal asset was its 90% interest in Shanxi Coal. Defendant was retained as counsel for the underwriters to conduct due diligence, but allegedly failed to detect and inform plaintiff that Puda no longer possessed that 90% interest.

The malpractice claim was properly dismissed as time-barred (*see* CPLR 214[6]), and the doctrine of equitable estoppel "will not toll a limitations statute where plaintiffs possessed timely knowledge sufficient to have placed them under a duty to make

inquiry and ascertain all the relevant facts prior to the expiration of the applicable statute of limitations” (*Rite Aid Corp. v Grass*, 48 AD3d 363, 364-365 [1st Dept 2008]). Here, the alleged malpractice occurred in December 2010 when defendant issued its opinion letter that “nothing has come to our attention that leads us to believe” that the registration statement “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.” Thereafter, a public report which broke the news of Puda’s fraud on April 8, 2011 confirmed that the fraudulent transfers of ownership of Shanxi Coal were documented in government filings. There was nothing preventing plaintiff from accusing defendant of substandard care in April 2011, based on defendant’s opinion letter, when compared to statements made in the public report and the securities litigation that followed in April 2011.

Plaintiff’s contention that it relied on defendant because it was a large, international law firm with alleged expertise in China-based companies, and because it trusted that defendant would comply with professional standards and its fiduciary duty to advise plaintiff if its work product was deficient, is misplaced. Plaintiff maintains that defendant’s withdrawal as counsel did not exempt it from such standards, as the decision to

terminate the relationship constituted an act of concealment that "left [plaintiff] in the dark regarding the extent of [defendant's] potential liability." Even if plaintiff's allegations of concealment were true, "plaintiff [has] failed to demonstrate [its] due diligence, for [it was] on inquiry notice by at least [2011] and failed to make a reasonable investigation" (*MBI Intl. Holdings Inc. v Barclays Bank PLC*, 151 AD3d 108, 117 [1st Dept 2017], *lv denied* 29 NY3d 919 [2017]).

Plaintiff's fraud claim is based on alleged misrepresentations in defendant's opinion letter and alleged omissions when it terminated legal representation. The fraud allegations in the complaint are duplicative of plaintiff's untimely legal malpractice claims (*see Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228 [1st Dept 2003]), and "there is no independent cause of action for concealing malpractice" (*Zarin v Reid & Priest*, 184 AD2d 385, 387 [1st Dept

1992] [internal quotation marks omitted]).

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7504 The People of the State of New York, Ind. 349/12
Respondent,

-against-

Denarious Jenkins,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Michael J. Obus, J.), rendered April 22, 2014, convicting defendant, upon his plea of guilty, of grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of two to four years, unanimously affirmed.

Defendant failed to preserve his claim that none of the three prior New Jersey convictions listed in the predicate felony statement was the equivalent of a New York felony (*see People v Jurgins*, 26 NY3d 607, 611-612 [2015]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. One of the New Jersey convictions was under a statute that is facially equivalent to the New York felony of third-degree criminal possession of a controlled substance, which prohibits knowing and unlawful possession of a

narcotic drug with intent to sell it (Penal Law § 220.16[1]). We have stated that "the unavailability of the agency defense in a foreign jurisdiction has no bearing on whether a foreign felony qualifies as the equivalent of a New York felony" (*People v Reilly*, 273 AD2d 143, 143 [1st Dept 2000], *lv denied* 95 NY2d 937 [2000]), and we see no reason to depart from our previous holdings on this subject.

Since at least one of the three New Jersey convictions qualified as a New York predicate felony, we need not decide the predicate status of either of the other two convictions. Furthermore, defendant's counsel was not ineffective in failing to challenge the second felony offender adjudication on this basis (*see People v Medina*, 129 AD3d 429, 430 [1st Dept 2015], *lv denied* 27 NY3d 1136 [2016]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7505 The People of the State of New York, Ind. 784/15
Respondent,

-against-

Mario Hines,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Eve Kessler of counsel), for appellant.

____

Judgment, Supreme Court, New York County (Melissa C. Jackson, J.), rendered February 16, 2016, 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: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7506 In re Joan Durcan, File 4296C/14
Deceased.
- - - - -
In re James Kevin Durcan,
Petitioner-Respondent,

-against-

Mary Anne Cunney,
Respondent-Appellant,

Morgan Stanley Smith Barney, LLC,
Respondent.

____

Mahon, Mahon, Kerins & O'Brien, LLC, Garden City (Robert P. O'Brien of counsel), for appellant.

Greenfield Stein & Senior, LLP, New York (Angelo M. Grasso of counsel), for respondent.

____

Appeal from order, Surrogate's Court, New York County (Rita Mella, S.), entered on or about April 11, 2018, which granted petitioner's motion for summary judgment directing respondents to turn over to him the proceeds of the individual retirement accounts (IRAs) owned by the decedent at the time of her death, and denied respondent Cunney's cross motion for summary judgment dismissing the petition, deemed appeal from decree, entered on or about August 3, 2018, directing respondents to turn over to petitioner all assets in the IRAs owned by the decedent at the time of her death, and, so considered, said decree unanimously affirmed, without costs.

The Surrogate correctly determined that, despite the decedent's clear intent to designate respondent Cunney as the beneficiary of her IRAs, Cunney is not entitled to the proceeds of the IRAs in the absence of a signed change of beneficiary form (*see* EPTL 13-3.2[e][1] ["A designation of a beneficiary or payee to receive payment upon death of the person making the designation . . . must be made in writing and signed by the person making the designation"]; *Androvette v Treadwell*, 73 NY2d 746 [1988]).

Citing the doctrine of substantial compliance, Cunney argues that Morgan Stanley's Client Data Form for New Personal Accounts filled out in the decedent's handwriting is sufficient to satisfy the requirement of a signed writing, as that document did not require a signature. However, she cites no authority for excusing the signed writing requirement in the context of a retirement account. Indeed, as the Surrogate noted, even in the insurance context, where strict compliance is not always required (*see McCarthy v Aetna Life Ins. Co.*, 92 NY2d 436, 440 [1998]), this Court has rejected the contention that an insured's specific testamentary disposition of an insurance policy in a will constitutes substantial compliance with the policy's requirements for effecting a change in the beneficiary of the policy (*see Lincoln Life & Annuity Co. of N.Y. v Caswell*, 31 AD3d 1, 7 [1st

Dept 2006]).

Cunney argues that the beneficiary designation form, which was part of a second set of documents sent to Morgan Stanley, may have been lost in the mail or in Morgan Stanley's offices. This argument is purely speculative, as there is no evidence that the decedent actually mailed the form. The decedent's financial advisor and his assistant testified that the decedent said she was going to send the form, but it is undisputed that the form could not be located in the decedent's apartment or Morgan Stanley's offices.

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7507 Fernando Ricaurte, Index 153561/16
Plaintiff-Respondent-Appellant,

-against-

Inwood Beer Garden & Bistro Inc.,
Defendant-Appellant-Respondent.

____

Boeggeman, Corde, Ondrovic & Hurley, P.C., White Plains (Jeremy D. Platek of counsel), for appellant-respondent.

Eddy & Associates, PLLC, Elmhurst (Deborah D. Eddy of counsel), for respondent-appellant.

____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered June 11, 2018, which, upon defendant's motion for summary judgment dismissing the complaint, denied the motion as to plaintiff's Dram Shop claim and granted the motion as to plaintiff's common law negligence claim, unanimously reversed, on the law, without costs, to grant the motion as to the Dram Shop Act claim and to deny the motion as to the common law negligence claim.

Defendant was entitled to summary judgment dismissing plaintiff's cause of action under the Dram Shop Act (General Obligations Law § 11-101; *see also* Alcohol Beverage Control Law § 65). A witness testified that plaintiff's assailant did not appear visibly intoxicated at the time he was served two drinks by defendant. This evidence was sufficient to make out a prima

facie showing that the assailant was not visibly intoxicated at the time he was served alcohol, since it is clear from the record that he was not served from that point in time until he attacked plaintiff (*see Coffey v Esparra*, 88 AD3d 621, 622 [1st Dept 2011]; *compare Cohen v Bread & Butter Entertainment LLC*, 73 AD3d 600, 601 [1st Dept 2010]). In opposition, plaintiff failed to raise a triable issue of fact, and, therefore, defendant has established its entitlement to judgment as a matter of law dismissing the Dram Shop Act cause of action (*see Coffey*, 88 AD3d at 622).

The motion for summary judgment dismissing the common law negligence claim, however, should have been denied. While the first assault was sudden and unforseeable, and therefore not actionable, defendant failed to demonstrate as a matter of law that it took reasonable actions to protect plaintiff from the assailant on the second assault and that it was not foreseeable. It is true that the husband of defendant's owner averred that he was escorting the assailant, who appeared to have calmed down "somewhat," from the premises, when he suddenly lunged two or three feet to where plaintiff was standing, and struck him. However, another witness testified that immediately prior to assailant's attack on plaintiff, he did not see anyone accompanying or escorting the assailant while the assailant

exited defendant's establishment. This raises issues of fact as to whether defendant took reasonable precautions to prevent the second assault (*see generally Deinzer v Middle Country Pub. Lib.*, 120 AD3d 1292, 1293 [2d Dept 2014] ["A possessor of real property is under a duty to maintain reasonable security measures to protect those lawfully on the premises from reasonably foreseeable criminal acts of third parties"]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7510 In re Bobbi B.,

A Child Under Eighteen Years of Age, etc.,

Bobby B.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

____

Order of fact-finding and disposition and final order of protection in favor of the subject child, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about October 27, 2017, which, inter alia, determined that respondent father neglected the child by committing acts of domestic violence in her presence, and directed the father to comply with the terms of an order of protection, unanimously affirmed, without costs.

The court credited the testimony of a disinterested observer, who worked at the shelter where the mother and the child were residing, that the father placed his hands around the mother's neck during a heated argument, while the mother was

holding their one-month old child. The shelter worker also testified that she heard the mother scream that the father bit her finger. There exists no basis for disturbing the court's credibility determinations (*see e.g. Matter of Aaron C. [Grace C.]*, 105 AD3d 548 [1st Dept 2013]).

Exposure to even a single instance of domestic violence may be a proper basis for a finding of neglect (*see Matter of Allyerra E. [Alando E.]*, 132 AD3d 472, 473 [1st Dept 2015], *lv denied* 26 NY3d 913 [2015]). Here, the child was in imminent danger of physical impairment due to her proximity to violence directed at the mother *(see Matter of Isabella S. [Robert T.]*, 154 AD3d 606 [1st Dept 2017]). Furthermore, the court properly discredited the father's testimony that he did not have a history of domestic violence against the mother in light of his criminal conviction of third degree assault, upon his guilty plea, and

given that an order of protection in favor of the mother was in effect when this incident occurred *(see Matter of Allyerra E.*, 132 AD3d at 473).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7511 The People of the State of New York, Ind. 4577/15
Respondent,

-against-

Mark Dwaileebe,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 4, 2016, convicting defendant, upon his plea of guilty, of attempted grand larceny in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea. "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v Fiumefreddo*, 82 NY2d 536, 544 [1993]). Here, the parties' written submissions and the plea minutes were sufficient to determine the motion. In his motion, defendant asserted that he had not taken his psychiatric medication on the day of the plea. During the plea colloquy, however, defendant responded appropriately and

coherently to the court's inquiries, stating that he was entering the plea of his own free will and that he understood the rights he was waving by doing so. There is nothing to cast doubt on defendant's competency or the voluntariness of his plea (*see e.g. People v Rodriguez*, 302 AD2d 317 [1st Dept 2003], *lv denied* 99 NY2d 657 [2003]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7512 Jin Ming Chen, Index 650142/14
Plaintiff-Appellant,

-against-

Insurance Company of the State of Pennsylvania,
Defendant-Respondent.

____

Kenneth J. Gorman, P.C., New York (Kenneth J. Gorman of counsel), for appellant.

Seiger Gfeller Laurie LLP, New York (Elizabeth F. Ahlstrand of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2017, adjudging defendant liable to plaintiff for $1,526,938 with costs and interest from May 2, 2016, the date of the order granting partial summary judgment to plaintiff, for $159,638.23, for a total award of $1,686,576.23, unanimously affirmed, without costs.

The specific interest-related questions at issue here did not become clear until after the May 2, 2016 order; only then did Supreme Court clarify that excess insurer defendant (ICSOP) was not liable to plaintiff for the first $1 million of the judgment. ICSOP's failure to articulate its position on interest issues earlier does not support a finding of waiver, which requires an indication of an intentional relinquishment of a known right

that, except for the waiver, the waiving party would have enjoyed (*see e.g. DLJ Mtge. Capital Corp., Inc. v Fairmont Funding, Ltd.*, 81 AD3d 563 [1st Dept 2011]). Nor will waiver be implied "unless the opposite party is misled to his or her prejudice into the belief that a waiver was intended" (57 NY Jur 2d, Estoppel, Ratification and Waiver § 89), and plaintiff did not suffer prejudice from ICSOP's delay, as Supreme Court made no decision about interest until it provided both parties an opportunity to brief their respective positions.

ICSOP's interest-related arguments were not impermissible under CPLR 2221(d), since Supreme Court granted leave to reargue for the very purpose of enabling the parties to address the interest issue. As the record does not show that the court granted relief under CPLR 5019(a), plaintiff's arguments about the scope of the court's authority under that statute are not relevant here.

Plaintiff's interpretation of the "follow form" provision in the ICSOP policy is not persuasive. He acknowledges that a following form policy is read in accord with the terms and conditions of the underlying policy (*see e.g. Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.,* 92 NY2d 363 [1998]). However, he does not adequately take into account that the "terms and conditions" of the underlying Arch policy include, in its

Supplementary Payments provision, Arch's agreement to cover prejudgment interest "on that part of the judgment we pay," i.e., the first $1 million, and "all" postjudgment interest on the "full amount of any judgment." The actual ICSOP "follow form" provision, moreover, states: "Except for the . . . conditions . . . of this policy, the coverage provided by this policy shall follow the terms, definitions, conditions and exclusions of the First Underlying Insurance Policy as shown in Item 4 of the Declarations." Among the "conditions" of the ICSOP policy is the "Maintenance of Underlying Insurance" provision, pursuant to which, and regardless of whether the insured actually maintained such underlying insurance, ICSOP's excess coverage would be triggered only upon exhaustion of the "limits of insurance of the Underlying Insurance shown in Item 4 of the Declarations," which "limits," in turn, were not reduced by, and thus included, the interest payments set forth in the Supplementary Payments provision.

We disagree that either *Ragins v Hospitals Ins. Co., Inc.* (22 NY3d 1019 [2013]) or *Welsh v Peerless Cas. Co.* (8 AD2d 373 [1st Dept 1959], *affd* 8 NY2d 745 [1960]) supports plaintiff's position, given key distinctions in the policy language at issue in those cases. Finally, we disagree that the ICSOP policy provisions regarding "Maintenance of Underlying Insurance" and

“Ultimate Net Loss” encompassed underlying coverage only to the extent of the $1 million per occurrence the primary policy provided. The language of the policies do not support this interpretation, and instead supports ICSOP’s position that its coverage obligations were meant to be excess to all aspects of coverage afforded by the primary policy – that is, not only the $1 million in coverage per occurrence, but also the Supplementary Payments, which, by their terms, did not reduce the Arch policy’s insurance limits.

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7513 The People of the State of New York, Ind. 1646/15
Respondent,

-against-

Chad Williams,
Defendant-Appellant.

____

Justine M. Luongo, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J.), rendered November 6, 2015,

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.

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

ENTERED: OCTOBER 30, 2018

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CLERK

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

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7514 The People of the State of New York, Ind. 3785/14
Respondent,

-against-

Kenneth Millan,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Kyle R. Silverstein of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Eugene Oliver, J.), rendered March 6, 2017,

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.

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

ENTERED: OCTOBER 30, 2018

CLERK

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

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7521 Sian Green, Index 161441/14
Plaintiff-Appellant,

-against-

Faysal Kabir Mohammad Himon,
et al.,
Defendants,

1251 American Associates II LP initially
sued herein as Mitsui Fudosan America,
Inc. et al.
Defendant-Respondent.

____

Kaplan, Williams & Graffeo LLC, New York (Kashif T. Chand of counsel), for appellant.

Gerber Ciano Kelly Brady LLP, Garden City (Robert W. Berbenich of Counsel), for respondent.

____

Order, Supreme Court, New York County (George J. Silver, J.), entered July 3, 2017, which granted the motion of defendant 1251 America Associates II LP i/s/h/a Mitsui Fudosan America, Inc. (1251 America) to dismiss the complaint and all cross claims as against it, unanimously affirmed, without costs.

Plaintiff sustained severe injuries when, while standing on the sidewalk adjacent to a building owned by defendant 1251 America, a taxicab hopped the curb and struck her. Moments before the accident, defendant taxicab driver had an altercation with defendant bike messenger. The taxicab driver then allegedly steered his vehicle into the bike messenger, striking plaintiff

in the process.

1251 America's motion was properly granted because it had no duty to install barriers on the public sidewalk to prevent against the unforeseeable risk that a car would mount the sidewalk and strike a pedestrian (*see Pulka v Edelman*, 40 NY2d 781 [1976]; *Jiminez v Shahid*, 83 AD3d 900 [2d Dept 2011], *lv denied* 18 NY3d 807 [2012]; *Grandy v Bavaro*, 134 AD2d 957 [4th Dept 1987], *lv denied* 71 NY2d 802 [1988]). Plaintiff's reliance on Administrative Code of City of NY § 7-210 is misplaced. Section 7-210 requires owners of property abutting the public sidewalk to perform various types of maintenance on the sidewalk, including replacing defective sidewalk flags and removing "snow, ice, dirt, or other material from the sidewalk" (*see Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517, 521 [2008]). Since the statute imposes a new duty on landowners "in derogation of common law" and creates liability where none previously existed, it "must be strictly construed" (*id.* [internal quotation marks omitted]), and cannot be interpreted to extend the landowner's obligations beyond the types of maintenance work listed in the statute and require them to protect pedestrians from remote risks posed by vehicular traffic.

Nor is there any basis for finding that 1251 America was a proximate cause of the accident, which occurred when the taxi

driver drove onto the sidewalk after an altercation with the bike messenger (*see Sheryll v United Gen. Constr.*, 138 AD3d 612 [1st Dept 2016], *lv denied* 28 NY3d 904 [2016]; *Chowes v Aslam*, 58 AD3d 790 [2d Dept 2011]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7522 The People of the State of New York, Ind. 5102/11
Respondent,

-against-

Jonathan Batticks,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered June 12, 2013, as amended September 4, 2013, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a second violent felony offender, to a prison term of six and one-half years, unanimously affirmed.

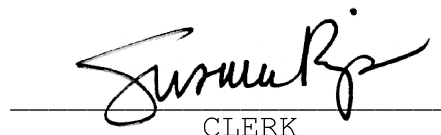
The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury’s credibility determinations. Defendant’s acquittal of other charges does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

Defendant’s claim regarding an incident involving a juror is similar to an argument unsuccessfully raised on appeal by both his codefendants (*People v Wiggins*, 132 AD3d 514 [1st Dept 2015],

lv denied 27 NY3d 1076 [2016]; *People v Bailey*, 148 AD3d 547 [1st Dept 2017], *affd on other grounds* ___ NY3d ___ [2018], NY Slip Op ___ NY3d ___ [2018], 04383 [2018]). Defendant, unlike his codefendants, preserved his claim by asking the trial court to conduct an inquiry to determine if the juror was grossly unqualified. However, we adhere to our ruling in those cases (expressed, not as "dicta" but as an alternative holding) that the trial court properly determined, based on its own observations, that no inquiry was necessary.

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

ENTERED: OCTOBER 30, 2018



CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7523 The People of the State of New York, Ind. 3035/14
Respondent,

-against-

Jerome Brith,
Defendant-Appellant.

____

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

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

____

Judgment, Supreme Court, New York County (Abraham L. Clott, J.), rendered June 19, 2015, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal sale of marijuana in the fourth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to consecutive terms of 10 years and 1 year, respectively, unanimously reversed, on the law, and the matter remanded for a new trial.

The court improvidently exercised its discretion in denying defendant's challenge for cause to a prospective juror who repeatedly expressed a predisposition to credit police testimony, and a belief that innocent defendants would testify on their own behalf, since the totality of his responses established that he would be unable to put aside his inclinations and be fair and

impartial (*see People v Arnold*, 96 NY2d 358, 362 [2001]). At no point did the panelist give an unequivocal assurance that he would put aside his beliefs and concerns and render an impartial verdict (*see People v Johnson*, 94 NY2d 600, 612 [2000]).

In light of the foregoing, we do not reach defendant's remaining claim.

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

ENTERED: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7524 The People of the State of New York, Ind. 2074/15
Respondent,

-against-

Naya B.,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Beth R. Kublin of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (George Villegas, J. at plea; William Mogulescu, J. at sentencing), rendered December 21, 2016,

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.

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

ENTERED: OCTOBER 30, 2018

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CLERK

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

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7525 The People of the State of New York, Ind. 5488/12
Respondent,

-against-

Emmanuel Bonafe,
Defendant-Appellant.

____

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

____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered October 16, 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: OCTOBER 30, 2018

CLERK

Acosta, P.J., Friedman, Kapnick, Webber, Moulton, JJ.

7526N In re Harinder Jeet Singh, Index 101552/16
Petitioner-Appellant,

-against-

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

____

Harinder Jeet Singh, appellant pro se.

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

____

Order, Supreme Court, New York County (W. Franc Perry, J.), entered June 1, 2017, which denied petitioner's application for leave to file an untimely notice of claim against respondents, unanimously affirmed, without costs.

Supreme Court properly denied petitioner's application for leave to file a late notice of claim against respondents the City of New York and The Fire Department, City of New York (collectively the "City") pursuant to General Municipal Law § 50-e. While courts should not usually "delve into the merits of an action in determining an application to file a late notice," here, petitioner's common law fraud claim is patently meritless (*Weiss v City of New York*, 237 AD2d 212, 213 [1st Dept 1997]).

Petitioner sets forth no facts at all alleging that a City

employee, either during the November 21, 2015 exam or at any time before the filing of his leave application, told him something that was untrue and that he relied upon that statement to his detriment (*see Vermeer Owners v Guterman*, 78 NY2d 1114, 1116 [1991]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Mazzarelli, J.P., Kapnick, Kahn, Kern, Singh, JJ.

6390 Arlene Rodriguez, etc., Index 22930
Plaintiff-Respondent,

-against-

DTS, Inc., et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered on or about December 23, 2015,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 17, 2018,

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Gische, Mazzarelli, Webber, Kahn, JJ.

7375 180 Ludlow Development LLC, Index 651473/13
Plaintiff-Appellant,

-against-

Olshan Frome Wolosky LLP,
Defendant-Respondent.

____

Pryor Cashman LLP, New York (Todd B. Marcus and Lauren B. Cooperman of counsel), for appellant.

Landman Corsi Ballaine & Ford, P.C., New York (Stephen Jacobs of counsel), for respondent.

____

Order, Supreme Court, New York County (Debra A. James, J.), entered August 23, 2017, which, insofar as appealed from as limited by the briefs, granted defendant law firm's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Although "[a] verified pleading is the equivalent of a responsive affidavit for purposes of a motion for summary judgment" (*Travis v Allstate Ins. Co.*, 280 AD2d 394, 394-395 [1st Dept 2001] [internal quotation marks omitted]), here, the verified complaint does not say who at plaintiff instructed Hyman Kindler of defendant to draft a zoning lot development and easement agreement (ZLDA) that would ensure that construction of plaintiff's cantilever would not place the adjoining property in violation of the Building Code, nor does it say when plaintiff

gave Kindler instructions. Thus, it is lacking in evidentiary detail (*see e.g. Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 94 [1st Dept 2009]; *compare Travis* at 395).

It is true that, for defendant "to limit the scope of its representation, it had a duty to ensure that [plaintiff] understood the limits of its representation" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC,* 157 AD3d 479, 482 [1st Dept 2018]). However, in *Genesis,* there was an issue of fact because the parties submitted conflicting affidavits (*see id.*). By contrast, plaintiff did not submit its own affidavit (as opposed to an expert's affidavit) in opposition to defendant's cross motion for summary judgment, and, as noted, its verified pleading lacks some of the requisite evidentiary details. Moreover, the evidence in the record, including a June 25, 2007 email from one of plaintiff's consultants, supports defendant's assertion that it was merely the transactional lawyer on plaintiff's team, and it is undisputed that plaintiff had separate zoning/land use counsel.

Even if the parties' conflicting expert affidavits created an issue of fact as to whether defendant was negligent in its representation (*see generally Cassagnol v Williamsburg Plaza Taxi,* 234 AD2d 208, 210 [1st Dept 1996]), that is only one element of malpractice (*see Nomura Asset Capital Corp. v*

Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015]). Another required element is that the attorney's breach of the duty to exercise the ordinary skill and knowledge possessed by members of the legal profession "proximately caused plaintiff to sustain actual and ascertainable damages" (*id.* [internal quotation marks omitted]).

While proximate cause is generally a question for the factfinder (*see e.g. Hain v Jamison,* 28 NY3d 524, 529 [2016]), it can, in appropriate circumstances, be determined as a matter of law (*id.; see also Jeremias v Allen,* 146 AD3d 623, 623-624 [1st Dept 2017]; *DiPlacidi v Walsh,* 243 AD2d 335 [1st Dept 1997]). This is one of these cases, inasmuch as plaintiff's damages were caused by its failure to keep defendant informed and its unilateral decision that a cantilever over a windowed courtyard constituted a violation as defined in the ZLDA.

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

ENTERED: OCTOBER 30, 2018

CLERK

Richter, J.P., Manzanet-Daniels, Kapnick, Kern, Moulton, JJ.

7382 The People of the State of New York, Ind. 2901/12
Respondent,

-against-

Robert McCray,
Defendant-Appellant.

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen Chu of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Cynthia A. Carlson of counsel), for respondent.

Judgment, Supreme Court, Bronx County (George Villegas, J. at CPL 190.50 motion; Martin Marcus, J. at jury trial and sentencing), rendered November 6, 2014, convicting defendant of arson in the second degree and criminal contempt in the first degree (three counts), and sentencing him to an aggregate term of 18 years, unanimously affirmed.

The court properly dismissed, as untimely, defendant's CPL 190.50 motion to dismiss the indictment on the ground that defendant was deprived of his right to testify before the grand jury. Contrary to defendant's assertion, the court specifically extended the deadline to file that motion to October 3, 2012, and not to October 18, the deadline to file other motions.

The court providently exercised its discretion in denying defense counsel's request for a CPL article 730 examination (*see*

Pate v Robinson, 383 US 375 [1966]; *People v Tortorici*, 92 NY2d 757, 766 [1999], *cert denied* 528 US 834 [1999]; *People v Morgan*, 87 NY2d 878, 879-880 [1995]). Although defendant engaged in obstreperous behavior and made false or disruptive remarks, the record does not cast doubt on his ability to understand the proceedings and assist in his defense (*see e.g. People v Taylor*, 92 AD3d 556, 557 [1st Dept 2012]).

The court properly found that defendant forfeited his right to be present at trial (*see* CPL 260.20) through his frequent outbursts and interruptions of the proceedings, after the court repeatedly warned him that he would be removed from the courtroom if he continued such behavior (*see People v Edwards*, 265 AD2d 220 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]). Defendant was first removed during the prosecutor's summation due to his interruption of the prosecutor; defendant was brought back to the courtroom for jury deliberations with a final warning, but then properly removed when he interrupted the court's response to a jury note (*see e.g. People v Valdes*, 283 AD2d 187 [1st Dept 2001], *lv denied* 97 NY2d 688 [2001]). Defendant's right to be present was forfeited, rather than waived (*see People v Corley*, 67 NY2d 105, 110 [1986]), and thus his arguments concerning waiver are misplaced.

Defendant's ineffective assistance of counsel claim

regarding the untimeliness of the dismissal motion is unavailing, because defendant has not shown prejudice under the state or federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not show any reason to believe that he might have avoided indictment had there been a second grand jury presentation (*see People v Simmons*, 10 NY3d 946, 949 [2008]). Defendant's claim that he received ineffective assistance at sentencing is unreviewable on direct appeal, in the absence of a CPL 440.10 motion, because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7454N Cynthia Gomez, Index 300630/14
Plaintiff-Respondent,

-against-

One Sickles Street Company, LP, et al.,
Defendants-Appellants.

____

Arnold & Porter Kaye Scholer LLP, New York (James M. Catterson of counsel), for appellants.

Mauro Lilling Naparty LLP, Woodbury (Seth M. Weinberg of counsel), for respondent.

____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about June 8, 2017, which denied defendants' motion to vacate a default judgment entered against them, unanimously affirmed, without costs.

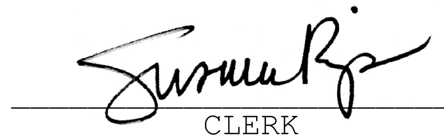
Defendants' failure to update their address on file with the Secretary of State for 14 years after moving their offices does not constitute a reasonable excuse for their default (CPLR 5015[a][1]; *see On Assignment v Medasorb Tech., LLC*, 50 AD3d 342 [1st Dept 2008]; *Lopez v 592-600 Union Ave. Corp.*, 292 AD2d 262 [1st Dept 2002]).

Defendants also failed to demonstrate that they had no knowledge of this personal injury action and that they had a meritorious defense, as required for relief under CPLR 317 (*see Lopez*, 292 AD2d at 263; *Baez v Ende Realty Corp.*, 78 AD3d 576

[1st Dept 2010]). As to lack of notice, defendants offered no explanation for their failure to receive the summons and complaint, and other documents, that plaintiff sent to the accident premises, i.e., the building they own (*see Baez*, 78 AD3d 576). The affidavit by defendants' officer fails to show a meritorious defense, as it contains only a general assertion of lack of knowledge of the incident or of any alleged defect in the premises and a claim that the officer would have timely answered had he known about the action (*see Lopez*, 292 AD2d at 263).

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

ENTERED: OCTOBER 30, 2018



CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7477 The People of the State of New York, Ind. 3160/13
Respondent,

-against-

Chadd Lyons,
Defendant-Appellant.

____

Christina A. Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (R. Jeannie Campbell-Urban of counsel), for respondent.

____

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered March 27, 2015, convicting defendant, after a jury trial, of burglary in the second degree, possession of burglar's tools and resisting arrest, and sentencing him, as a second felony offender, to an aggregate term of seven years, unanimously affirmed.

Defendant did not preserve his present challenge to the court's response to a jury note. At a colloquy about the court's response, defense counsel alluded, at most (*see People v Borrello*, 52 NY2d 952 [1981]), to the principle that he now claims should have been charged to the jury, but he never directly and clearly made such a request. Furthermore, when the court announced the instruction it intended to deliver, counsel agreed to that instruction, and after the court delivered it to

the jury, counsel specifically said he had no exceptions or further requests to charge. Thus, counsel did nothing to alert the court that its charge had not addressed the concerns raised at the colloquy (*see People v Lewis*, 5 NY3d 546, 551 [2005]; *People v Whalen*, 59 NY2d 273, 280 [1983]; *People v Lipton*, 54 NY2d 340, 341 [1981]).

We decline to review this claim in the interest of justice. As an alternative holding, we find that the court provided a meaningful response that was legally accurate, responsive to the jury's question and fully consistent with the principle that an intent to commit a trespass, like an unlawful entry into one of the apartments of the building in question, could not, by itself, satisfy the intent element of burglary.

Defendant's 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, 709 [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]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7478 Scott Meyer, Index 152786/16
Plaintiff-Respondent,

-against-

224 Lafayette St. Corp., also known as
224 Lafayette Street Corp., et al.,
Defendants-Appellants.

____

Helbraun & Levey, LLP, New York (Elizabeth M. Kolleeny Tankel of counsel), for appellants.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for respondent.

____

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered May 19, 2017, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment as to liability on the causes of action for rent overcharges, treble damages and interest and conversion of the security deposit, declaring his rights under the Rent Stabilization Law and the Rent Stabilization Code, and dismissing the statute of limitations affirmative defense, and declared that apartment 8 in the building located at 224 Lafayette Street in Manhattan was a rent-stabilized unit and that plaintiff was entitled to a rent-stabilized lease and receipts for all rental payments made by him, unanimously affirmed, without costs.

Plaintiff established prima facie the existence of an

illusory tenancy scheme by defendants (*see Matter of Avon Furniture Leasing v Popolizio*, 116 AD2d 280, 284 [1st Dept 1986], *lv denied* 68 NY2d 610 [1986]; *Primrose Mgt. Co. v Donahoe*, 253 AD2d 404, 405 [1st Dept 1998]). The affidavits by plaintiff and a former tenant show that the registration filed by defendants reflected that various relatives of the landlord's principal were tenants of apartments that were actually occupied by other individuals.

Defendants failed to raise an issue of fact; they submitted no leases to the tenants shown on the registration or rent ledgers or similar documentation. Defendants' claim that the son of landlord's principal was the prime tenant of apartment 8 is not supported by any documentary evidence, including leases. Defendants also failed to support their contention that plaintiff was not entitled to the rights of a rent-stabilized tenant because apartment 8 was not his primary residence; in contrast, plaintiff submitted voluminous records reflecting the indicia of prime tenancy (*see Glenbriar Co. v Lipsman*, 5 NY3d 388 [2005]; 9 NYCRR 2200.3[j]).

In view of the foregoing, the court correctly concluded that the DHCR default formula should be used to calculate the rent overcharges (*see Conason v Megan Holding, LLC*, 25 NY3d 1 [2015]).

Defendants failed to raise an issue of fact whether

plaintiff ever made a security deposit. In his affidavits, the supposed prime tenant, the son of the landlord's principal, did not deny that a security deposit was received, and defendants provided no documentation of a security deposit bank account.

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7479 In re Andre A. (Anonymous),

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

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

Zachary W. Carter, Corporation Counsel, New York (Deborah E. Wassel of counsel), for presentment agency.

Order of disposition, Family Court, New York County (Adetokunbo O. Fansanya, J.), entered on or about August 5, 2016, which adjudicated appellant a juvenile delinquent upon appellant's admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion to the extent appealed from. Initially, we find no basis for disturbing the court's credibility determinations.

For purposes of this appeal we assume, without deciding, that the police encounter with appellant was an arrest requiring *Miranda* warnings, as opposed to an investigatory detention that does not require those warnings, regardless of whether the

suspect is free to leave (*see Berkemer v McCarty*, 468 US 420, 436-437 [1984]; *People v Bennett*, 70 NY2d 891 [1987]). Nevertheless, we conclude that appellant's statement, made after an officer answered appellant's question about why he was being detained, was spontaneous and not the result of interrogation (*see Rhode Island v Innis*, 446 US 291, 300-301 [1980]). "Where, as here, a defendant's inquiry concerning the reason for an arrest is immediately met by a brief and relatively innocuous answer by the police officer, there is no interrogation or its functional equivalent" (*People v Mercado*, 92 AD3d 458, 438 [1st Dept 2012] [internal quotation marks omitted], *lv denied* 18 NY3d 996 [2012]).

When the police removed a box cutter from appellant's pocket, this seizure was incident to a lawful arrest. Based on first-hand information provided by a store manager, and a surveillance videotape, the police had probable cause to believe

that defendant had committed a crime in the store and had not merely been involved in some kind of dispute. We have considered and rejected appellant's arguments to the contrary.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7480 Yvette Mahon, Index 150366/11
Plaintiff,

-against-

David Ellis Real Estate, L.P.,
et al.,
Defendants.
- - - - -
David Ellis Real Estate, L.P.,
Third-Party Plaintiff-Respondent,

-against-

B.R. Guest, LLC, et al.,
Third-Party Defendants,

USC Operating Company, LLC doing business
as Union Square Café,
Third-Party Defendant-Appellant.
- - - - -
[And a Second Third-Party Action]

____

Pillinger Miller Tarallo, LLP, Elmsford (Daniel Owen Dietchweiler of counsel) for appellant.

PGG Law Firm - The Peisner Group, New York (Kathi Peisner of counsel), for respondent.

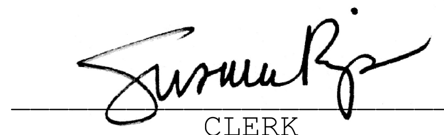
____

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered August 10, 2017, which, insofar appealed from as limited by the briefs, denied third-party defendant USC Operating Company, LLC d/b/a Union Square Café's (USC) motion to dismiss the third-party claim for contractual indemnification, unanimously affirmed, without costs.

The indemnification clause in the contract between David Ellis Real Estate, L.P. (Ellis), the owner of the building outside which plaintiff fell, and its tenant, USC, does not violate General Obligations Law § 5-321 because it does not purport to indemnify David Ellis from liability for its own negligence (*see Glover v City of New York*, 215 AD2d 146 [1st Dept 1995]). However, while section 7-210 of the Administrative Code places the obligation upon Ellis as landowner to keep the sidewalk in good repair, the lease agreement broadly states that USC would indemnify Ellis for all personal injury claims arising from an accident that occurred on the sidewalks adjoining its demised premises. Accordingly, the record before us precludes a determination, as a matter of law, as to whether USC will be required to indemnify Ellis for the subject personal injury claim.

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

ENTERED: OCTOBER 30, 2018



CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7481 Brinia Castro, et al., Index 350020/11
Plaintiffs,

Solangie Rojas, etc.,
Plaintiff-Appellant,

-against-

DADS National Enterprises,
Inc., et al.,
Defendants-Respondents.

____

Mitchell Dranow, Sea Cliff, for appellant.

Maroney O'Connor, LLP, New York (Ross T. Herman of counsel), for DADS National Enterprises, Inc., and Lennard Washington Jackson, respondents.

Russo & Tambasco, Melville (Susan J. Mitola of counsel), for Lucy R. Figueroa, respondent.

____

Order, Supreme Court, Bronx County (Joseph E. Capella, J.), entered on or about June 8, 2017, which, to the extent appealed from as limited by the briefs, granted defendants' motions for summary judgment dismissing plaintiff Solangie Rojas's complaint based on her inability to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants established entitlement to judgment as a matter of law by submitting evidence showing that plaintiff's claimed injuries were not serious within the meaning of Insurance Law §

5102(d). Defendants submitted the affirmed reports of their respective expert physicians, each of whom documented normal range of motion, diagnosed plaintiff with resolved strains/sprains of the spine, and opined that there was no objective evidence of serious injury (*see e.g. Cattouse v Smith*, 146 AD3d 670, 672 [1st Dept 2017]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether she sustained a serious injury, rather than a minor injury. Plaintiff's chiropractic and physical therapy records were neither sworn nor certified, and the motion court properly declined to consider them (*see Pagano v Kingsbury*, 182 AD2d 268 [2d Dept 1992]). In any event, the records contain no MRI or other objective evidence of injury (*see Thomas v City of New York*, 99 AD3d 580 [1st Dept 2012], *lv denied* 22 NY3d 857 [2013]), and document only four months of therapy following the accident (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013]). Moreover, plaintiff resumed physical activities and participation in her gymnastics class.

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7482 The People of the State of New York, Ind. 3400/10
Respondent,

-against-

Gabriel Thompson,
Defendant-Appellant.

Christina A. Swarns, Office of the Appellate Defender, New York (Anastasia Hegger of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Lori Ann Farrington of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered September 27, 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.

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

ENTERED: OCTOBER 30, 2018

CLERK

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

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7483 Licelot Deno, Index 305172/12
Plaintiff, 84028/12

-against-

Persio Belliard, et al.,
Defendants.
- - - - -
Persio Belliard, et al.,
Third-Party Plaintiffs-Respondents,

-against-

The City of New York, et al.,
Third Party Defendants-Appellants.

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

The Lubowitz Law Firm, Scarsdale (Susan I. Lubowitz of counsel), for respondents.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 25, 2017, which, insofar as appealed from as limited by the briefs, denied third-party defendants’ motion for summary judgment dismissing the third-party complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Dismissal of the third-party complaint is warranted in this personal injury action arising from a two-car accident between a police car owned and operated by third-party defendants and a taxi cab owned and operated by defendants/third-party plaintiffs.

The accident occurred when the police car, while responding to an emergency call, drove through a red light. Plaintiff, who was a passenger in the police vehicle, commenced an action against the owner and operator of the taxi cab, who then brought a third-party action.

Here, third-party defendant police officer testified that he came to a complete stop before entering the intersection and looked in the direction of the taxi, but did not see it. Accordingly, the officer's testimony demonstrated that his actions were not reckless as a matter of law (*see Flynn v Sambuca Taxi, LLC*, 123 AD3d 501, 502 [1st Dept 2014]; *see also Quock v City of New York,* 110 AD3d 488, 489 [1st Dept 2013]), and third-party plaintiffs' attempts to undermine the officer's credibility are unpersuasive. While there is a question as to whether the police car's sirens were activated at the time of the accident, this issue is "not material, as a police vehicle performing an emergency operation is not required to activate [lights or

sirens] in order to be entitled to the statutory privilege of passing through a red light" (*Flynn* at 502; *see Lewis v City of New York*, 155 AD3d 441 [1st Dept 2017]; Vehicle and Traffic Law § 1104[c]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7484-
7484A E.E. Cruz & Company, Inc., Index 152988/12
Plaintiff-Respondent,

-against-

Axis Surplus Insurance Company,
Defendant,

Arch Insurance Company,
Defendant-Respondent,

National Casualty Company,
Defendant-Appellant-Respondent,

Everest National Insurance Company,
Defendant-Respondent-Appellant.

\- - - - -

Arch Insurance Company, as real party
in interest to E.E. Cruz & Company, Inc.,
Third-Party Plaintiff-Respondent,

-against-

Axis Surplus Insurance Company,
Third-Party Defendant,

National Casualty Company,
Third-Party Defendant-Appellant-Respondent.

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Kennedys CMK, New York (Max W. Gershweir of counsel), for appellant-respondent.

Barclay Damon LLP, Rochester (Sanjeev Devabhakthuni of counsel), for respondent-appellant.

Lewis, DiBiasi, Zaita & Higgins, LLP, New York (Nicholas J. Zaita of counsel), for E.E Cruz & Company, Inc., respondent.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Louise M. Cherkis of counsel), for Arch Insurance Company, respondent.

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Orders, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 21, 2017 and December 26, 2017, respectively, which, to the extent appealed from, denied defendants National Casualty Company and Everest National Insurance Company's motions for summary judgment dismissing the complaint as against them or declaring that plaintiff is not entitled to coverage under the insurance policies they issued with respect to any claims or damages alleged in the complaint, unanimously modified, on the law, to grant the motions to the extent of declaring that plaintiff's markups for overhead and profit on remediation work are not damages covered by the policies and that National's share of excess coverage is 1/11, and otherwise affirmed, without costs.

Plaintiff, the contractor on a deck replacement project on the Throgs Neck Bridge, seeks to recover under various insurance policies for remediation costs it incurred and damages awarded against it in favor of the Triborough Bridge and Tunnel Authority (TBTA) as a result of a fire that broke out on the bridge during the performance of its work.

The record shows that plaintiff complied with the notice provision of the policy issued by National, which required it to "*see to it* that [National was] notified as soon as practicable of an 'occurrence' or an offense . . . which may result in a claim"

(emphasis added). Plaintiff was not required to notify National directly (*see Spoleta Constr., LLC v Aspen Ins. UK Ltd.*, 27 NY3d 933, 935-936 [2016]; *United States Underwriters Ins. Co. v Falcon Constr. Corp.*, 2003 WL 22019429, *5, 2003 US Dist LEXIS 14817, *15-16 [SD NY 2003]).

National contends that the costs of remediation undertaken by plaintiff were voluntary payments as a matter of law and not damages it was "legally obligated to pay." This contention fails to take into account the emergency nature of the remediation required; the bridge had been completely shut down as a result of the fire and was only partially opened as the damage was assessed and remediation work begun. Given that the costs incurred were covered under the policy, that time was of the essence in performing the remediation, and that plaintiff's damages would grow without remediation, we cannot conclude as a matter of law that the remediation costs were voluntary payments.

Nor can we conclude that, as National and Everest contend, their policies do not cover amounts awarded to TBTA in arbitration because plaintiff "entered into" the arbitration without their consent or that of the underlying insurers. The submission of a dispute notice to TBTA's Contractual Disputes Review Board merely preserved plaintiff's right to challenge TBTA's determination of damages in a mandatory arbitration. In

any event, both policies are ambiguous, as it is unclear which of the items in the list that precedes the phrase "entered into without our consent," i.e., settlements, judgments, arbitration, and other dispute methods, the phrase is intended to modify.

National argues that, because the policy provides additional insured coverage for property damages "caused, in whole or in part," by the named insured's acts or omissions, plaintiff is not entitled to additional insured coverage for the portion of fire damage attributed to it. However, the purpose of the quoted language is "to provide coverage for an additional insured's vicarious or contributory negligence" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 326 [2017]).

We reject National's and Everest's arguments that costs incurred for site safety monitoring in connection with the remediation are, as a matter of law, not damages resulting from the accident.

National and Everest argue correctly that plaintiff's markups for its own overhead and profit on the remediation work are not covered under the policies, because these markups are not costs that it was "legally obligated to pay," within the meaning of the policies.

National is correct that its share of excess coverage is 1/11 of the total. While the National and Everest policies each

provide excess coverage of $10 million, the National policy further provides that where additional insured coverage is required pursuant to contract, "the most we will pay on behalf of the additional insured is the amount of insurance required by the contract, less any amounts payable by [the underlying insurance]." National's named insured's subcontract required "not less than" $2 million in commercial general liability coverage naming plaintiff as an additional insured, and the underlying policy limit was $1 million. Thus, National's limit here is $1 million (*see Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 156 n 14 [1st Dept 2008]). Because insurers sharing the same risk are required to "contribute in the proportion their policies bear to the limit of coverage at that level" (*Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]), National's share of the total excess coverage of $11 million is 1/11 (*see Bovis*, 53 AD3d at 155-156).

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7485 Sheriff Alabi-Ajidagba also known as Sheriff Alabiajudagba, Plaintiff-Appellant, Index 303573/14

-against-

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

Law Firm of Duane C. Felton, Staten Island (Duane C. Felton of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about June 27, 2017, which granted defendants' motion to modify a prior order, same court (Larry S. Schachner, J.), entered on or about May 19, 2016, and clarified that the prior order granted defendants summary judgment disposing of the action in its entirety, unanimously affirmed, without costs.

In this action alleging negligent police investigation and damages arising therefrom due to plaintiff's interim incarceration, such claim was properly dismissed, as no such claim is recognized in New York (*see Medina v City of New York*, 102 AD3d 101, 108 [1st Dept 2012]; *Hines v City of New York*, 142 AD3d 586 [2d Dept 2016]). Plaintiff, who filed the note of issue in this case, has not pointed to evidence that might raise a triable issue as to whether the qualified immunity of defendant

police officer for his discretionary acts in connection with plaintiff’s arrest and processing was compromised by any actions inconsistent with acceptable police practice (*see Lubeki v City of New York*, 304 AD2d 224, 233-234 [1st Dept 2003], *lv denied* 2 NY3d 701 [2004]).

The record reflects that defendants’ two motions placed plaintiff on notice of the dispositive relief sought as to all claims. Thus, his due process claims are unavailing.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7486 The People of the State of New York, Ind. 27/11
Respondent,

-against-

Rodney Alcala,
Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Luis Morales 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 (Bonnie Wittner, J.), rendered January 7, 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.

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

ENTERED: OCTOBER 30, 2018

CLERK

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

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7487-
7488 Davian M.J.G. also known
as Davian G., and Another,

Dependent Children Under Eighteen Years
of Age, etc.,

Candy J.,
Respondent-Appellant,

The Children's Aid Society,
Petitioner-Respondent.

____

Geoffrey P. Berman, Larchmont, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel) for respondent.

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

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Orders of disposition, Family Court, Bronx County (Robert D. Hettleman, J.), entered on or about September 12, 2017, which, insofar as appealed from, after a hearing, revoked a suspended judgment, terminated respondent's parental rights and committed guardianship and custody of the children to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

A preponderance of the evidence supports the Family Court's conclusion that the termination of respondent's parental rights is in the children's best interests. The children have been in foster care for most of their lives and their foster parents have

provided them with a stable and nurturing home, and wish to adopt them (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Aparicio Rodrigo B.*, 29 AD3d 351, 352 [1st Dept 2006]). On the other hand respondent's exercise of poor judgment in, among other things, continuing to place the children in dangerous situations involving domestic violence demonstrates that she could not provide a stable home for the children. Despite receiving a one-year suspended judgment, which was extended, respondent did not make sufficient progress to permit the safe return of the children to her care. Accordingly, terminating parental rights to permit a permanent alternative is in the children's best interests (Social Services Law § 384-b[1][a][iv]).

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7490 The People of the State of New York, Ind. 3519/13
Respondent,

-against-

Dushawn Green,
Defendant-Appellant.

____

Seymour W. James, Jr., The Legal Aid Society, New York (Amy Donner and Justine M. Luongo of counsel), for appellant.

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

____

Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered May 28, 2014, convicting defendant, upon his plea of guilty, of burglary in the third degree, and sentencing him to a term of one to three years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved, and we decline to review it in the interest of justice. Because "[d]efendant said nothing [at] the plea colloquy or . . . sentencing proceeding that negated an element of the crime," the narrow exception to the preservation rule does not apply (*People v Pastor*, 28 NY3d 1089, 1090-1091 [2016]; *People v Lopez*, 71 NY2d 662, 665 [1988]).

At sentencing, defendant mentioned that he did not steal anything at the time of the burglary to which he had pleaded guilty. The court appropriately advised defendant that burglary

did not require an actual theft, but only the intent to commit a crime such as larceny, whereupon defendant said nothing further. Accordingly, there was no need for any further inquiry. The court was not required to inquire into other statements that defendant made in presentence interviews (*see e.g. People v Rojas*, 159 AD3d 468 [1st Dept 2018], *lv denied* 31 NY3d 1086 [2018]). In any event, the plea allocution establishes the voluntariness of the plea.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7492 Barbara Quigley, Index 154474/14
Plaintiff-Appellant,

-against-

Nederlander Organization, Inc.,
doing business as The Lunt-Fontanne
Theater, et al.,
Defendants-Respondents,

Consolidated Edison of New York, Inc.,
et al.,
Defendants.

____

Pillinger Miller Tarallo, Elmsford (Patrice M. Coleman of counsel), for appellant.

Nicoletti Gonson Spinner Ryan Gulino Pinter LLP, New York (Benjamin Gonson of counsel), for respondents.

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Order, Supreme Court, New York County (David B. Cohen, J.), entered September 26, 2017, which granted the motion of defendant Nederlander Organization, Inc. d/b/a The Lunt-Fontanne Theater for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Defendant theater established its entitlement to judgment as a matter of law in this action for personal injuries sustained when plaintiff tripped and fell on the street, nearly a block away from defendant theater, as she was maneuvering her way through a crowded sidewalk. Plaintiff testified that when she arrived at the theater, her group was directed to join the end of

the line. As she followed her group, plaintiff stepped off the sidewalk onto the street, where her heel got caught in a crack between two metal plates, causing her to fall.

Defendant was not on notice of any dangerous crowding condition or of a hazardous condition on the street, in close proximity to where its patrons stood in line. Nor did plaintiff identify any overcrowding condition that restricted her movement. Rather, she stated that she observed a mix of patrons and pedestrians on the sidewalk, that she was not directed by defendant to walk on the street, and that the crowd of patrons was not unruly. Even assuming that the crowd took over the entire width of the sidewalk, in the absence of prior notice of a dangerous condition, it was not foreseeable that directing plaintiff to join the line in order to enter the theater would have placed her in danger (*see Maheshwari v City of New York*, 2 NY3d 288 [2004]; *Marrero v City of New York*, 102 AD3d 409 [1st Dept 2013]; *compare Sachar v Columbia Pictures Indus., Inc.*, 129 AD3d 420 [1st Dept 2015]).

Plaintiff failed to raise a triable issue of fact. The evidence shows that the accident was caused by her own conduct in an attempt to maneuver her way through a crowd of patrons and pedestrians when she chose to step onto the street. Nor is there

any evidence that sidewalk was so crowded that it unduly restricted plaintiff’s freedom of movement (*see Alexopoulos v Metropolitan Transp. Auth.*, 41 AD3d 171 [1st Dept 2007]).

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7493 The People of the State of New York, Ind. 4107/15
Respondent,

-against-

Fabian Aviles,
Defendant-Appellant.

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

Judgment, Supreme Court, New York County (Michael Sonberg, J.), rendered January 5, 2016, 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: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7494 Sara Hong Robert, Index 651800/18
Plaintiff-Respondent-Appellant,

-against-

Ringerjeans, LLC,
Defendant-Appellant-Respondent,

Gabriel Zeitouni,
Defendant-Respondent.

____

Matalon Shweky Elman PLLC, New York (Joseph Lee Matalon of counsel), for appellant-respondent and respondent.

Richard Friedman PLLC, New York (Richard B. Friedman of counsel), for respondent-appellant.

____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 25, 2018, which, to the extent appealed from, granted defendants' motion to dismiss plaintiff's claims against the individual member of the corporate defendant and her claim for unjust enrichment against the corporate defendant, and denied the motion as to plaintiff's claims for promissory estoppel and quantum meruit against the corporate defendant, unanimously modified, on the law, to dismiss the complaint in its entirety, and as so modified, affirmed, without costs. The Clerk is directed to enter judgment accordingly.

General Business Law § 130(9)'s prohibition against a person in violation of General Business Law § 130(1) maintaining any action or proceeding in any court in this state on any contract,

account, or transaction, bars plaintiff from asserting any claims, including equitable claims. This is the only reading that gives effect to all of the provisions of the statute (*see* McKinney's Cons Laws of NY, Book 1, Statutes § 98). It is consistent with our reading of an analogous statute, Business Corporation Law § 1312 (*see Showcase Limousine v Carey*, 269 AD2d 133, 133-134 [1st Dept 2000], *mod* 273 AD2d 20 [1st Dept 2000], *lv dismissed* 95 NY2d 902 [2000]; *see also DMBJ Prods. v TMZ TV*, 2009 WL 2474190, at *4 [SD NY Aug 11, 2009]).

Ordinarily, absent an intent to deceive, a plaintiff may be granted leave, until entry of judgment, to cure the statutory violation (*see Cohen v OrthoNet N.Y. IPA, Inc.*, 19 AD3d 261 [1st Dept 2005]). Here, however, because the contract is in the name

of an LLC, plaintiff cannot comply; she cannot file an assumed name that includes a corporate identifier (see 19 NYCRR 156.4[c]).

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

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7495 The People of the State of New York, Ind. 2518/12
Respondent,

-against-

Jeffrey Crovador,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Clara H. Salzberg of counsel), for respondent.

____

Judgment, Supreme Court, Bronx County (Alvin M. Yearwood, J.), rendered May 14, 2014, convicting defendant, after a jury trial, of robbery in the third degree and petit larceny, and sentencing him to an aggregate term of 1 to 3 years, unanimously reversed, on the law, and the matter remanded for a new trial.

The court should have permitted defendant to introduce expert testimony to the effect that witnesses are less likely to accurately identify persons of other racial groups than persons of their own race (*see People v LeGrand*, 8 NY3d 449, 452-454 [2007]). The case turned on the accuracy of the victim's cross-racial identification of defendant, and there was no corroborating evidence connecting defendant to the crime. Furthermore, the circumstances surrounding the identification did not render it so reliable as to justify precluding expert

testimony. The expert testimony produced during the *Frye* hearing sufficiently established that the cross-race effect has been generally accepted in the relevant scientific community. The People do not dispute that this phenomenon applies to identifications of certain racial groups. Moreover it can be deduced from the expert testimony that the cross-race effect applies to all racial groups.

The court should also have granted defendant's explicit request for a jury instruction on cross-racial identification. Initially, we reject the People's argument that defendant failed to preserve this issue.

People v Boone (30 NY3d 521, 535-536 [2017]), which requires that a jury charge on the cross-race effect be given on request, should be applied retroactively to cases pending on direct appeal. *Boone* plainly announces a new rule, and that rule is plainly based on state rather than federal law. Accordingly, its application to cases pending on appeal is not automatic, but depends on a balancing of the three factors set forth in the *Mitchell-Pepper* test (*People v Mitchell*, 80 NY2d 519, 528 [1992]; *People v Pepper*, 53 NY2d 213, 220 [1981], *cert denied* 454 US 967 [1981]).

As to the first factor (the purpose of the rule), "standards that go to the heart of a reliable determination of guilt or

innocence will be applied retroactively, but decisions which are only collateral to or relatively far removed from the fact-finding process at trial apply prospectively only" (*People v Baret*, 23 NY3d 777, 799-800 [2014] [internal quotation marks omitted]). Here, cross-racial identification instructions go to the fact-finding process, and are essential to a reliable determination of guilt or innocence (*see People v Favor*, 82 NY2d 254, 266 [1993]). Thus, the first factor favors retroactive application.

As to the second factor (extent of reliance on the old rule), the People cite a number of cases showing that courts have relied on the pre-*Boone* rule in declining to give a charge on cross-racial identification, in the exercise of discretion. This favors prospective application of the rule, but we do not find that it outweighs the other factors.

As to the third factor (effect on the administration of justice of retroactive application), retroactive application of *Boone* would not significantly affect the administration of justice. A limited number of cases turn on the accuracy of single-witness, cross-racial identifications, and the particular evidence could render a failure to give a cross-racial identification charge harmless. Moreover, the rule in *Boone* is expressly limited to cases where the charge has been requested

(30 NY3d at 535-536), and the fact that *Boone* had not yet been decided at the time of a particular trial would not provide an exemption from the requirement of a timely request (*see People v Reynolds*, 25 NY2d 489, 495 [1969]; *see also People v Hill*, 85 NY2d 256, 262 [1995]). Thus, contrary to the People's contention, it is unlikely that retroactive application of *Boone* would result in wholesale reversals and burden trial courts with unnecessary retrials (*see Favor*, 82 NY2d at 266).

There is no basis for finding harmless error here, because the sole evidence connecting defendant to the crime is the victim's cross-racial identification.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7496 The People of the State of New York, Respondent, Ind. 3092/00 6271/00

-against-

Alberto Benvenutti, Defendant-Appellant.

____

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

Cyrus R. Vance, Jr., District Attorney, New York (Meghan Callagee O'Brien of counsel), for respondent.

____

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about May 18, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The record supports the court's discretionary upward departure (*see People v Gillotti*, 23 NY3d 841, 861-62 [2014]). Clear and convincing evidence established aggravating factors that were not adequately taken into account in the risk assessment instruments. Defendant committed two egregious sexual assaults against strangers, demonstrating a pattern of predatory conduct indicative of sexual recidivism (*see e.g. People v Roman*, 143 AD3d 476, 477 [1st Dept 2016], *lv denied* 28 NY3d 912 [2017]). The mitigating factors cited by defendant, such as rehabilitation

while incarcerated, were adequately accounted for by the risk assessment instruments (*see People v Watson*, 112 AD3d 501, 503 [1st Dept 2013], *lv denied* 22 NY3d 863 [2014]), and in any event did not outweigh the aggravating factors.

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

ENTERED: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7497-
7497A — The People of the State of New York, Respondent, — Ind. 3694/14
2393/14

-against-

Kermit Irizarry,
Defendant-Appellant.

____

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

Darcel D. Clark, District Attorney, Bronx (Joshua P. Weiss of counsel), for respondent.

____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, Bronx County (Lester Adler, J. at plea; Robert Torres, J. at sentencing), rendered March 30, 2016,

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 judgments so appealed from be and the same are hereby affirmed.

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

ENTERED: OCTOBER 30, 2018

CLERK

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

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7498 The People of the State of New York, Ind. 3225/12
Respondent,

-against-

Dashawn Bennett,
Defendant-Appellant.

____

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

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Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered September 3, 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: OCTOBER 30, 2018

CLERK

Sweeny, J.P., Mazzarelli, Kahn, Oing, Singh, JJ.

7499N In re Gary Segal, Index 651745/18
Petitioner-Respondent,

-against-

Five Star Electric Corporation,
et al.,
Respondents-Appellants.

Frankfurt Kurnit Klein & Selz PC, New York (Nicole I. Hyland of counsel), for appellants.

Mintz & Gold LLP, New York (Steven G. Mintz of counsel), for respondent.

Order, Supreme Court, New York County (Andrew Borrok, J.), entered July 3, 2018, which granted petitioner's motion to disqualify respondents' counsel in a separate arbitration, unanimously reversed, on the law and the facts, without costs, and the motion denied.

Petitioner, who was CEO of respondent Five Star Electric Corporation during the relevant period, has not established that Five Star's counsel, Daniel Horwitz, represented him personally in connection with certain government investigations into Five Star's business practices (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]; *Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]; *Campbell v McKeon*, 75 AD3d 479, 480-481 [1st Dept 2010]). Petitioner's subjective belief that Horwitz was his personal attorney was not reasonable under the

circumstances and did not give rise to an attorney-client relationship (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 100-101 [1st Dept 2008]).

Petitioner fails to identify any personal confidential information obtained by respondents' counsel (*Roberts v Corwin*, 118 AD3d 571, 573 [1st Dept 2014]*; Roddy v Nederlander Producing Co. of Am., Inc.*, 96 AD3d 509, 510 [1st Dept 2012]), or how any such information would not be discoverable after having been exchanged pursuant to the parties' lapsed joint defense agreement.

Petitioner has not met his heavy burden of establishing that the testimony of Five Star's former general counsel, Robert Saville, is necessary rather than cumulative, as required for his disqualification under the advocate-witness rule (*Orbco Advisors LLC v 400 Fifth Realty LLC*, 134 AD3d 448 [1st Dept 2015]; *1010Data Inc. v Firestone Enters., Inc.*, 88 AD3d 627, 628 [1st Dept 2011]; *Talvy v American Red Cross in Greater N.Y.*, 205 AD2d 143, 152 [1st Dept 1994], *affd* 87 NY2d 826 [1995]; Rules of Professional Conduct, rule 3.7 [22 NYCRR 1200.00]). Neither did

petitioner identify specific issues requiring Saville's testimony, the weight of such testimony, or the unavailability of other sources of such evidence (*Campbell v McKeon*, 75 AD3d at 481).

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