SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 28, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gische, J.P., Kahn, Gesmer, Singh, Moulton, JJ.

9324 In re Rose Heavens, Index 251184/14
Petitioner,

-against-

State of New York Office
of Children and Family Services,
Respondent.

_____

Rose Heavens, petitioner pro se.

Letitia James, Attorney General, New York (David Lawrence III of counsel), for respondent.

_____

Determination of respondent (OCFS), dated March 30, 2012, which denied pro se petitioner's request to annul the indicated report of child maltreatment maintained at the Statewide Register of Child Abuse and Maltreatment, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, Bronx County [Kenneth L. Thompson Jr., J.], entered January 11, 2016), dismissed, without costs.

Substantial evidence supports OCFS's determination that, as alleged in the maltreatment report, petitioner failed to provide adequate supervision to the four-year-old child who fell from a

bathroom window at the daycare facility where she worked (*see* 18 NYCRR 432[b][1][ii]; *see Matter of Stead v Joyce*, 147 AD3d 1317, 1318 [4th Dept 2017]; *Matter of Cheryl Z. v Carrion*, 119 AD3d 1109, 1111 [3d Dept 2014]). Contrary to petitioner's contention, the evidence, including her own testimony at the administrative hearing, establishes that approximately an hour passed between the last time petitioner saw the child and the time at which the child was admitted to a nearby hospital, having been found unconscious on the ground outside the daycare facility.

Petitioner contends that she was deprived of a fair hearing because she did not receive OCFS's exhibits that would have allowed her to refute the allegations against her. However, petitioner declined the administrative law judge's offer of time to review the packet before the hearing. Accordingly, we find that petitioner waived the contention (*see e.g. Matter of Javier R.*, 72 AD3d 1553 [4th Dept 2010]).

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

ENTERED: MAY 28, 2019

CLERK

Acosta, P.J., Manzanet-Daniels, Kapnick, Kahn, Oing, JJ.

8695 Edison Mauricio Landi, Index 300500/15
Plaintiff-Respondent-Appellant,

-against-

5908 21st Avenue,
Defendant-Appellant-Respondent.

Appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about May 18, 2018,

And said appeals 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 May 1, 2019,

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9412- Ind. 1501/14
9413 The People of the State of New York, 3252/14
Respondent,

-against-

Jonathan Cotto,
Defendant-Appellant.

_____

Christina Swarns, Office of The Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Michael A. Gross, J.), rendered April 14, 2015, convicting defendant, after a jury trial, of attempted murder in the second degree, and sentencing him, as a second violent felony offender, to a term of 16 years, and judgment (same court and Justice), rendered May 7, 2015, as amended May 20, 2015, convicting defendant, upon his plea of guilty, of criminal contempt in the first degree, and sentencing him, as a second felony offender, to a concurrent term of two to four years, unanimously affirmed.

The court providently exercised its discretion when it included the concept of the duty to retreat in its justification charge. The evidence introduced by both sides, viewed as a whole, presented a jury issue as to whether defendant had a duty

to retreat. The standard charge sufficiently conveyed the principle that defendant's duty to retreat arose at the time deadly physical force was contemplated or threatened (*see People v Gonzalez*, 38 AD3d 439, 440 [1st Dept 2007], *lv denied* 9 NY3d 865 [2007]). The language proposed by defendant was unnecessary and potentially misleading. In any event, any error in the court's instructions was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly permitted police officers to testify about the conversation they heard shortly after the incident when defendant's girlfriend put her phone on speaker so the officers could hear it. Although the girlfriend did not testify, there was sufficient circumstantial evidence to establish that defendant was the caller (*see People v Lynes*, 49 NY2d 286, 291-293 [1980]). This included the girlfriend addressing the caller by defendant's first name, and the fact that the content of the call was obviously about the incident that had just occurred, about which the caller was making potentially incriminating statements. Contrary to defendant's argument, there is no reason to believe that an impostor was maliciously generating false evidence against defendant, and was able to deceive defendant's girlfriend as to his identity. In any event,

defendant's challenges to this evidence go to weight rather than admissibility.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9414 Manzoor Ahmad, Index 150871/13
Plaintiff-Appellant,

-against-

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

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin Osowski of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered on or about October 23, 2017, which denied plaintiff's motion to set aside the jury's verdict in defendants' favor and direct a judgment in his favor, unanimously affirmed, without costs.

Plaintiff claims that defendant police officer used excessive force and committed battery against him during a traffic stop. The uncontested trial evidence shows that the officer saw plaintiff's vehicle make an illegal turn and gestured to plaintiff to pull over, that plaintiff initially slowed down and then drove around the officer to a point 40 feet from where he was standing, that the officer ran to the car and instructed plaintiff to take the car out of drive and place it in park so that he would be unable to drive away again, and that, as the

officer reached into the car for the gear shift, plaintiff pushed his hands away.

We cannot conclude on this evidence that the jury's verdict in defendants' favor was utterly irrational, that is, that there is no valid line of reasoning and permissible inferences that could lead a rational person to the same conclusion (*see Killon v Parrotta*, 28 NY3d 101, 108 [2016]). Nor can we conclude that the evidence weighed so heavily in plaintiff's favor that the jury could not have interpreted it fairly in finding for defendants (*see id.* at 107). In view of the fact that plaintiff had driven away from the officer once, the jury could reasonably have found that under the circumstances the minor contact between plaintiff's and the officer's hands did not constitute excessive force (*see Koeiman v City of New York*, 36 AD3d 451, 453 [1st Dept 2007], *lv denied* 8 AD3d 814 [2007]; *see also Davila v City of New York*, 139 AD3d 890, 892 [2d Dept 2016], *lv denied* 28 NY3d 914 [2017]).

Plaintiff failed to demonstrate that, as he argues, the officer's testimony was incredible as a matter of law because it is contrary to "recognized realities" (*see People v Moore*, 93 AD3d 519, 522 [1st Dept 2012], *lv denied* 19 AD3d 865 [2012]).

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: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9415 In re Natalia M.,
Petitioner-Respondent,

-against-

Odane S.,
Respondent-Appellant.

_____

Douglas H. Reiniger, New York, for appellant.

Andrew J. Baer, New York, for respondent.

Janet Neustaetter, The Children's Law Center, Brooklyn (Rachel J. Stanton of counsel), attorney for the child.

_____

Order, Family Court, Bronx County (Karen M. C. Cortes, Referee), entered on or about July 24, 2017, which denied respondent father's motion to vacate an order entered upon his default granting custody of the subject child to petitioner mother, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the father's motion to vacate his default for failing to appear at the March 1, 2017 hearing. His claim that he was confused as to when the custody hearing was to begin was insufficient to establish a reasonable excuse, because it is belied by the transcripts of prior hearings, which show that he was present when the date and time for the March 1st hearing were selected (*see Matter of Yadori Marie F. [Osvaldo F.]*, 111 AD3d 418 [1st

Dept 2013]). The father's failure to maintain contact with his attorney and keep himself apprised of the status of the hearing showed that his default was due to an overall lack of attention to the proceeding (*see Matter of Christina McK. v Kyle S.*, 154 AD3d 548 [1st Dept 2017]).

In view of the father's failure to proffer a reasonable excuse for his default, we need not determine whether there existed a meritorious defense to the mother's custody petition (*see Matter of Tyrone F. v Mariah O.*, 165 AD3d 433, 433-434 [1st Dept 2018]). Were we to do so, we would agree with the trial court that respondent father's claims were unsubstantiated and conclusory.

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9416 In re Country-Wide Insurance Company, Index 652429/15
Petitioner-Respondent,

-against-

TC Acupuncture P.C. as assignee of
Alexander Oneal,
Respondent-Appellant.

_____

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for appellant.

Thomas Torto, New York (Jason Levine of counsel), for respondent.

_____

Order, Supreme Court, New York County (Erika M. Edwards, J.), entered June 22, 2017, which awarded attorneys' fees in the amount of $749.38, unanimously reversed, on the law, without costs, the award vacated, and the matter remanded for a calculation of reasonable attorneys' fees in accordance with 11 NYCRR § 65-4.10(j)(4).

The court failed to consider 11 NYCRR 65-4.10(j)(4), which applies to this appeal of a master arbitration award. Instead, the court applied 11 NYCRR 65-4.6, the regulation applicable to attorneys' fee awards at an initial arbitration, and calculated the award as 20% of the arbitration demand of $3,746, awarding $749.38.

Pursuant to Insurance Law § 5106(a), if a valid claim or portion of a claim for no-fault benefits is overdue, "the

claimant shall also be entitled to recover his attorney's reasonable fee, for services necessarily performed in connection with securing payment of the overdue claim, subject to [the] limitations promulgated by the superintendent in regulations" (*Matter of Unitrin Advantage Ins. Co. Kemper A. Unitrin Bus. v Professional Health Radiology*, 143 AD3d 536, 537 [1st Dept 2016]). Here, in a proceeding for judicial review of an award by a master arbitrator, the attorneys' fee award "shall be fixed by the court adjudicating the matter" (*Matter of GEICO Ins Co. v AAAMG Leasing Corp.*, 148 AD3d 703, 705 [2d Dept 2017] citing Insurance Department Regulations [11 NYCRR] § 65-10[j][4]).

Because this is an appeal from a master arbitration award, we remand the matter for a calculation of fees in accordance with 11 NYCRR 65-4.10(j)(4) (*see Matter of Country-Wide Ins. Co. v Bay Needle Care Acupuncture, P.C.*, 162 AD3d 407, 408 [1st Dept 2018]). We note that the fees would only apply to this appeal.

In addition, we reject as unpreserved appellant's claims that it is entitled to further fees for the underlying arbitration under 11 NYCRR § 65-4.6(c) or (d).

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9417 Toniann Foley, et al., Index 152941/16
Plaintiffs-Appellants,

-against-

Chateau Rive Equities, LLC, et al.,
Defendants-Respondents.

_____

Goldblatt & Associates, P.C., Mohegan Lake (Kenneth B. Goldblatt of counsel), for appellants.

Gannon Rosenfarb & Drossman, New York (Lisa L. Gokhulsingh of counsel), for respondents.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered August 10, 2018, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants demonstrated prima facie that there was no defective condition in the staircase "at or near Unit 403," which was the accident location that injured plaintiff Toniann Foley identified in her initial and amended bill of particulars and deposition testimony. Plaintiff also testified that there was no debris or wetness on the stairs and could not say what caused her to fall (*see Peralta-Santos v 350 W. 49th St. Corp.*, 139 AD3d 536, 537 [1st Dept 2016]; *Lee v Ana Dev. Corp.*, 110 AD3d 479 [1st Dept 2013]).

In opposition, plaintiffs failed to raise a triable issue of

fact. Plaintiff contends that the accident actually happened on a different staircase, identified in a second supplemental bill of particulars, where there was a worn defective step, purportedly shown in two photographs she identified at her deposition. However, her deposition testimony concerning the accident location was clear, and the close-up photographs of the steps are of no assistance. Plaintiff's belated attempt to change the location of her accident through her expert's affidavit and amended bill of particulars, is unavailing. Since her expert did not examine the location described in plaintiff's testimony and initial pleadings, his affidavit did not conflict with that of defendants' expert, and thus, failed to raise an issue of fact (*see Roimesher v Colgate Scaffolding & Equip. Corp.*, 77 AD3d 425 [1st Dept 2010]; *see also Sternberg v Rugova*, 162 AD3d 456 [1st Dept 2018]).

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

ENTERED: MAY 28, 2019

CLERK

CORRECTED ORDER - MAY 30, 2019

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9418 The People of the State of New York, Respondent, Ind. 3214/16

-against-

Christian Mercedes, Defendant-Appellant.

Brafman & Associates, P.C., New York (Mark M. Baker of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Kevin B. McGrath, Jr., J. at speedy trial motion; Melissa C. Jackson, J. at jury trial and sentencing), rendered April 11, 2018, convicting defendant of burglary in the second degree as a sexually motivated felony and public lewdness, and sentencing him to an aggregate term of 3½ years, unanimously affirmed. **The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).**

The verdict was supported by legally sufficient evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence establishes a knowingly unlawful entry. At a building that had a no-trespassing sign, and whose gated courtyard and lobby were both secured by locks and buzzer systems, defendant passed through both entrances by following a resident who entered

by means of a key. The fact that defendant did not reside in the building could be inferred from the manner of these entries, as well as defendant's attempt to use an elevator that had been out of service for more than a year. The jury could have reasonably found that a witness's courteous act of stopping the lobby door from slamming on defendant gave him no reason to believe the witness had conferred upon defendant a license to enter where no such license otherwise existed. We also note that although defendant was charged with unlawfully entering the building, the circumstances of his entrance into the gated courtyard were equally relevant to his knowing, unlawful entry into the lobby. Finally, defendant's conduct immediately after he entered established that he entered with intent to, at least, commit the crime of public lewdness.

The court properly denied defendant's speedy trial motion. Contrary to defendant's assertion, the single period of postreadiness delay at issue was not "unexplained." The record adequately explained (*see People v Brown*, 28 NY3d 392, 404 [2016]) that the case had been adjourned, on consent, for purposes of disposition to allow defendant to consider a plea offer, and that when defendant rejected the offer, the court adjourned the matter for trial, thereby according the People a reasonable time to prepare (*see e.g. People v Reynoso*, 295 AD2d 156, 157 [1st Dept 2002], *lv denied* 98 NY2d 701 [2002]; *People v*

Delvalle, 265 AD2d 174 [1st Dept 1999], *lv denied* 94 NY2d 879 [2000]).

The trial court providently exercised its discretion (*see People v Patterson*, 93 NY2d 80, 84 [1999]) in admitting a very brief portion of a surveillance videotape that, unlike the rest of the videotapes in evidence, could not be directly authenticated by a witness to the events depicted. "The totality of the evidence, including the relationship of the videotapes at issue to other videotapes that were undisputedly authenticated, supported the inference that the videotapes at issue depicted the relevant [events], and any alleged uncertainty went to the weight to be accorded the evidence rather than its admissibility" (*People v Reed*, 169 AD3d 573, 574 [1st Dept 2019]; *see also People v McEachern*, 148 AD3d 565, 566 [1st Dept 2017], *lv denied* 29 NY3d 1083 [2017]).

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9420 Flutur Bida, Index 111370/10
Plaintiff-Appellant,

-against-

Port Authority of New York
and New Jersey, et al.,
Defendants-Respondents.

_____

Law Office of Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph III of counsel), for appellant.

Port Authority Law Department, New York (Nicholas Mino of counsel), for Port Authority of New York and New Jersey, respondent.

D'Amato & Lynch, LLP, New York (David A. Boyar of counsel), for Modern Facilities Services, Inc., respondent.

_____

Judgment, Supreme Court, New York County (James E. d'Auguste, J.), entered June 22, 2017, insofar as appealed from as limited by the briefs, dismissing the complaint as against defendant Port Authority of New York and New Jersey (Port Authority) upon a jury verdict in its favor, unanimously affirmed, without costs.

The jury's determination that the Port Authority's negligence was not a substantial factor in causing plaintiff's injuries was not against the weight of the credible evidence (*see Dwight v New York City Tr. Auth.*, 30 AD3d 270, 270-271 [1st Dept 2006], *lv denied* 7 NY3d 711 [2006]). Given plaintiff's equivocal

testimony as to the cause of her fall, it was entirely within the jury's province to conclude that she failed to meet her burden of proving that the cause of her fall was the Port Authority's failure to adequately maintain the stairwell on which she fell (*see Weber v City of New York*, 24 AD3d 130 [1st Dept 2005]).

Plaintiff's argument regarding the order of the interrogatories concerning the parties' liability on the verdict sheet is unpreserved for appellate review, since she did not object or take exception thereto at trial (*see Ganaj v New York City Health & Hosps. Corp.*, 130 AD3d 536 [1st Dept 2015];; *see also Grace v New York City Tr. Auth.*, 123 AD3d 401 [1st Dept 2014]). In any event, the court ordered the interrogatories in the manner identified in PJI 2:36, which is consistent with our jurisprudence on the order in which negligence and comparative negligence are to be considered (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

The court did not improvidently exercise its discretion in precluding plaintiff's expert engineer from testifying. Plaintiff's CPLR 3101(d) exchange indicated that the witness would testify that the Port Authority violated the New York City Building Code, with which it is not required to comply (*see Love v Port Auth. of N.Y. & N.J.*, 168 AD2d 222 [1st Dept 1990]). Even were we to find that nonmandatory standards otherwise accepted in

the relevant community at the relevant time provide some evidence of negligence, plaintiff's expert failed to show that the standards he relied on were accepted at the relevant time (*see Hotaling v City of New York*, 55 AD3d 396 [1st Dept 2008], *affd* 12 NY3d 862 [2009]).

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

ENTERED: MAY 28, 2019

CLERK

Friedman J.P., Gische, Tom, Webber, Gesmer, JJ.

9421 Jenny Polanco, Index 311271/11
Plaintiff-Appellant,

-against-

Newmark & Company Real
Estate, Inc., et al.,
Defendants-Respondents.

_____

Elefterakis, Elefterakis & Panek, New York (Oliver R. Tobias of counsel), for appellant.

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

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered on or about November 29, 2017, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Summary judgment was properly granted to defendants in this action where plaintiff was injured when she slipped and fell on water in the lobby of a building owned and maintained by defendants. The incident occurred during an ongoing rainstorm. Defendants were not required to provide a constant ongoing remedy for an alleged slippery condition caused by moisture tracked indoors during the storm (*see Richardson v S.I.K. Assoc., L.P.*, 102 AD3d 554 [1st Dept 2013]). Moreover, defendants demonstrated that they employed reasonable maintenance measures to address the

wet conditions, by laying out rubber mats throughout the lobby (*see O'Sullivan v 7-Eleven, Inc.*, 151 AD3d 658, 658-659 [1st Dept 2017]*; Guntur v Jetblue Airways Corp.*, 103 Ad3d 485 [1st Dept 2013]).

The record also shows that defendants met their prima facie burden of showing lack of notice through, inter alia, plaintiff's testimony that she did not see the water before she fell. Therefore, it was not visible and apparent *(see Berger v ISK Manhattan, Inc.*, 10 AD3d 510 [1st Dept 2004]). Since the spot of water could have been tracked in by pedestrian traffic, there is no basis for finding constructive notice (*Richardson,* 102 AD3d 554). In opposition, plaintiff failed to create a triable issue of fact.

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: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9422-
9423 Index 650726/18

Gerald A. Niznick, et al.,
Plaintiffs-Appellants,

-against-

Sybron Canada Holdings, Inc., et al.,
Defendants-Respondents.

_____

Davidoff Hutcher & Citron LLP, New York (Martin H. Samson of counsel), for appellants.

Williams & Connolly LLP, New York (Adam J. Podoll of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered July 19, 2018, which granted defendants' motion to dismiss the complaint, and order, same court and Justice, entered January 22, 2019, which, to the extent appealed from, denied plaintiffs' motion to renew, unanimously modified, on the law, to declare that the contractual provisions at issue did not begin their five-year term on January 29, 2014, and, as so modified, affirmed, without costs.

Neither the doctrine of res judicata nor the doctrine of judicial or collateral estoppel applies to the issue of when plaintiff Gerald A. Niznick transferred his 25% share in the joint venture, because the parties did not previously litigate the issue, and defendants did not take the position that Niznick did not own shares after January 29, 2014 (*see e.g. Ford Motor Credit Co. v Colonial Funding Corp.*, 215 AD2d 435, 436 [2d Dept

1995] [having prevailed on summary judgment in prior action on position that lease was genuine and enforceable, party may not in separate action argue that lease was not genuine]). In the prior action, the court set a retroactive date for the transfer of the shares, upon a finding that the employment call option in the agreement had been triggered, solely for the purpose of fixing the date of breach and enabling a determination of damages. Moreover, to find that the retroactive date also applied to the running of the non-compete and non-solicitation clauses would grant a benefit to Niznick for having breached the agreement, an unfair reading leading to an absurd result (*see Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413 [1st Dept 2010]).

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

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9424 In re Patrick A. St. M-H,

A Child Under Eighteen Years
of Age, etc.,

Patrick St. M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

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

Bruce A. Young, New York, attorney for the child.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about April 9, 2018, which, inter alia, upon a finding that respondent father neglected the subject child, released the child to nonrespondent mother with supervision by petitioner Administration for Children's Services for a period of 12 months, unanimously affirmed, without costs.

The finding of neglect based on the father's infliction of excessive corporal punishment on the then seven-year-old child was supported by a preponderance of the evidence, including the child's out-of-court statements, medical records and the caseworker's observations (*see Matter of Deivi R. [Marcos R.]*, 68

AD3d 498 [1st Dept 2009]). When the child returned to the mother's care after spending the weekend with the father, the child had a bruise on his right cheek. The child disclosed to a caseworker, a pediatrician, and the mother that the father had slapped him twice in the face with enough force as to cause his tooth to bleed, and three days after the incident occurred, the child had a linear abrasion measuring two-to-three centimeters. This single instance of excessive corporal punishment is sufficient to make a finding of neglect (*see e.g. Matter of Chance R. [Andre W.]*, 168 AD3d 554, 555 [1st Dept 2019]; *Matter of Cevon W. [Talisha W.]*, 110 AD3d 542 [1st Dept 2013]).

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

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9425 The People of the State of New York, Respondent, Ind. 414/16

-against-

Henry Hassan, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Emmanuel H. Arnaud of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Michael R. Sonberg, J.), rendered September 20, 2016, convicting defendant, upon his plea of guilty, of criminal possession of stolen property in the fifth degree and resisting arrest, and sentencing him to concurrent terms of one year, unanimously modified, on the law, to the extent of reducing the mandatory surcharge to $175, and otherwise affirmed.

Defendant made a valid waiver of his right to appeal. The court's oral colloquy with defendant concerning the waiver avoided conflating the right to appeal with the rights normally forfeited upon a guilty plea, and it exceeded the minimum standards for such a colloquy (*see People v Bryant*, 28 NY3d 1094 [2016]), in addition to being supplemented by a detailed written waiver. Defendant's valid waiver forecloses his suppression

claims.

Regardless of whether defendant validly waived his right to appeal, we find that the court properly denied defendant's suppression motion. The record establishes that the search was incident to an undisputedly lawful arrest.

The court erroneously imposed the $300 surcharge applicable to a felony conviction rather than the $175 surcharge applicable to a misdemeanor.

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9426 Altagracia S., etc., et al., Index 21433/13E
Plaintiffs-Respondents,

-against-

Robert Cowels, M.D., et al.,
Defendants-Appellants.

_____

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Robert Cowels, M.D., appellant.

McAloon & Friedman, P.C., New York (Gina Bernardi Di Folco of counsel), for Keith Kuenzler, M.D., Alana Murphy, M.D., and New York Presbyterian Hospital, appellants.

Wolf & Fuhrman, LLP, Bronx (Carole R. Moskowitz of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lewis J. Lubell, J.), entered May 14, 2018, which denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

Plaintiffs claims that defendant's misdiagnosis of acute appendicitis resulted in infant plaintiff undergoing an unnecessary appendectomy and the unnecessary surgery was a proximate cause of her subsequent urinary dysfunction. According to defendants, the diagnosis of acute appendicitis was confirmed, but plaintiffs' experts conclude the appendix was normal and the appendectomy was wholly unnecessary. Plaintiff contends that she

developed a postoperative infection and, therefore, her urological problems are causally related to the appendectomy, which should not have been performed.

Defendants made a prima facie showing that infant plaintiff had appendicitis and clinically presented with symptoms consistent with a conclusion that an appendectomy was indicated and performed in accordance with prevailing standards of medical care. Defendants also prima facie established that infant plaintiff's claimed injuries were not causally related to the appendectomy, regardless of whether there was any deviation in the standard of medical care defendants provided to her.

In opposition, plaintiffs did not raise any issue about whether any alleged negligence was a proximate cause of infant plaintiff's injuries. Plaintiffs' experts only speculate that infant plaintiff's subsequent urological difficulties were proximately caused by the postoperative infection that plaintiff suffered following the appendectomy (*see Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]). They do not address, let alone refute, defendants' experts' medical analysis of infant plaintiff's medical records, which the experts opine do not support plaintiffs' claim of a causal connection between the appendectomy and the urological injury alleged. Plaintiffs' experts' affidavits fall far short of the competent medical proof

required to make a causal connection between the alleged departure and the injury alleged (*see Rivera v Jothianandan*, 100 AD3d 542 [1st Dept 2012], *lv denied* 21 NY3d 861 [2013]).

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9427- Ind. 665/15
9427A- 2046/15
9427B The People of the State of New York, 3487/15
Respondent,

-against-

Horace Madison,
Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Amanda Rolat 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 judgments of the Supreme Court, New York County (Ellen Biben, J. at plea and sentencing), rendered April 19, 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.

ENTERED: MAY 28, 2019

CLERK

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

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9428 In re New York City Yacht Club, Petitioner-Respondent-Appellant, Index 100643/17

-against-

The New York City Department of Buildings, et al., Respondents-Appellants-Respondents,

Sofitel New York Hotel, et al., Intervenors.

_____

Zachary W. Carter, Corporation Counsel, New York (Lorenzo D. Silvio of counsel), for appellants-respondents.

Goetz FitzPatrick LLP, New York (John B. Simoni, Jr. of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered on May 2, 2018, which granted the petition to compel respondent Department of Buildings (DOB) to issue a notice of violation to the past and present owners of intervenor Sofitel New York Hotel to the extent of directing DOB to issue a final determination as to whether to issue a notice of violation, unanimously modified, on the law, to vacate the direction to issue a final determination, and otherwise affirmed, without costs.

DOB's determination not to issue a notice of violation to the past and present owners of the Sofitel Hotel for failure to

comply with Administrative Code of City of NY § 27-860 following its own inspection involved the exercise of discretion, not the performance of a mandatory, non-discretionary act; a writ of mandamus to compel is therefore not available (*see Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d 113, 117 [1st Dept 2017], *affd* 32 NY3d 1091 [2018]; *Matter of James v City of New York*, 154 AD3d 424, 425 [1st Dept 2017], *lv dismissed* 32 NY3d 1036 [2018]; *Mater of Young v Town of Huntington*, 121 AD2d 641, 642 [2d Dept 1986]). Petitioner is also not entitled to a writ of mandamus compelling DOB to issue a final determination on petitioner's request, which would afford petitioner further administrative review by the New York City Board of Standards and Appeals, as it identified no authority establishing that it has a clear legal right to the issuance of such a final determination (*see Matter of Willows Condominium Assn. v Town of Greenburgh*, 153 AD3d 535, 536-537 [2d Dept 2017]).

Assuming that DOB's letter to petitioners was a final determination permitting article 78 review, the fact that the determination involved the exercise of discretion does not mean that it is unreviewable under CPLR 7803(3) (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 843 [1st Dept 2005]). However, petitioner failed to establish that DOB's determination

not to issue a violation was arbitrary and capricious or constituted an abuse of discretion (*see generally Matter of 1234 Broadway, LLC v New York State Div. of Hous. & Community Renewal*, 102 AD3d 628, 629 [1st Dept 2013]), given the lapse in time between the completion of construction and petitioner's complaint to DOB (*see New York Yacht Club v Lehodey*, __ AD3d __, 2019 NY Slip Op 02643 [1st Dept 2019]; *see also Matter of Franklin St. Realty Corp. v NYC Envtl. Control Bd.*, 164 AD3d 19, 24 [1st Dept 2018]).

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9429 Bovis Lend Lease (LMB), Inc., Index 603243/09
Plaintiff,

-against-

Lower Manhattan Development Corporation,
Defendant.

- - - - -

Bovis Lend Lease (LMB), Inc.,
Third-Party Plaintiff-Appellant,

-against-

Arch Insurance Company,
Third-Party Defendant-Respondent.

_____

Eversheds Sutherland (US) LLP, New York (Lawrence A. Dany III of counsel), for appellant.

Torre, Lentz, Gamell, Gary & Rittmaster, LLP, Jericho (Kevin M. Gary of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 18, 2018, which construed third-party defendant Arch Insurance Company's (Arch) pre-trial "preliminary motion in limine" a "motion for clarification," and granted the motion "only to the extent that [Bovis's] damages on its remaining claim against Arch for breach of the Bonds, on which it was granted summary judgment on liability, shall exclude all damages that would have been recoverable under the Companion Agreement, namely excess abatement costs and damages for claims resolved in the LMDC settlement," unanimously modified, on the

law, to vacate the portion of the order permitting the parties to raise at trial whether third-party plaintiff Bovis Lend Lease (LMB), Inc.'s (Bovis) negligence limited its recovery, and otherwise affirmed, without costs.

The court properly limited the damages that Bovis may recover on its third-party claim for breach of the bonds as set forth in the order appealed from. The plain language of the Supplemental Agreement and Companion Agreement support the court's conclusion that the Companion Agreement was a "settlement" that resolved the dispute regarding Arch's liability for abatement costs above the initial $35 million adjusted price in the abatement subcontract. Nothing in the agreements supports Bovis's claim that the Companion Agreement was an "interim funding mechanism for pre-fire regulatory issues which caused cost overruns at the Project." Further, our prior decision dismissing all claims under the Companion Agreement did not implicate only the $28.3 million that Lower Manhattan Development Corporation had advanced to Bovis (*see* 153 AD3d 432 [1st Dept 2017]). Nothing in the Supplemental Agreement limited litigation commenced thereunder to disputes regarding monies advanced. Rather, the Supplemental Agreement broadly contemplates litigation for all contested excess abatement costs.

In light of the foregoing, we reject Bovis's request for

partial summary judgment in the amount of $44,185,987.31.

However, we grant Bovis's request to vacate the portion of the order holding that "triable issues of fact regarding whether Bovis's own alleged negligence limits its recovery." Tort principles cannot apply to contract claims (*see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.]*, 84 NY2d 685, 688-689 [1995]).

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9430 Xiomara Vila, Index 303913/10
Plaintiff-Appellant,

-against-

NYC Housing Authority,
Defendant-Respondent.

_____

Frekhtman & Associates, Brooklyn (Eileen Kaplan of counsel), for appellant.

Herzfeld & Rubin, P.C., New York (Sharyn Rootenberg of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about January 10, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she suffered emotional and psychological injury as a result of defendant's negligence. However, she made no such allegation in the notice of claim. Accordingly, we need not reach any other issues.

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9431 Deborah Wheeler, Index 150079/17
Plaintiff-Appellant,

-against-

Linden Plaza Preservation LP, et al.,
Defendants-Respondents.

_____

Peter H. Paretsky, Attorney at Law, PLLC, New York, (Peter H. Paretsky of counsel), for appellant.

Rubin, Fiorella & Friedman LLP, New York (Mara Schiefelbein of counsel), for Linden Plaza Preservation LP and Linden Plaza Housing Co., Inc., respondents.

Wood Smith Henning & Berman LLP, New York (Christopher J. Seusing of counsel), for RY Management Co., Inc., respondent.

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for Madison Security Group, Inc., respondent.

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Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered on or about March 12, 2018, which granted defendant RY Management Co. Inc.'s pre-answer motion to dismiss, and defendants Linden Plaza Preservation LP and Linden Plaza Housing Co., Inc.'s, and Madison Security Group, Inc.'s respective motions for summary judgment, unanimously reversed, on the law, without costs, and the motions denied.

The motion court should not have dismissed the complaint based on res judicata. Plaintiff tenant's claims for money damages arising out of torts unrelated to possession of the

premises or collection of rent, and involving parties other than just her landlord, could not have been brought as counterclaims in housing court and therefore were not subject to preclusion under the doctrine of res judicata (*Rostant v Swersky*, 79 AD3d 456 [1st Dept 2010]).

The Civil Court Act and article 7 of the RPAPL provide the housing court with limited jurisdiction in summary proceedings, that is: actions for the recovery of possession of real property under various circumstances, and actions for the collection of rent (New York City Civil Court Act § 204; RPAPL 711). To require a party to raise claims outside the housing court's purview solely to preserve them for severance and transfer to another court would be a waste of judicial resources. What is more, requiring the housing court to hear any manner of claim merely because they arise, however tangentially, out of the same facts as an article 7 proceeding would turn the housing court into a court of general jurisdiction.

Res judicata does not apply to claims, as here, that are not inextricably "intertwined" with the landlord's recovery of possession or collection of rent (*Sutton Fifty-Six Co. v Fridecky*, 93 AD2d 720, 722 [1st Dept 1983]). Notably, neither the management company nor the security company were or could have been parties to the landlord defendants' summary proceeding

against the tenant, and therefore res judicata would not apply to them in any event.

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

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9433N In re Arthur L. Gallagher, Petitioner-Appellant, Index 100300/16

-against-

Old Guard of the City of New York, Respondent-Respondent.

_____

Arthur L. Gallagher, appellant pro se.

Busson & Sikorski, P.C., New York (Robert S. Sikorski of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered March 2, 2018, which denied petitioner's motion for a finding of contempt against respondent organization, unanimously affirmed, without costs.

In the interest of justice, and on our own motion, we grant petitioner leave to appeal from the order denying his motion to hold respondent organization in contempt of the judgment entered September 13, 2017 (Lucy Billings, J.), since the March 2, 2018 order is not appealable as of right (CPLR 5701[b][1]; *Matter of Britt v City of New York*, 160 AD3d 524, 524 [1st Dept 2018]). Upon review of the merits, however, we find that the IAS court was well within its discretion to deny petitioner's contempt motion. Respondent did not violate any "clearly express[ed]" or "unequivocal" mandate of the IAS court (*Matter of Britt*, 160 AD3d

at 524, *citing Matter of Department of Envtl. Protection of City of N.Y. v Department of Envtl. Conservation of State of N.Y.*, 70 NY2d 233, 240 [1987]).

After petitioner was expelled from the organization, he commenced an article 78 proceeding seeking reinstatement. By judgment entered September 13, 2017, the Supreme Court (Lucy Billings, J.), granted the petition to the extent of annulling petitioner's expulsion and ordering respondent to reinstate him as a member. Subsequent to his reinstatement, new charges were brought against petitioner, which again resulted in his expulsion. Petitioner contends that by expelling him a second time, respondent is in contempt of the judgment.

In order to find a party in civil contempt, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect, that the party charged with contempt had notice of the order and disobeyed it, and that the failure to comply with the order prejudiced the rights of a party to the litigation (*Garcia v Great Atl. & Pac. Tea Co.*, 231 AD2d 401 [1996]).

Although the judgment mandated petitioner's reinstatement, it did not address any future charges and did not hold that petitioner can never be discharged from the respondent organization. The sole mandate of the judgment, which was based

exclusively on the first charges brought against petitioner, was for respondent to reinstate petitioner. Since respondent admittedly complied with that mandate, there was no violation such that a finding of contempt would be appropriate.

Despite petitioner's argument that he is entitled to a determination as to his allegations of fraudulent conduct by other members of respondent and as to whether respondent followed proper procedure in expelling him a second time, the initial petition did not seek such determinations. The underlying petition, having only sought a determination as to the first set of charges, was finally disposed of by the judgment.

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

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9434-
9435N Index 161708/14

Steven J. Cayre,
Plaintiff-Appellant,

-against-

Massimo Pinelli, etc., et al.,
Defendants-Respondents.

_____

Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for appellant.

Schwartz Sladkus Reich Greenberg Atlas LLP, New York (Steven D. Sladkus of counsel), for respondents.

_____

Order, Supreme Court, New York County (Nancy M. Bannon, J.), entered January 3, 2018, which denied plaintiff's motion to hold defendant in contempt for violating a so-ordered settlement stipulation and for specific performance of that stipulation, and order, same court and Justice, entered on or about July 19, 2018, to the extent it denied plaintiff's motion to renew, unanimously affirmed, without costs.

Given defendant's substantial compliance with the so-ordered stipulation and what the record shows was inadvertence with respect to the one item not completed, plaintiff failed to establish a basis on which to hold defendant in civil contempt (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). Further, plaintiff failed to show by clear and convincing evidence that

even the one alleged deficiency in defendant's compliance was the source of any other or further leaks into his condominium unit, and therefore failed to show prejudice to his rights from any such noncompliance (*see id.*).

Plaintiff is not entitled to specific performance, because defendant made reasonable, and ultimately successful, attempts to remediate subsequent leaks.

Nor was plaintiff entitled to renewal, as the facts he presented on the motion to renew were immaterial to the court's decision.

Plaintiff is not a prevailing party for purposes of the fee-shifting provision in the stipulation, because he did not prevail with respect to the central relief he sought (*see Blue Sage Capital, L.P. v Alfa Laval U.S. Holding, Inc.*, 168 AD3d 645, 646 [1st Dept 2019]). He did not prevail with respect to contempt (nor should he have prevailed) or specific performance.

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

ENTERED: MAY 28, 2019

CLERK

Friedman, J.P., Gische, Tom, Webber, Gesmer, JJ.

9436 [M-1903] In re The People of the State of New York, ex rel. Alma Magana, on behalf of Jose Gonzalez, Petitioner-Appellant,

SCI 30056/19
Index 450347/19
Ind. 221/19

-against-

Cynthia Brann, Commissioner, New York City Department of Correction, Respondent-Respondent.

_____

Janet E. Sabel, The Legal Aid Society, New York (Alma Magana of counsel), for appellant.

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

_____

Judgment (denominated an order), Supreme Court, New York County (Michael J. Obus, J.), entered on or about April 4, 2019, denying the petition for a writ of habeas corpus and dismissing the proceeding, unanimously affirmed, without costs.

We find that the writ of habeas corpus was properly denied (*see* CPLR 7010).

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9437 The People of the State of New York, Respondent, Ind. 1360/09

-against-

Vasileios Giamagas, Defendant-Appellant.

_____

Christina A. Swarns, Office of The Appellate Defender, New York (Mandy E. Jaramillo of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered February 25, 2010, convicting defendant, after a jury trial, of robbery in the first degree, robbery in the second degree (two counts), grand larceny in the second degree and criminal possession of a weapon in the fourth degree (three counts), and sentencing him to an aggregate term of 11 to 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's arguments are generally similar to arguments this Court rejected on the codefendants' appeals (*People v Gogoladze*, 114 AD3d 417 [1st Dept 2014], *lv denied* 22 NY3d 1199 [2014]), and we find no reason to reach a different result here. In particular, we decline to disturb the

jury's credibility determinations, and we conclude that the threatened use of dangerous instruments was sufficiently immediate and connected to the taking of property to satisfy the elements of first-degree robbery.

The court properly denied defendant's motion to replace a sworn juror as "grossly unqualified" (CPL 270.35[1]). After the juror reported that several unidentified courtroom spectators had initiated an innocuous, non-case-related conversation with her in the hallway, the court conducted a suitable inquiry (*People v Buford*, 69 NY2d 290, 299 [1987]). While the juror found the spectators' behavior "odd" and "a little inappropriate," the juror made clear that she "didn't feel threatened," and the court obtained unequivocal assurances from the juror that the incident would not affect her ability to deliberate impartially (*see People v Romance*, 35 AD3d 201, 203 [1st Dept 2006], *lv denied* 8 NY3d 926 [2007]). Furthermore, to the extent the juror expressed any bias, it was, at most, against the *spectators*; she never stated that she believed these spectators to be associated with this defendant, or with the codefendants. Defendant's argument that the juror engaged in "misconduct" is meritless, because the jurors never received any instructions about conversing with unidentified persons regarding matters unrelated to the case.

The court properly denied defendant's motion to dismiss the

indictment, made on the ground that a witness's trial testimony allegedly revealed that the integrity of the grand jury had been impaired by materially false testimony (*see* CPL 210.35[5]). At trial, the victim explained that he had given incorrect testimony in the grand jury about the contents of a document, as the result of having forgotten a handwritten provision later added to the document. There is no merit to defendant's claim that this event entitled him to the extraordinary remedy of dismissal. There was no impairment of the grand jury proceeding based on such "honestly mistaken" testimony (*see People v Crowder*, 44 AD3d 330 [1st Dept 2007], *lv denied* 9 NY3d 1005 [2007]), and dismissal was not warranted (*see People v Darby*, 75 NY2d 449, 455 [1990]). In any event, regardless of whether the victim was mistaken or intentionally untruthful in his grand jury testimony, this was not a case like *People v Pelchat* (62 NY2d 97 [1984]), where the indictment was based solely on perjured testimony.

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9438 Raymer Castillo-Moran, Index 300561/15
Plaintiff-Respondent,

-against-

The Port Authority of New York & New Jersey, et al.,
Defendants,

American Airlines, Inc.,
Defendant-Appellant.

_____

Condon & Forsyth LLP, New York (Michael G. Koueiter of counsel), for appellant.

Kalra Law Firm, Forest Hills (Neil Kalra of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Donald A. Miles, J.), entered on or about August 29, 2018, which, to the extent appealed from, denied defendant American Airline Inc.'s (American) motion for summary judgment, unanimously affirmed, without costs.

The court correctly denied American's motion for summary judgment, as the movant failed to demonstrate, as a matter of law, the absence of any material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562-563 [1980]). The record does not permit resolution of whether it was foreseeable that an airport worker such as plaintiff would exit his vehicle to walk to another vehicle in the restricted "safety area" where

plaintiff slipped and fell (*see Basso v Miller*, 40 NY2d 233, 241 [1976]), as well as whether it was reasonable for American to have waited more than two hours from the end of the snowfall to address the icy condition *(see Gonzalez v American Oil Co.*, 42 AD3d 235, 256 [1st Dept 2007]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9439 In re Justin E., and Another,

Children Under Eighteen Years of Age, etc.,

Jose N.-R.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent,

Maria E.,
Respondent.

_____

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

Zachary W. Carter, Corporation Counsel, New York (Ashley R. Garman of counsel), for respondent.

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

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about September 8, 2017, which, to the extent appealed from as limited by the briefs, found that respondent neglected a child for whom he was legally responsible and derivatively neglected his own child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence (Family Ct Act § 1046[b][i]). The out-of-court statements by the child regarding a domestic incident involving

respondent and her mother in the child's presence were sufficiently corroborated by respondent's own statements to the caseworker (*see Matter of Nicole V.*, 71 NY2d 112, 118-119 [1987]), and the court was entitled to reject the purported exculpatory explanation of the incident that respondent gave to the caseworker (*see Matter of Rashawan J. [Veronica H.-B.]*, 159 AD3d 1436, 1437 [4th Dept 2018]. The court also properly drew a negative inference from respondent's failure to testify and explain the statement or offer any evidence (*see e.g. Matter of Mia B. [Brandy R.]*, 100 AD3d 569 [1st Dept 2012], *lv denied* 20 NY3d 858 [2013]). Furthermore, the child's statement that she was afraid of respondent demonstrated an imminent risk of emotional and physical impairment (*see Matter of Serenity H. [Tasha S.]*, 132 AD3d 508, 509 [1st Dept 2015]; *see also Matter of Carmine G. [Franklin G.]*, 115 AD3d 594 [1st Dept 2014]).

The finding of derivative neglect was warranted because respondent's actions demonstrated such an impaired level of parental judgment as to create a substantial risk of harm for any child in his care (*see Matter of Deandre C. [Luis D.]*, 169 AD3d 609 [1st Dept 2019]).

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

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9440 Felix Colon, Index 23906/15E
Plaintiff-Appellant,

-against-

Third Avenue Open MRI, Inc., et al.,
Defendants-Respondents.

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellant.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Gerard Benvenuto of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered June 21, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on his Labor Law § 240(1) claim, and granted defendants' cross motion for summary judgment dismissing the claim, unanimously affirmed, without costs.

Plaintiff, who occasionally worked as a handyman for defendants, was injured when he fell from a six-foot A-frame ladder which he was climbing to fix a leak from the ceiling in defendant's x-ray room. Plaintiff surmised that the leak was coming from the joint of a cast iron drain pipe in the ceiling, and that he could tighten the clamps with a screwdriver that he had on his person. Defendant's principal testified that the leak eventually stopped on its own, and he ultimately learned that the

source of the leak was a spill from the apartment above, and not an issue with the plumbing system at all. Under these circumstances, the motion court correctly found that plaintiff was engaged in routine maintenance, rather than "repairing," and, therefore, that defendants cannot be held liable for his injury under Labor Law § 240(1) (*see Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 53 [2004]; *Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526 [2003]; *cf. Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526-527 [1st Dept 2014]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, JJ.

9441-
9442 MurrayRayeDebbie, LLC, et al.,
Plaintiffs-Respondents,

-against-

Rosenphil LLC,
Defendant-Appellant.

Index 156640/17

_____

Spolzino Smith Buss & Jacobs LLP, Yonkers (Jeffrey D. Buss of counsel), for appellant.

Rivkin Radler LLP, Uniondale (Henry M. Mascia of counsel), for respondents.

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Judgment and order (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered September 19, 2018, directing the partition and sale of the subject building, and bringing up for review an order, same court and Justice, entered July 10, 2018, which granted plaintiffs' motion for summary judgment, unanimously affirmed, without costs.

Plaintiffs established their prima facie case under RPAPL 901(1) by establishing that 1) the parties own the building as tenants in common and 2) physical partition of the property would come at great prejudice to the owners (*Ferguson v McLoughlin*, 184 AD2d 294 [1st Dept 1992]). In opposition, defendant failed to raise an issue of fact or a viable affirmative defense based on an alleged deal between plaintiffs and the tenant of the building

(*Estate of Steingart v Hoffman*, 33 AD3d 465, 466 [1st Dept 2006]).

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

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9443 In re J. Phinias Antonoffsky, SCI 100260/17
Petitioner,

-against-

Maria Torres-Springer, etc.,
Respondent.

_____

William E. Leavitt, New York, for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Anna B. Wolonciej of counsel), for respondent.

_____

Determination of respondent, dated November 3, 2016, which, after a hearing, denied petitioner's request for accommodations in lieu of termination from respondent's Section 8 rent subsidy program, unanimously confirmed, the petition denied and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Nancy M. Bannon, J.], entered on or about April 25, 2018), dismissed, without costs.

Substantial evidence supports the finding that the petitioner's proposed accommodations, periodic drug testing and drug inspections, would be unduly burdensome, requiring a fundamental change to a housing agency that does not employ health care or law enforcement personnel (*see 300 Gramatan Ave. Assocs. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978];

Moore v New York City Hous. Auth, 134 AD3d 493, 494 [1st Dept 2015]).

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

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9444 The People of the State of New York, Ind. 2571/15
Respondent,

-against-

Thomas McField,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Noreen Stackhouse 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 (Michael Obus, J.), rendered April 20, 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.

ENTERED: MAY 28, 2019

CLERK

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

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9446- Index 22645/15E
9446A-
9446B-
9446C Rigoberto Martinez-Gonzalez,
Plaintiff-Respondent,

-against-

56 West 75th Street, LLC, et al.,
Defendants.
- - - - -
[And a Third-Party Action]
- - - - -
Brusco Contracting Corp.,
Second Third-Party Plaintiff-Respondent,

-against-

Pearl Renovations, Inc.,
Second Third-Party Defendant-Appellant.
- - - - -
56 West 75th Street, LLC,
Third Third-Party Plaintiff-Respondent,

-against-

Pearl Renovations, Inc.,
Third Third-Party Defendant-Appellant,

Pearl Drywall Finishing, Inc.,
Third Third-Party Defendant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (I. Elie Herman of counsel), for appellant.

Greenberg Law P.C., Garden City (Lisa M. Comeau of counsel), for Rigoberto Martinez-Gonzalez, respondent.

Nicoletti Gonson Spinner, New York (Benjamin N. Gonson of counsel), for Brusco Contracting Corp., respondent.

O'Toole Scrivo Fernandez Weiner Van Lieu, LLC, New York (Michael C. Feinberg of counsel), for 56 West 75th Street, LLC, respondent.

Orders, Supreme Court, Bronx County (Robert T. Johnson, J.), entered April 5, 2018, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment against defendants 56 West 75th Street, LLC and Brusco Contracting Corp. on the issue of liability under Labor Law § 240(1), and granted defendant 56 West's motion for summary judgment on its claim against second/third third-party defendant Pearl Renovations, Inc. (Pearl) for contractual indemnification, and, upon searching the record, granted summary judgment to defendant Brusco on its contractual indemnification claim against Pearl, unanimously affirmed, without costs.

Plaintiff was injured in a fall from a scaffold. It is undisputed that the scaffold he was supplied with and directed to use lacked railings, and that he fell off when the scaffold tipped as one wheel broke through the floor on which it was standing. Plaintiff was not provided with any other safety devices. This evidence establishes prima facie a violation of Labor Law § 240(1) (*see Celaj v Cornell*, 144 AD3d 590 [1st Dept 2016]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]). Plaintiff was not required to show that the scaffold was

defective (*see Ross v 1510 Assoc. LLC*, 106 AD3d 471 [1st Dept 2013]; *see also Kash v McCann Real Equities Devs.*, 279 AD2d 432 [1st Dept 2001]; *Gallagher v Bechtel Corp.*, 245 AD2d 36 [1st Dept 1997]). In opposition, Pearl failed to raise an issue of fact.

Pearl, plaintiff's employer, which was hired to do sheetrocking and taping work at the job site, signed an agreement in connection with the renovation work, which clearly and unambiguously obligated it to defend and indemnify 56 West and Brusco for any personal injury claims resulting therefrom. 56 West and Brusco had no involvement in plaintiff's work, and their liability to plaintiff was strictly vicarious. Under these circumstances, defendants are entitled to contractual indemnification by Pearl (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990]; *see Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 312 [1st Dept 2003]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9447-
9448-
9449

Index 653111/17

Ian Sassoon,
Plaintiff-Respondent-Appellant,

-against-

CDx Diagnostics, Inc., et al.,
Defendants-Appellants-Respondents.

_____

Polsinelli PC, New York (Frank T. Spano of counsel), for appellants-respondents.

Wachtel Missry LLP, New York (John H. Reichman of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered on or about March 13, 2018, which, to the extent appealed from as limited by the briefs, denied defendants' motion to dismiss the unjust enrichment, fraud, promissory estoppel, and tortious interference with contract claims, unanimously modified, on the law, to grant the motion as to the fraud and tortious interference claims, and otherwise affirmed, without costs. Orders, same court and Justice, entered on or about November 15, 2018, which, to the extent appealed from, upon reargument, granted plaintiffs' motion to reinstate the quantum meruit claim and, upon renewal, granted the defendant's motion to dismiss the breach of contract claim, unanimously affirmed.

The written agreement between plaintiff and defendant CDx

Diagnostics, Inc. provides that plaintiff will receive a fee if "an M&A transaction is concluded with any Referred Investor." "M&A" is defined as "a Merger or Acquisition transaction for the Company [CDx] in which a majority of our equity would be sold." Contrary to plaintiff's contention, "[A]n asset sale and an equity sale are two very different transactions with two entirely different consequences" (*Abundance Partners LP v Quamtel, Inc.*, 840 F Supp 2d 758, 771 [SD NY 2012]). The first amended complaint recognizes the distinction in alleging, in paragraph 34, that "Rutenberg and CDx arranged a deal with Galen such that CDx's equity would not be sold and instead CDx's assets would be sold." The Stock Asset and Purchase Agreement (APA) also recognizes the distinction in providing in article 1.01(b) that CDx's capital stock is an "Excluded Asset[]" from the transaction, i.e., "shall remain [an] asset[] of [CDx] after the Closing." As the final transaction was not restructured as a sale of the majority of CDx's equity, plaintiff is not entitled to a fee under the written agreement, and the breach of contract claim was correctly dismissed.

The agreement notwithstanding, the quasi contract claims were correctly sustained because plaintiff alleges that he performed services outside the scope of the agreement (*see Ashwood Capital, Inc. v OTG Mgt., Inc.* 99 AD3d 1, 10 [1st Dept

2012]). The complaint alleges that plaintiff "worked diligently to get the two parties to a point where they could reach a final agreement" and that "[d]efendants had plaintiff work on the project for close to a year," and is supplemented by emails in which defendants promise, inter alia, "to do what we can to fairly compensate you for your services" *cf Citibank N.A. v Soccer for a Cause, LLC*, 169 AD3d 401 ([1st Dept. 2019]). In view of this documentary evidence, defendants' Statute of Frauds argument fails. The emails exchanged between the parties establish that plaintiff was performing services for defendants; "[t]he obligation to provide reasonable compensation is then implied" (*Davis & Mamber v Adrienne Vittadini, Inc.*, 212 AD2d 424, 424-425 [1st Dept 1995]).

The fraud claim must be dismissed as duplicative of the breach of contract claim. The allegation that defendants "structured their business arrangement, either deliberately or incidentally, in a manner they now claim permits them to seek to avoid paying plaintiff his fees," is based on the same facts as underlie the contract claim and is not collateral to the contract, and the claim alleges no damages that would not be recoverable as contract damages (*J.E. Morgan Knitting Mills v Reeves Bros.*, 243 AD2d 422, 423 [1st Dept 1997]; *see e.g. Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115-116 [1st Dept

1998]).

The tortious interference with contract claim fails in the absence of a breached contract (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9450 The People of the State of New York, Ind. 2911/11
Respondent,

-against-

Jeffrey Ramirez,
Defendant-Appellant.

_____

Speiser & Heinzmann, White Plains (Joseph Heinzmann of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Julia L. Chariott of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Nicholas J. Iacovetta, J. at suppression hearing; Troy K. Webber J. at jury trial and sentencing), rendered February 3, 2015, convicting defendant of manslaughter in the second degree, attempted murder in the second degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 25 years, unanimously affirmed.

The court properly denied defendant's motion to suppress his statements to the police. The record supports the hearing court's finding that Homeland Security officers had probable cause to seize defendant at an airport based on information from the police, which was in turn based on confidential information that supplied significant predictive information, particularly with regard to defendant's impending efforts to flee, as well as other details corroborated by the observations of law enforcement

personnel (*see People v DiFalco*, 80 NY2d 693, 700 [1993]; *People v Elwell*, 50 NY2d 231, 236-237 [1980]).

Regardless of whether there was probable cause for defendant's arrest, the record supports the hearing court's alternative finding of attenuation. During defendant's detention, but before the questioning that elicited his statements, the police independently obtained undisputed probable cause to arrest. This intervening circumstance attenuated the taint of any potentially illegal detention (*See People v Bradford,* 15 NY3d 329, 334 [2010]). In addition, "there is no demonstrable proof in the record that the initial detention of defendant was motivated by bad faith or a nefarious police purpose" (*id*). On the contrary, law enforcement officials had, at least, a high level of suspicion and a good faith belief that it was urgently necessary to prevent defendant from boarding an international flight.

Because defendant only argued that his statements should be suppressed as fruit of an illegal arrest, he did not preserve his argument that the statements were made involuntarily, due to the conditions that he was under, and we decline to review it in the interest of justice. As an alternative holding, we find that there was no coercive police conduct, and that the totality of the circumstances establishes that the statements were

voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]).

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9451 In re Tiffany P.,
Petitioner-Appellant,

-against-

Sharon B.,
Respondent-Respondent,

Morris T.,
Respondent.

_____

Law Office of Neal D. Futerfas P.C., White Plains (Neal D. Futerfas of counsel), for appellant.

Kenneth M. Tuccillo, Hastings on Hudson, for respondent.

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

_____

Order, Family Court, New York County (J. Machelle Sweeting, J.), entered on or about May 16, 2017, which modified an order of visitation, entered on or about August 16, 2012, with respect to the subject child, unanimously affirmed, without costs.

The Family Court properly modified the order of visitation, granting the mother four hours of unsupervised visitation with the child, every Sunday. Among other things, during the child's life, the mother's contact with him has been sporadic. The mother was incarcerated for more than two years, when the child was two years old, and her subsequent visitation with him continued to be limited. The mother's visitation alternated between supervised and unsupervised visits, and her visitation

was suspended, in June 2015, for a period of time, based on her continuing to speak to the child about his paternity and telling him that she hoped the paternal grandmother who had cared for the child since his infancy, dies. The mother also engaged in other inappropriate conduct with the child, which caused him to feel uncomfortable and unsafe.

There was a sound and substantial basis in the record for the court's determination (*see Matter of Frank M. v Donna W.*, 44 AD3d 495 [1st Dept 2007]). Among other things, the court gave proper weight to the forensic expert's report (*see Matter of Alfredo J.T. v Jodi D.*, 120 AD3d 1138 [1st Dept 2014]) and the child's clearly expressed wishes (*Matter of Swinson v Dobson*, 101 AD3d 1686, 1687 [4th Dept 2012], *lv denied* 20 NY3d 862 [2013]). At the mother's request, the court also heard testimony from her caseworker. On this record, and in light of the court's long history with the parties, a further hearing was unwarranted

(*Matter of Oliver S. v Chemung County Dept. of Social Servs.*, 162 AD2d 820, 821-822 [3d Dept 1990]; *Matter of Chaim N.[Angela N.]*, 103 AD3d 728 [2d Dept 2013]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh JJ.

9454 Joseph Veltre, et al., Index 158486/14E
Plaintiffs-Respondents,

-against-

Rainbow Convenience Store, Inc.,
Defendant-Respondent,

Eureka Realty Corp.,
Defendant,

PEC, LLC,
Defendant-Appellant.

- - - - -

PEC, LLC,
Third-Party Plaintiff-Respondent-Appellant,

-against-

Kigs 508, LLC, et al.,
Third-Party Defendants,

Walkinstown, Inc.,
Third Party Defendant-Appellant-Respondent.

_____

O'Toole Scrivo Fernandez Weiner Van Lieu, LLC, New York (Rosemarie C. Hebner of counsel), for PEC, LLC, appellant/respondent-appellant.

Lewis Brisbois Bisgaard & Smith LLP, New York (Nicholas P. Hurzeler of counsel), for Walkinstown, Inc., appellant/respondent.

Kagan & Gertel, Brooklyn (Irving Gertel of counsel), for Joseph Veltre and Denise Sala Veltre, respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered September 6, 2018, which denied defendant-third-party plaintiff PEC, LLC's motion for summary judgment dismissing the

complaint and all cross claims against it, and denied third-party defendant Walkinstown, Inc.'s cross motion for summary judgment dismissing the third-party complaint and all cross claims against it, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment accordingly.

PEC and Walkinstown, Inc. established prima facie that plaintiff Joseph Veltre did not slip and fall on snow or ice on the sidewalk abutting their premises, by submitting the deposition testimony from both plaintiffs stating that the accident occurred in front of the adjacent premises, Rainbow Convenience Store. PEC and Walkinstown, Inc. were therefore not responsible for maintaining the portion of the sidewalk where plaintiff fell in a reasonably safe condition (*see Cohen v City of New York*, 101 AD3d 426 [1st Dept 2012]; *Thompson v 793-97 Garden St. Hous. Dev. Fund Corp.*, 101 AD3d 642 [1st Dept 2012]).

In opposition, plaintiff failed to raise an issue of fact. The accident report plaintiff relied upon, in which an employee of Rainbow Convenience Store stated that he saw plaintiff attempting to walk over a mound of snow in front of the sidewalk abutting PEC and Walkinstown, Inc.'s premises, was unsworn and thus inadmissible (*see Perez v Brux Cab Corp.*, 251 AD2d 157, 159 [1st Dept 1998]). The employee's deposition testimony that after

he saw plaintiff attempting to walk over a mound of snow, he entered the convenience store and when he went outside five minutes later he saw plaintiff sitting on the curb, was not circumstantial evidence to raise an issue of fact as to whether plaintiff fell on the sidewalk abutting PEC and Walkinstown, Inc.'s premises. The employee admitted that he did not see plaintiff's accident, or that he was even aware that plaintiff had slipped and fell. The employee's testimony regarding where he believed plaintiff fell was too speculative to constitute circumstantial evidence, and did not show "facts and conditions from which the negligence of [PEC and Walkinstown, Inc.] and the causation of the accident by that negligence may be reasonably inferred" (*see Schneider v Kings Hwy. Hosp. Ctr.*, 67 NY2d 743, 743 [1986]).

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9455- Index 656016/17
9456-
9457 Kenneth DuBow,
Plaintiff-Appellant,

-against-

Century Realty, Inc., et al.,
Defendants-Respondents.

_____

Peter M. Levine, New York, for appellant.

Proskauer Rose LLP, New York (Peter J. W. Sherwin of counsel), for respondents.

_____

Orders, Supreme Court, New York County (Eileen Bransten, J.), entered March 6, 2018 and June 28, 2018 which, inter alia, collectively dismissed the entirety of the complaint, unanimously affirmed, with costs.

Given the "no representations" clause and the other language of the integration clause in a settlement agreement negotiated by the parties (Settlement Agreement), the court correctly dismissed the fraudulent inducement claim, which was based on an alleged promise that defendants would pay the tax liability for the loan to plaintiff they were forgiving (*see Pate v BNY Mellon-Alcentra Mezzanine III, LP*, 163 AD3d 429, 430 [1st Dept 2018]; *WT Holdings Inc. v Argonaut Group, Inc.*, 127 AD3d 544 [1st Dept 2015]).

Plaintiff's argument, raised for the first time on appeal,

that the settlement agreement is actually an executory accord, rather than a substitute agreement, is directly contradicted by the express language of the Settlement Agreement, which states that it "constitutes the complete understanding between them and supersedes any and all agreements, understandings, and discussions, whether written or oral, between them with respect to the subject matter herein" (*see Wyckoff v Searle Holdings, Inc.*, 111 AD3d 546, 546-547 [1st Dept 2013]).

Plaintiff's Labor Law claim was properly dismissed as released by the terms of the Settlement Agreement.

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9458- Ind. 5022/14
9458A The People of the State of New York, 465/15
Respondent,

-against-

Julian LaPorte,
Defendant-Appellant.

_____

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

Julian LaPorte, appellant pro se.

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

_____

Judgments, Supreme Court, New York County (Melissa C. Jackson, J.), rendered November 16, 2015, convicting defendant, upon his pleas of guilty, of burglary in the second degree (six counts), of burglary in the third degree (10 counts), grand larceny in the third degree (two counts), attempted burglary in the second degree, criminal mischief in the third degree, grand larceny in the fourth degree and unauthorized use of a vehicle in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 11 years, unanimously affirmed.

Defendant made a valid and enforceable waiver of his right to appeal. The oral colloquy and written waiver, which the court confirmed that defendant had discussed with defense counsel and

understood, sufficiently ensured that defendant understood the rights that he was waiving (*see People v Bryant*, 28 NY3d 1094 [2016]).

Defendant's valid waiver of his right to appeal forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

We have considered the arguments raised in defendant's pro se supplemental brief and find them unavailing.

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

ENTERED: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh, JJ.

9459 Sonja Valenta, Index 152824/14
Plaintiff-Appellant,

-against-

Spring Street Natural, et al.,
Defendants-Respondents.

_____

The Law Offices of Russell Trocano & Associates, New York (Russell P. Trocano of counsel), for appellant.

The Law Office of James J. Toomey, New York (Jason Meneses of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered March 29, 2017, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants established prima facie that they neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*e.g. Parietti v Wal-Mart Stores, Inc.*, 29 NY3d 1136, 1137 [2017]; *Perez v River Park Bronx Apts., Inc.*, 168 AD3d 465, 466 [1st Dept 2019]). Among other things, defendants' manager received no complaints concerning the floor and saw nothing on the floor when he inspected in the morning or later, around ten minutes before plaintiff fell (*see Fink v Board of Educ. of City of N.Y.*, 117 AD2d 704, 705 [2d Dept 1986], *lv denied* 68 NY2d 607

[1986]). The evidence that neither plaintiff nor defendants' employees saw the slippery substance on the floor until after plaintiff fell demonstrates that it was not sufficiently visible and apparent to charge defendants with constructive notice (*see Gomez v J.C. Penny Corp., Inc.*, 113 AD3d 571 [1st Dept 2014]; *Siciliano v Garden of Eden, Inc.*, 12 AD3d 319 [1st Dept 2004]). Furthermore, testimony by defendant's manager that the porter cleaned the restaurant floor every night with a solution of water and vinegar is sufficient to establish a lack of constructive notice (*see Harrison v New York City Transit Authority*, 94 AD3d 512, 514 [1st Dept 2012]).

In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff's speculation that her fall could have been caused by the porter's use of a vinegar and water mixture to clean the floors is insufficient to sustain a cause of action (*see Acevedo v York Intl. Corp.*, 31 AD3d 255, 257-258 [1st Dept 2006], *lv denied* 8 NY3d 803 [2007]). The wet or greasy substance on the floor of a busy restaurant was a transient condition that could have appeared at any point after the porter finished cleaning the floors in the morning (*see Perez*, 168 AD3d at 466).

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: MAY 28, 2019

CLERK

Sweeny, J.P., Richter, Kapnick, Oing, Singh JJ.

9462N Leigh Betancourt, Index 24776/15
Plaintiff-Appellant,

-against-

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

_____

Hach & Rose, LLP, New York (Michael A. Rose of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Yasmin Zainulbhai of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Mitchell J. Danziger, J.), entered on or about December 22, 2017, which denied plaintiff's motion to consolidate two personal injury actions, unanimously affirmed, without costs.

The court providently exercised its discretion in denying the motion to consolidate the two actions, as there are insufficient common questions of law and fact (*see J. Henry Schroder Bank & Trust Co. v South Ferry Bldg. Co.*, 88 AD2d 570, 571 [1st Dept 1982]; CPLR 602[a]). The 2015 action arises from an assault by a student and is based in negligence, while the 2017 action arises out of an accident with an alleged defective door and is a premises liability case. While both actions involve the same plaintiff and defendants, the underlying facts and standards of liability are different. Furthermore, there is

no danger of defendants in one case blaming the defendants in the other case for plaintiff's exacerbated injuries (*compare Gage v Travel Time & Tide*, 161 AD2d 276 [1st Dept 1990]).

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: MAY 28, 2019

CLERK

CORRECTED OPINION - MAY 28, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer
Peter H. Moulton, JJ.

8235 [M-5194]
Ind. 3305/15
OP 161/18

_____x

In re Samy **F.**,
Petitioner,

-against-

Hon. Ralph Fabrizio, etc.,
Respondent.
- - - -
Darcel D. Clark,
Nonparty Respondent.

_____x

Petitioner seeks a writ of mandamus pursuant to CPLR article 78.

Petrillo Klein & Boxer LLP, New York (Leonid Sandlar of counsel), for petitioner.

Barbara D. Underwood, Attorney General, New York (Carly Weinreb of counsel), for Hon. Ralph Fabrizio, respondent.

Darcel D. Clark, District Attorney, Bronx (James J. Wen of counsel), for Darcel D. Clark, respondent.

GISCHE, J.

Databanks containing DNA profiles of convicted defendants have proven to be useful and valuable tools in criminal law enforcement. They allow a DNA profile to be used by law enforcement in identifying qualifying DNA matches to unknown forensic material recovered in connection with ongoing and future criminal investigations (Executive Law §§ 995-c[3][a], [6][a]; *see also* 9 NYCRR Part 6192; *see e.g. Kellogg v Travis*, 100 NY2d 407, 410 [2003]). Since 1996, New York has maintained a state DNA index system (SDIS) for the mutual exchange, use and storage of DNA records. The storage and use of such records is subject to the provisions and requirements of Article 49-B of the Executive Law (§ 995 *et seq.*).

This petition raises two issues of first impression for this Court. The first is whether the local DNA databank maintained by the Office of the Chief Medical Examiner (OCME) is subject to the State Executive Law. The second is, when DNA is collected during the investigatory phase of a particular crime that ultimately results in a youthful offender (YO) determination, whether the court has the authority to expunge the YO's DNA profile from the SDIS, along with the underlying DNA records. We conclude that both questions should be answered in the affirmative.

The underlying facts are not in dispute. On October 18,

2015, petitioner, then age 16, was arrested on a weapons charge following a shooting. A gun was recovered from a vehicle in which he was a passenger. Petitioner was taken into custody and administered *Miranda* warnings. He was then asked to voluntarily provide a DNA sample. Petitioner agreed by signing a consent form, and a buccal swab was obtained from him. He was subsequently indicted on a charge of criminal possession of a weapon in the second degree (Penal Law § 265.03). Although in a pretrial suppression motion petitioner contested the voluntariness of his consent to providing DNA, he ultimately agreed to a YO disposition (CPL 720.10 *et seq.*). Because the YO disposition was agreed to before the court made any decision on the pending suppression motion, petitioner forfeited any right to contest the voluntariness of his consent to providing a DNA sample for use in that particular prosecution (*People v Hecker*, 105 AD3d 606 [1st Dept 2013] *lv denied* 21 NY3d 1016 [2013]). At some point petitioner's DNA profile was uploaded to the SDIS[1].

[1]Exactly when this record was uploaded to SDIS is unclear, but that it was actually uploaded at some point is not disputed by respondent or refuted by the District Attorney. The issue of at what point in a criminal proceeding DNA information can be unloaded to SDIS, while very much an open legal issue, is not implicated by this proceeding (*see People v Flores*, 61 Misc 3d 1219[A] [Crim Ct, NY County 2018]; *People v Blank*, 61 Misc 3d 542, 545 [Sup Ct, Bronx County 2018]; *People v K.M.*, 54 Misc 3d 825, 832 [Sup Ct, Bronx County 2016]).

Following the conclusion of his criminal case, petitioner filed a motion in Supreme Court to have his DNA and DNA-related records expunged from OCME's databank. In denying the motion, the Supreme Court held that, as a matter of law, it had no authority to grant the relief requested on three separate bases. The Supreme Court held that Executive Law § 995-c(9)(b), which pertains to expungement of DNA profiles, did not apply to OCME which was a local DNA index. The Court also determined that nothing in the YO statute expressly provided for expungement of lawfully collected DNA from a youthful offender (CPL § 720.35). Finally, the Supreme Court held that although Executive Law §§ 995-c(9)(a), (b), provides for expungement of DNA records in the case of an acquittal, reversal or vacatur of a conviction, a YO adjudication did not qualify under any of those criteria.

Petitioner contends that the Supreme Court has discretion to expunge a YO's DNA records and seeks a writ of mandamus, directing that respondent (a Supreme Court Justice) exercise his discretion to decide whether respondent's DNA profile and records should be expunged under the facts and circumstances of the underlying criminal proceeding.

The Article 78 petition is properly brought

Respondent urges dismissal of this petition based on two procedural threshold issues, which we reject. We do not agree

that the District Attorney is a necessary party under either CPLR 7804(i) or CPLR 1001(a). Nor is the DA required under a permissive joinder analysis. There is no relief that the DA can provide, and the DA will not be equitably affected by any disposition of this petition (*see e.g. City of New York v Long Is. Airports Limousine Serv. Corp.*, 48 NY2d 469, 475 [1979]). Additionally, not only was the DA served with the petition, but filed opposition, which was considered by this Court (*Matter of Lovell v Goodman*, 305 AD2d 314, 315 [1st Dept 2003]). Consequently the failure to name the DA as a party is not fatal to this petition.

Respondent also argues that petitioner has an adequate remedy at law, namely a direct appeal from the denial of his underlying expungement motion. No appeal lies from a determination made in a criminal proceeding, however, unless specifically provided for by statute (*People v Lovett*, 25 NY3d 1088, 1090 [2015]). The limited grounds for appeal set forth in section 450.15 of the Criminal Procedure Law do not apply to the Supreme Court disposition of the expungement motion. Although respondent now argues this is a directly appealable civil matter, neither party, nor the DA, treated the underlying motion as one for civil relief, with a right of direct appeal. In the absence of an available remedy at law (*see* CPL 450.20), the important

issues raised on this appeal will escape this Court's review unless this petition proceeds (*Matter of Clark v Newbauer*, 148 AD3d 260, 265-266 [1st Dept 2017]).[2] Moreover, this Court has original jurisdiction over the issues raised because they concern a sitting justice (CPLR 506[b][1]; 7804[b]; *see Matter of Baba v Evans*, 213 AD2d 248 [1st Dept 1995], *cert denied* 520 US 1254 [1997]).

The Executive Law applies to OCME's DNA Laboratory and Databank

There is abundant support for the conclusion that OCME's responsibilities in testing, analyzing and retaining DNA data is subject to the State Executive Law. Respondent's arguments that the statutory reference to a "state" DNA identification index in Article 49-B necessarily excludes a local DNA laboratory like that the one operated by OCME, is unavailing.

Since 1996, New York has maintained a "state DNA identification index" to store the DNA profiles of "designated offenders" as expressly defined in the statute (Executive Law §§

[2]Issues concerning collection of a youth's DNA, what happens when a YO determination is made, and whether the profile must or should be expunged has garnered considerable attention at the trial level, not always with the same results (*People v K.N.*, 62 Misc 3d 444 [Crim Ct NY County 2018]; *People v Flores*, 61 Misc 3d 1219[A] [Crim Ct NY County 2018]; *People v K.M.*, 54 Misc 3d 825 [Sup Ct Bronx County 2016]; *People v Debraux*, 50 Misc 3d 247 [Sup Ct NY County 2015]; *People v Mohammed*, 48 Misc.3d 415 [Sup Ct Bronx County 2015]).

995[6], 995-c). Designated offenders are required to provide post conviction DNA samples, regardless of whether DNA was required as part of the investigation of the underlying crime for which they were convicted (Executive Law § 995-c[3]). The collected DNA samples are then tested and analyzed by authorized forensic DNA laboratories, which create profiles that are indexed and eventually uploaded to the state databank (Executive Law § 995-c[5]).

Article 49-B broadly defines a "forensic [DNA] laboratory" as "*any* laboratory operated by the *state or unit of local government* that performs forensic DNA testing on crime scenes or materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification" (Executive Law § 995[1] [emphasis added]). The Commission on Forensic Science (CFS), a body created under the Executive Law, sets the minimum standards and a process by which "all" public forensic laboratories within the state are accredited (Executive Law §§ 995-a; 995-b). The Executive Law also ensures that all forensic DNA laboratories comply with any applicable privacy laws, and adhere to restrictions on the disclosure or re-disclosure of DNA records, findings, reports and results (Executive Law § 995-d[1]). Pursuant to Executive Law § 995-d, DNA testing records, findings, and reports "shall be confidential," with certain

exceptions, one being for use in law enforcement (Executive Law §§ 995-d[2]; 995-c[6]).

OCME, established in 1918, self-identifies as having the largest public DNA crime laboratory in the world (*About OCME* https://www.nyc.gov/site/ocme/about/about-ocme.page, last accessed May 10, 2019). It is an independent subdivision of the New York City Department of Health and Mental Hygiene. Pursuant to section 557(f)(3) of the New York City Charter, OCME may "to the extent permitted by law, provide forensic and related testing and analysis . . . in furtherance of investigations ... not limited to . . .(DNA) testing . . ."

Notwithstanding OCME's general authorization to act under the New York City Charter, it is also one of New York State's eight local, public forensic laboratories, accredited by the CFS, all fulfilling the Executive Law mandate to test, analyze and maintain the DNA records of designated offenders (https:/www.criminaljustice.ny.gov/forensic/dnabrochure, last last accessed May 10, 2019; *see* Executive Law §§ 995-b, 995-c[1],[4],[7]; 9 NYCRR 6190). These local public forensic laboratories each upload their DNA data into a Local DNA Index System, or LDIS. The LDIS and SDIS are part of the Combined DNA Index System, known as CODIS. CODIS is the Federal Bureau of Investigation's (FBI) nation-wide searchable software program

that supports criminal justice DNA databases (https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet, last accessed May 10, 2019). The National DNA Index System (NDIS), is part of CODIS (*see also* https://www.criminaljustice.ny.gov/forensic/dnabrochure.htm, last accessed May 10, 2019). An LDIS is defined by the State executive branch regulations as "that level of the CODIS program in which a public DNA laboratory maintains its DNA records for searching and uploading to higher level indices such as SDIS and NDIS" (9 NYCRR 6192.1[r]). Information available in the New York State Division of Criminal Justice Services (DCJS) website establishes that the forensic DNA profiles that OCME generates at the LDIS level flow upward to populate the SDIS (https://www.criminaljustice.ny.gov/forensic/dnafaqs.htm., last accessed May 10, 2019).

OCME's forensic DNA laboratory operates in accordance with guidelines and accreditation credentialing required under the Executive Law. Although OCME also has its own internal procedures for the verifying and reporting of DNA matches within the state, nationwide and beyond, they are in addition to the minimum procedures required under the Executive Law. (https://www1.nyc.gov/site/ocme/services/technical-manuals.page, last accessed May 10, 2019);

https://www1.nyc.gov/assets/ocme/downloads/pdf/technical-manuals/forensic-biology-codis-manual/Verifying-and-Reporting-DNA-Matches.pdf, last accessed May 10, 2019).

The Executive Law expressly provides that it "shall not apply" to a federally operated DNA laboratory (Executive Law § 995-e). There is no similar exclusion for an LDIS, like OCME (Executive Law §995[1]). To the contrary, the broad definition of "forensic laboratory" in the Executive Law includes DNA laboratories operated by local government. Given OCME's responsibilities for the testing, storage and sharing of DNA data, the Executive Law clearly applies to an LDIS, like OCME's. By establishing a "state" DNA identification index, the state has created a "comprehensive and detailed regulatory scheme" with regard to the subject matter. OCME's operations fall firmly within the Executive Law umbrella and "must yield to that of the State in regulating that field" (*People v Diack*, 24 NY3d 674, 677 [2015]).

The Supreme Court has discretion under the Executive law to Expunge a YO's DNA Records

As more fully set forth below, we hold that the same discretion afforded to a court under the Executive Law to expunge DNA profiles and related records when a conviction is vacated may also be exercised where, as here, a YO disposition replaces a

criminal conviction. The motion court, in finding that, as a matter of law, it had no discretion, failed to fulfill its statutory mandate to consider whether in the exercise of discretion, expungement of petitioner's DNA records was warranted in this case.

A core mandate of the Executive Law is that, after conviction, "designated offenders" must provide DNA samples to be tested, analyzed and retained in the SDIS (Executive Law § 995-c). In 2012, the category of "designated offenders" who must provide post conviction DNA samples was considerably expanded to require that any defendant convicted of "any felony ... or any misdemeanor[3] defined in the penal law" (Executive Law § 995[7], as amended by L 2012, ch 19), "shall be required to provide a sample ... for DNA testing" and for inclusion in the state DNA identification index (Executive Law § 995-c[3][a]). It is beyond dispute that youthful offenders are not "designated offenders" under the Executive Law and that their DNA may not be collected post conviction (https://www.criminaljustice.ny.gov/forensic, last accessed May 10, 2019). In fact, a YO is not even subject to a mandatory surcharge imposed to collect DNA (CPL 60.02[3], 60.35[10]; *People v Stump*, 100 AD3d 1457, 1458 [4th Dept 2012],

[3]There is an exception for misdemeanor concerning marijuana possession (Penal Law § 221.10).

lv denied 20 NY3d 1104 [2013]).

The only reason we are faced with issues concerning retention of petitioner YO's DNA records is because the DNA was collected by law enforcement as part of the underlying criminal investigation against him. The DNA was not and could not have otherwise been collected or stored in the SDIS. Petitioner's circumstances are, therefore, different from mandatory postconviction DNA collection otherwise required by the Executive Law.

After an arrest, but preconviction, a DNA sample may only be obtained from a suspect on consent, or by warrant or court order (CPL 240.40[2][v]; *see e.g. People v Dail*, 69 AD3d 873, 874 [2d Dept 2010], *lv denied* 14 NY3d 839 [2010]). As limited by constitutional concerns, a court will issue an order to collect a DNA sample only when there is (1) probable cause to believe defendant has committed a crime, (2) a "clear indication" that relevant evidence will be found, and (3) the method used to secure it is safe and reliable (*People v Debraux*, 50 Misc 3d 247, 260 [Sup Ct, NY County 2015] *citing Matter of Abe A.*, 56 NY2d 288, 291 [1982]). The mandatory DNA requirements of Executive Law § 995-(9)(a) do not apply and cannot be invoked to collect DNA from a suspect by law enforcement for use in the investigation or prosecution of a crime.

The Executive Law provides, under certain limited circumstances, an ability to expunge a DNA profile from the databank, as well as the related DNA records. The law, however, makes distinctions, based upon whether the DNA was mandatorily collected post conviction or obtained as part of the investigation of the prosecution of a crime (Executive Law § 995-c[9]). Where the DNA is mandatorily collected from a designated offender after a conviction, if the conviction is then reversed or vacated or the defendant has been pardoned, the DNA record is automatically expunged from the SDIS. Additionally, the defendant has the right to apply to the court in which the original judgment of conviction was granted for the discretionary expungement of any additional related DNA records, including samples or analyses (Executive Law §995-c[9][a]).

Where, however, DNA was provided either voluntarily or obtained pursuant to court order during an investigation or prosecution of a crime, a defendant may only seek the discretionary expungement of the DNA records where: (1) no criminal action was timely commenced; (2) there was an acquittal; or (3) if there was a conviction, it was reversed or vacated or the defendant was pardoned (Executive Law § 995-c[9][b] [discretionary expungement]). A youthful offender could never qualify for automatic expungement from the database, because no

DNA can be collected from such a youth post disposition. Any rights that a youthful offender may have to expungement, therefore, flow only from the discretionary authority the statue provides to the court with respect to DNA material that may have been collected during the investigatory, preconviction phase of a criminal proceeding.

We disagree with the motion court's conclusion that a YO finding does not meet any of the statutory criteria for the exercise of discretionary expungement. A YO disposition by its very nature is a judgment of conviction that is vacated and then replaced by a YO determination. This conclusion is supported by the mechanics of the YO statute, its salutary goals, and legislative intent.

The YO statute (Penal Law §§ 720.10[1], [2] *et seq.*) codifies a legislative desire to relieve youths from the stigma or onus of a criminal record and the consequences of "hasty or thoughtless acts" (*People v Francis*, 30 NY3d 737, 740-741 [2018], *quoting People v Drayton*, 39 NY2d 580, 584 [1976]). Upon determining that an eligible youth is a youthful offender, the youth's conviction is deemed vacated and replaced by the YO finding, affording that youth "the opportunity for a fresh start, without a criminal record" (*People v Francis*, 30 NY3d at 741). A YO adjudication is "not a judgment of conviction for a crime or

any other offense" (CPL 720.35[1]). While the motion court reasoned that the vacatur of a conviction in a YO circumstance was not a finding the petitioner was "not guilty," not all vacaturs of convictions in non-YO circumstances are the equivalent of findings of innocence (*see Wilson v State of New York*, 127 AD3d 743, 744 [2d Dept 2015], *lv denied* 25 NY3d 913 [2015]; *Lekav v State of New York*, 16 AD3d 557, 558 [2d Dept 2005], *lv denied* 5 NY3d 704 [2008]). The Executive Law does not provide that only particular types of vacaturs are eligible for expungement consideration.

Aside from imposing a lesser punishment, a further objective of a YO finding is to protect a youth from having an historical record of criminal behavior arising from the circumstances underlying the YO. Thus, when a youth is granted YO status, "all official records and papers, whether on file with the court, a police agency or the [DCJS]" relating to the YO adjudication are rendered confidential (CPL 720.35[2]; *Matter of Capital Newspapers Div. of Hearst Corp. v Moynihan*, 71 NY2d 263, 268 [1988]). Such records remain confidential and they "may not be made available to any person or public or private agency," except where required or permitted by law or court order, or unless the statutory privilege is waived, for instance by the youthful offender affirmatively placing the information or conduct at

issue in a civil action (CPL 720.35[2]; *Castiglione v James F.Q.*, 115 AD3d 696, 697 [2d Dept 2014]).

Consistent with this public policy, the legislature has generally exempted YO status from the reach of the Executive Law. A youthful offender is not a "designated offender" mandatorily required to provide DNA. Proposed legislation to expand the definition of "designated offender" to explicitly include YOs never made it out of the committee process (*see* 2011 NY Senate Bill S1675; 2011 NY Senate Bill S693A). In a 2012 press release, Governor Andrew M. Cuomo expressly stated that the law "does not apply to . . . youthful offenders" (https://www.criminaljustice.ny.gov/pio/press_releases/2012-8-1_pressrelease.html, last accessed May 10, 2019).

Respondent argues that there is no prohibition in the statute against the permanent storage of petitioner's profile and records in OCME's DNA databank or further dissemination of that information. That observation, while true, is not inconsistent with discretionary expungement of such records in appropriate circumstances. In respondent's view, once a youthful offender's DNA is lawfully obtained, that youth loses any right to "recover" it. These arguments are irreconcilable with the inherent protections of CPL § 720.35(2) and undermines the legislature's desire to provide a youthful offender with "the opportunity for a

fresh start, without a criminal record" (*People v Francis*, 30 NY2d at 741). Moreover, a "record" need not be documentary in nature or a file, as respondent suggests. The confidentiality provision has been applied to the information gleaned from corporeal test results (*see Matter of Barnett v David M.W.*, 22 AD3d 575, 577 [2d Dept 2005][results of breathalyzer and blood alcohol tests that resulted in a prior YO adjudication fall within the category of information protected by CPL 720.35, unless waived]).

Petitioner did not, either expressly or by implication, waive the privilege of nondisclosure and confidentiality by providing his DNA before the court made its determination that he was eligible for YO status. Clearly the Executive Law permits an adult who has voluntarily given his or her DNA in connection with a criminal investigation the right to seek discretionary expungement where a conviction had been reversed or vacated. A youthful offender does not have and should not be afforded fewer pre-YO adjudication protections than an adult in the equivalent circumstances.

Respondent contends that use of the permissive word "may" in Executive Law § 995-c(9)(b) means petitioner has no clear legal right to expungement of his DNA profile from the OCME databank and the legislature intended to impart discretion on the court in

deciding whether to grant a motion for expungement. We agree that this subdivision of the law imparts discretion on the part of the court (Executive Law §995-c[9][b]). Respondent, however, did not exercise any discretion by finding that the law simply did not apply to these circumstances. Significantly, we are not directing the respondent how to exercise his discretion, only that it must do so. In considering whether, in whole or part, to expunge petitioner's DNA records in this case, respondent should consider, among other things, the events surrounding the underlying YO finding, including the extent of petitioner's participation in the underlying crime, the circumstances surrounding petitioner's consent to DNA sampling, including his age when such consent was provided, his claim of developmental delays and the absence of a parent or other adult at the time of his consent. Because the respondent held he had no discretion, none of these or any other relevant factors were considered before respondent denied the motion.

Accordingly, the petition brought pursuant to CPLR article 78 for a writ of mandamus should be granted, without costs, and respondent directed to exercise his discretion to decide whether, under the facts and circumstances of this case, petitioner's DNA profiles and records, or any part thereof, should be expunged from the SDIS or other part of the court records.

All concur.

Petition brought pursuant to CPLR article 78 for a writ of mandamus granted, without costs, and respondent directed to exercise his discretion to decide whether, under the facts and circumstances of this case, petitioner's DNA profiles and records, or any part thereof, should be expunged from the SDIS or other part of the court records.

Opinion by Gische, J. All concur.

Friedman, J.P., Gische, Kapnick, Gesmer, Moulton, JJ.

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

ENTERED: MAY 28, 2019

CLERK