SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 1, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9940 Dmitry Markov, Index 156493/15
Plaintiff-Appellant-Respondent,

-against-

Malcolm Katt,
Defendant-Respondent-Appellant.

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Law Office of Jorge Sorote, New York, (Jorge Sorote of counsel), for appellant-respondent.

Law Office of Richard A. Altman, New York (Richard A. Altman of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Shlomo Hagler, J.), entered on or about April 2, 2018, which, to the extent appealed from, granted defendant's motion for summary judgment dismissing the complaint, denied plaintiff's cross motion for summary judgment on his complaint, granted plaintiff/counterclaim defendant's cross motion for summary judgment dismissing the counterclaim, and denied defendant/counterclaim plaintiff's motion for summary judgment on his counterclaim, unanimously affirmed, without costs.

The motion court properly dismissed plaintiff's unjust enrichment claim because such a cause of action "is not available where it simply duplicates, or replaces, a conventional contract ... claim" (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012]). It is beyond dispute that defendant Katt breached the parties' settlement agreement by suing plaintiff Markov in a prior action.

Pursuant to *Paramount Pictures Corp. v Allianz Risk Transfer AG* (141 AD3d 464, 467 [1st Dept 2016], *affd* 31 NY3d 64 [2018]), the court should not have found Markov's contract claim barred by res judicata. Markov was not required to bring a counterclaim for Katt's breach of the settlement agreement in the prior action (*see* CPLR 3109).

However, on the merits, and based on the arguments made by the parties, the court properly dismissed the contract claim. The elements of such a claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). While the first three elements are undisputed, the damages resulting from Katt's breach of the settlement agreement are the attorneys' fees that Markov incurred in the prior lawsuit. However, one may not collect such

fees unless they are clearly authorized by contract (*see Hooper Assoc. v AGS Computers,* 74 NY2d 487, 491-492 [1989]). The parties' settlement agreement did not provide that Katt would pay Markov's attorneys' fees if Katt breached the contract by suing Markov.

On appeal, Markov no longer seeks the attorneys' fees he incurred in the prior action; instead, he seeks the return of the $100,000 he paid Katt. However, that money does not constitute damages *resulting from* Katt's lawsuit against Markov.

In light of the above disposition, Katt's argument that Markov should be judicially estopped from seeking the return of the $100,000 is academic.

The motion court properly rejected Katt's argument that Markov's demand for $100,000 is tantamount to rescission of the settlement agreement. CPLR 3004, on which Katt relies, is

inapplicable, as he failed to establish fraud, misrepresentation, mistake, duress, infancy, or incompetency (*see Netherby Ltd. v G.V. Trademark Invs.*, 261 AD2d 160, 161 [1st Dept 1999]).

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9941 In re Jurgita C.,
Petitioner-Respondent,

-against-

Manuel O.,
Respondent-Appellant.

- - - - -

Manuel O.,
Petitioner-Appellant,

-against-

Jurgita C.,
Respondent-Respondent.

_____

Larry S. Bachner, New York, for appellant.

Zeitlin & Zeitlin, P.C., Brooklyn (David Zeitlin of counsel), for respondent.

_____

Order, Family Court, New York County (Emily M. Olshansky, J.), entered on or about March 27, 2018, which denied the father's objections to an order (Cheryl Weir-Reeves, Support Magistrate), dated August 2, 2017, after a hearing, dismissing the father's petition for a downward modification of child support and granted the mother's petition for an upward modification of child support as it related to childcare expenses, unanimously affirmed, without costs.

The Family Court properly determined that the mother

established a substantial change in circumstances in that the child was no longer cared for by a relative and was enrolled in a daycare program, with additional care provided by a babysitter (*see Matter of Scarduzio v Ryan*, 86 AD3d 573, 574 [2d Dept 2011]). Contrary to the father's contention, the fact that the mother was able to cover the cost of childcare by herself did not absolve him from contributing to the financial support of his own child. The Family Court properly awarded reasonable childcare costs to the mother (Family Court Act § 413[1][c][4]).

With respect to the father's downward modification petition, a party seeking modification of an order of support has the burden of establishing the existence of a substantial change in circumstances (*O'Brien v McCann*, 249 AD2d 92 [1st Dept 1998]). While a loss of income may be sufficient to modify an order of support in some circumstances, the determination to reduce support "must be predicated on the [petitioner's] capacity to generate income, not his current economic status" (*id.* at 93). Here, the court found that the father lost his employment through no fault of his own, but also determined that the father failed to show that he made diligent efforts to secure employment commensurate with his education, skills, and experience. Although he demonstrated some effort in securing employment in

the area of his experience, the father's testimony showed that he spent most of his time establishing and promoting himself as a motivational speaker and coach, and also spent four months abroad during the relevant period. The Family Court properly accorded deference to the Support Magistrate's credibility determinations and this Court will not disturb those findings (*see Matter of Dunung v Singh*, 135 AD3d 606 [1st Dept 2016]).

With respect to the father's contention that the Support Magistrate did not properly consider a prior order of support for a non-subject child, the father testified that he had not paid child support for that child in a year. Since there was evidence that the support was not "actually paid," the Family Court properly declined to deduct it from the father's income (*see Matter of Commissioner of Social Servs. of City of N.Y. v Raymond S.*, 180 AD2d 510, 512 [1st Dept 1992]; Family Court Act § 413[1][b][5][vii][D]). The Family Court properly used the father's then most recent tax return to calculate his child support obligation (*see Hughes v Hughes*, 79 AD3d 473, 475 [1st Dept 2010]), *lv denied* 22 NY3d 948 [2013]).

The court properly found that the Support Magistrate's finding concerning the amount of the mother's income was properly based on evidence in the record, including her testimony and tax

returns, which showed she only received a bonus one year and reported a loss with respect to a rental property.

The father's remaining arguments are not preserved for appellate review (*see Robillard v Robbins*, 78 NY2d 1105 [1991]).

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9942 Kim Dixon, Index 303177/15
Plaintiff-Respondent,

-against-

The New York City Housing Authority,
Defendant-Appellant,

New York City Department of
Parks & Recreation,
Defendant.

_____

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

Silbowitz Garafola Silbowitz Schatz & Frederick, LLP, New York (Mitchell Silbowitz of counsel), for respondent.

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Order, Supreme Court, Bronx County (Llinet M. Rosado, J.), entered on or about July 13, 2018, which denied the New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint against it, unanimously affirmed, without costs.

Plaintiff alleges that she slipped and fell on ice as she was walking through a playground at a NYCHA premises at approximately 8:30 a.m. on January 19, 2015. Plaintiff claimed to have first noticed the ice, which she described as "shiny" and "dirty," after her fall, and her son took a picture of it. NYCHA moved for summary judgment, claiming that it did not have actual

or constructive notice of any dangerous ice in the subject area. In support of its motion, NYCHA submitted an affidavit and weather records collected by a climatologist, who opined that despite precipitation the morning before the accident, it was impossible for ice to have formed at the premises in the 24 hours prior to plaintiff's fall.

In opposition, plaintiff submitted deposition testimony from two NYCHA maintenance employees, both of whom indicated that de-icing material was being applied in the subject area at the time plaintiff was observed by a maintenance employee to be on the ground after her fall. In addition, plaintiff's fall was noted in NYCHA's daily maintenance logbook, and a further logbook entry indicted NYCHA's maintenance supervisor at the complex had directed staff personnel to inspect and de-ice the walkways where needed.

This evidence, along with an expert-enhanced digital photograph of the surface area on which plaintiff claimed she fell (the photograph that plaintiff's son took only minutes after her fall), when viewed favorably to plaintiff as opponent of the motion, raise factual issues as to whether a hazardous ice condition caused her fall and whether such condition existed for a sufficient period of time to attribute constructive notice of

it to NYCHA (see *Adario-Caine v 69th Tenants Corp.*, 164 AD3d 1143 [1st Dept 2018]; *Perez v New York City Hous. Auth.*, 114 AD3d 586 [1st Dept 2014]).

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

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9943 The People of the State of New York, Ind. 839/13
Respondent,

-against-

Tazhame L., etc.,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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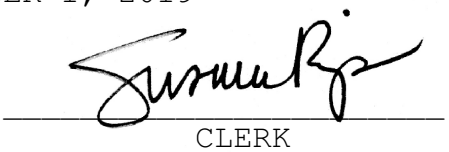
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J. at July 9, 2013 plea and September 16, 2014 youthful offender adjudication; Marc Whiten J. at May 25, 2017 plea and September 28, 2017 sentencing), rendered September 28, 2017,

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

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

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

ENTERED: OCTOBER 1, 2019



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

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9944- Index 101013/17
9945 Church of Jesus Christ of Latter-Day 100603/17
Saints, Servant: Xiu Jian Sun, the
Spiritual Adam,
Plaintiff-Appellant,

-against-

Charles F. Sanders, et al.,
Defendants-Respondents,

Demidchik Law Firm, P.L.L.C., et al.,
Defendants.

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Church of Jesus Christ of Latter-Day
Saints, Servant: Xiu Jian Sun, the
Spiritual Adam,
Plaintiff-Appellant,

-against-

Oren L. Zeve,
Defendant-Respondent.

_____

Xiu Jian Sun, appellant pro se.

Letitia James, Attorney General, New York (Oren L. Zeve of counsel), for Charles F. Sanders, Eric T. Schneiderman, D. Stan O'Loughlin and David Lawrence, III, respondents, and (David Lawrence III of counsel), for Oren L. Zeve, respondent.

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Order, Supreme Court, New York County (Barbara Jaffe, J.), entered February 28, 2018, which granted defendant Oren L. Zeve's motion to dismiss the complaint, unanimously affirmed, without costs. Order, Supreme Court, New York County (Nancy M. Bannon,

J.), entered February 26, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Construing the pleadings liberally, accepting all the facts alleged in the complaints to be true, and according plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), there are simply no viable causes of action against defendants that are discernible from plaintiff's complaints.

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

ENTERED: OCTOBER 1, 2019

CLERK

CORRECTED ORDER - OCTOBER 8, 2019

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9947-
9947A The People of the State of New York, Ind. 3872/14
Respondent, **1435/15**

-against-

Janice Bar,
Defendant-Appellant.

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Law Office of Bruno C. Bier, New York, (Bruno C. Bier of counsel), for appellant.

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

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Judgment**s**, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 29, 2016, convicting defendant, after a jury trial, of forgery in the second degree and making an apparently sworn false statement in the first degree, and sentencing her to concurrent terms of one to three years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to concurrent terms of six months, concurrent with five years' probation, and otherwise affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

Defendant's legal insufficiency claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see*

People v Danielson, 9 NY3d 342, 348-349 [2007]). The evidence, along with reasonable inferences that could be drawn therefrom, established the elements of the crimes at issue based on an acting in concert theory, as well as establishing venue in New York County.

Defendant's challenges to the court's jury charge and supplemental deadlock instruction are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that any defect in the court's charge on forgery in the second degree was harmless, and we also find, as we did on the jointly tried codefendant's appeal (*People v Spallone*, 150 AD3d 556, 556-557 [1st Dept 2017], *lv denied* 29 NY3d 1134 [2017]) that while the supplemental instruction contained improvident language, it was not coercive under all the circumstances.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9948- Ind. 3109/14
9949 The People of the State of New York,
Respondent,

-against-

Jose Beniquez,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Miguel Gonzalez,
Defendant-Appellant.

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Marianne Karas, Thornwood, for Jose Beniquez, appellant.

Feldman and Feldman, Uniondale, (Arza Feldman of counsel), for Miguel Gonzalez, appellant.

Miguel Gonzalez, appellant pro se.

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

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Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered January 25, 2017, convicting defendant Beniquez, after a jury trial, of murder in the second degree, conspiracy in the second degree, gang assault in the first degree and assault in the first degree, and sentencing him, as a second violent felony offender, to an aggregate term of 20 years to

life, unanimously affirmed. Judgment, same court, Justice and date rendered, convicting defendant Gonzalez, after a jury trial, of manslaughter in the first degree, conspiracy in the fourth degree, assault in the first degree and gang assault in the first degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

Except for Beniquez's argument that the People failed to establish his intent to kill, which we find unavailing, both defendants' legal insufficiency claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find that the verdicts were supported by legally sufficient evidence, and we also find that they were not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The testimony by one of the members of a gang who participated in carrying out a plan to commit the stabbing was abundantly corroborated by other evidence, including police testimony and cell phone records. This extensive evidence not only satisfied the accomplice corroboration requirement (CPL 60.22[1]), but rendered the proof overwhelming. Contrary to Beniquez's individual argument, the evidence supports a reasonable inference that, acting as a gang

leader, he authorized the planned attack.

Beniquez's evidentiary arguments are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. Moreover, any error in any of the court's evidentiary rulings was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Beniquez's ineffective assistance of counsel claim related to the lack of preservation is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record. Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing either of the sentences.

Gonzalez's pro se claims are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9950 In re Yenis C.,
Petitioner-Respondent,

-against-

Daniel R.,
Respondent-Appellant.

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Steven N. Feinman, White Plains, for appellant.

Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for respondent.

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Order of fact-finding and disposition (one paper), Family Court, New York County (Gail A. Adams, Referee), entered on or about January 19, 2018, which, upon a fact-finding determination that respondent father Daniel R. committed the family offenses of assault in the third degree and menacing in the third degree, granted a one-year order of protection in favor of petitioner mother Yenis C., unanimously affirmed, without costs.

Given the enduring consequences which may potentially flow from an adjudication that respondent committed a family offense, this Court will address the merits of an appeal even though the order of protection at issue has expired (*see Matter of Charlene R. v Malachi R.*, 151 AD3d 482, 482 [1st Dept 2017]). Contrary to respondent's contention, the record is sufficiently complete to

allow this Court to make an independent factual review and draw its own conclusions as to whether petitioner demonstrated the petition's allegations by a preponderance of the evidence.

There is no basis to disturb the Referee's credibility determinations (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489 [1st Dept 2009]). Based upon our review of the record we find that a preponderance of the evidence adduced at the fact-finding hearing established that respondent's actions during the March 13, 2015 incident constituted the family offense of menacing in the third degree (Penal Law § 120.15), because petitioner's testimony that he threatened her with a steak knife and told her that "he wanted to kill [her]," causing her to become "very scared" and "very sad," shows that his words and actions placed or attempted to place her in fear of death, imminent serious physical injury or physical injury (*see* Family Ct Act § 832; *Matter of Sonia S. v Pedro Antonio S.*, 139 AD3d 546 [1st Dept 2016]; *Matter of William M. v Elba Q.*, 121 AD3d 489 [1st Dept 2014]; *Matter of Melind M. v Joseph P.*, 95 AD3d 553, 555 [1st Dept 2012]).

We also find that petitioner's testimony that she was in a lot of pain on one occasion after respondent pushed and kicked her, requiring emergency medical attention, and had difficulty

breathing on another while respondent sat on her head for about one minute and would not get off her until their 14-year-old daughter intervened, was sufficient to establish that his actions constituted the family offense of assault in the third degree (Penal Law § 120.00 [1]); *People v Martinez*, 90 AD3d 409 [1st Dept 2011], *lv denied* 18 NY3d 960 [2012]; *People v Delph*, 269 AD2d 218 [1st Dept 2000], *lv denied* 94 NY2d 947 [2000]).

We have reviewed the remaining arguments of the parties and find them unavailing.

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9951 Bluebanana Group, et al., Index 650733/18
Plaintiffs-Appellants,

-against-

Dennis Sargent,
Defendant-Respondent,

Marc Tenzer,
Defendant.

_____

Kraus & Zuchlewski LLP, New York (Desiree J. Gustafson of counsel), for appellants.

Law Office of Mark E. Goidell, Garden City (Mark E. Goidell of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 10, 2019, which, to the extent appealed from as limited by the briefs, granted defendant Dennis Sargent's motion to dismiss the complaint and dismissed the complaint with prejudice, unanimously affirmed, with costs.

Plaintiffs have failed to state a cognizable claim for breach of the duty of loyalty, which requires the employee to have "acted directly against the employer's interests - as in embezzlement, improperly competing with the current employer, or usurping business opportunities" (*Veritas Capital Mgt., L.L.C. v Campbell*, 82 AD3d 529, 530 [1st Dept 2011], *lv dismissed* 17 NY3d

778 [2011]). Plaintiffs have not alleged that they were in any of the same businesses as Sargent. Plaintiffs do not claim any tangible expectancy in Sargent's alleged side business activity, nor are there any well-pled allegations that Sargent stole or embezzled funds. The claim for breach of duty of loyalty/faithless servant was properly dismissed.

Plaintiffs' breach of fiduciary duty claims are duplicative, and should be dismissed for the same reasons. This Court has applied the same standards for determining a breach of duty of loyalty claim to a breach of fiduciary duty claim against an employee (*see e.g. Riom Corp. v McLean*, 23 AD3d 298 [1st Dept 2005]).

Plaintiffs make no argument regarding the court's denial of their cross motion to amend, and therefore we deem this aspect of the appeal abandoned.

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9952 Ana Maria Platon, Index 657256/17
Plaintiff-Respondent,

-against-

Linden-Marshall Contracting Inc.,
Defendant-Appellant.

_____

Ahmuty, Demers & McManus, New York (Glenn A. Kaminska of counsel), for appellant.

Frey & Kozak LLP, New York (Zachary A. Kozak of counsel), for respondent.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered September 10, 2018, which, insofar as appealed from as limited by the briefs, denied defendant's motion to dismiss plaintiff's claims for statutory right to cancel the contract, negligence, fraud in the inducement, and statutory penalties pursuant to the General Business Law, unanimously reversed, on the law, without costs, and the motion granted as to these claims. The Clerk is directed to enter judgment dismissing the complaint.

This action arises out of allegedly unsatisfactory renovation work performed by defendant on a bathroom owned by plaintiff. A prior action in small claims court resulted in a judgment, after trial, dismissing plaintiff's breach of contract

claim in connection with this work and awarding defendant judgment on its counterclaim. The parties dispute whether plaintiff is now barred by the doctrine of res judicata from asserting the instant claims for negligence, fraud in the inducement, and violations of the General Business Law.

The doctrine of res judicata bars all claims "arising out of the same transaction or series of transactions" as a claim that was previously resolved "on the merits" and which the party opposing preclusion had "a full and fair opportunity to litigate" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under this transactional approach, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v Syracuse*, 54 NY2d 353, 357 [1981]). Although judgments of the small claims court are statutorily prohibited from having collateral estoppel or issue preclusive effect (*see* City Court Act [CCA] § 1808), this provision "does not divest the small claims judgment of its res judicata, or claim preclusion, effect" (*Chapman v Faustin*, 150 AD3d 647, 647 [1st Dept 2017]).

We find that plaintiff's negligence, fraudulent inducement, and General Business Law claims are barred by the doctrine of res

judicata, as they arose out of the same transaction or occurrence as plaintiff's prior breach of contract claim - i.e., defendant's contract to perform and allegedly poor-quality performance of renovation work. It does not matter that plaintiff now requests greater damages or that the small claims part has jurisdictional limits on the amount of damages that may be sought (*see* CCA § 1801), as it was plaintiff's choice to proceed in that court first (*see Chapman*, 150 AD3d at 647).

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9953 The People of the State of New York, Ind. 4101/15
Respondent,

-against-

Oscar Mejia,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered March 28, 2016, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9954 The People of the State of New York, Ind. 2139/16
Respondent,

-against-

Joel Correa,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Maria Ortiz of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Anthony J. Ferrara, J.), rendered December 8, 2016, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously reversed, on the facts, and the indictment dismissed.

We find that the verdict was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Two police officers testified that they observed defendant in a high drug trafficking area. They both saw defendant approach a man and talk to him. The man gave defendant money and there was

an "exchange," but the officers did not see what was exchanged. Shortly thereafter, one of the officers witnessed a woman approach defendant. The officer saw the woman speak to defendant and then touch his hand, but the officer did not see any money or drugs exchanged. Defendant and the woman separated, and the officer approached the woman. The officer identified herself, said that she just saw what happened, and heard the woman chewing on something. She asked the woman to spit out the object, which turned out to be a small bag containing $10 worth of crack cocaine. The officer never saw the woman put the bag in her mouth or even bring her hand to her mouth. The police then arrested the woman and defendant. Defendant did not have any drugs on him, but had $10 in his sweatshirt pocket and other denominations of cash in his pants pocket.

In the exercise of our factual review power, we conclude that the People did not prove beyond any reasonable doubt that defendant sold cocaine to the woman, which was the only crime charged. The officer who witnessed the transaction acknowledged she did not observe an exchange of anything, including money, drugs or unidentified objects, between defendant and the woman. In addition, the People's theory that the woman put the bag in her mouth after purchasing it from defendant was contradicted by

the officer's testimony that she never saw the woman put anything into her mouth, or even put her hand to her mouth. Furthermore, the People's theory that defendant sold two $10 bags, one to the man and the other to the woman, was inconsistent with the cash found on defendant.

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9955 The People of the State of New York, Ind. 1569/15
Respondent,

-against-

Sergey Kim,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Felicia A. Yancey of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam R. Best, J.), rendered February 22, 2016,

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9956 The People of the State of New York, Ind. 777/17
Respondent,

-against-

Edward Roman,
Defendant-Appellant.

_____

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

Darcel D. Clark, District Attorney, Bronx (Robert L. Myers of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ralph A. Fabrizio, J.), rendered March 22, 2018,

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9957 Vera Arthur, Index 350016/16
Plaintiff-Respondent-Appellant,

-against-

Gabriele Galletti,
Defendant-Appellant-Respondent.

_____

McNamee Lochner P.C., Albany (Bruce J. Wagner of counsel), for appellant-respondent.

Law Office of Howard Benjamin, New York (Howard Benjamin of counsel), for respondent-appellant.

Law Offices of Rosemary Rivieccio, New York, (Rosemary Rivieccio of counsel), attorney for the children.

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Order, Supreme Court, New York County (Laura E. Drager, J.), entered May 9, 2018, which, to the extent appealed from as limited by the briefs, after a custody trial, awarded defendant father residential custody of the children with permission to relocate to Lodi, Italy, until the youngest child attains the age of eight, at which time the children shall relocate to the New York metropolitan area, provided that plaintiff mother still works there, unanimously modified, on the law and the facts, to vacate the decretal directive that the children relocate to the New York metropolitan area when the youngest child attains the age of eight, and otherwise affirmed, without costs.

The award of residential custody of the children to defendant has a sound and substantial basis in the record (*see Matter of Salena S. v Ahmad G.*, 152 AD3d 162 [1st Dept 2017]). Upon consideration of all the relevant factors, the court properly concluded that, while the evidence demonstrated that both parties were fit and loving parents, the children's best interests would be served by remaining with defendant. Defendant acted as the children's primary caregiver, getting them ready for school and feeding them dinner, while plaintiff was often unavailable, choosing to absent herself from the home at the expense of spending time with the children (*see Matter of Ivan J. v Kathryn G.*, 164 AD3d 1151 [1st Dept 2018]).

The decision to permit defendant to relocate to Lodi, Italy, also has a sound and substantial basis in the record. Contrary to plaintiff's contention, the factors set forth in *Matter of Tropea v Tropea* (87 NY2d 727 [1996]) do not govern this matter, because there was no prior custody order at the time of defendant's relocation, and the court properly considered relocation as one factor in determining the child's best interests (*see Matter of Michael B. [Lillian B.]*, 145 AD3d 425, 430 [1st Dept 2016]). The children had already spent a substantial portion of their childhood in Lodi, where they

attended school, and they were surrounded by defendant's family, who provided emotional and practical support.

The court however should not have directed that the children return to New York when the youngest child attains the age of eight. The court concluded that relocation at that point would be in the children's best interests based on their ages and "international pedigree." However, the court's reasoning is not so "compelling as to warrant the attendant [further] disruption of the children's lives" (*Matter of Lawrence C. v Anthea P.*, 79 AD3d 577, 579 [1st Dept 2010]; *see also Matter of Eason v Bowick*, 165 AD3d 1592, 1593 [4th Dept 2018], *lv denied* 32 NY3d 912 [2019] [this provision "impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child(ren's) best interests at that time"] [internal quotation marks omitted]).

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9958 The People of the State of New York, Ind. 2586/13
Respondent,

-against-

Michael Israel,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila O'Shea of counsel), for respondent.

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Judgment, Supreme Court, New York County (Michael J. Obus, J. at motion for disclosure of police records; Rena K. Uviller, J. at suppression hearing; Daniel P. McCullough, J. at jury trial and sentencing), rendered January 27, 2014, as amended February 19, 2014, convicting defendant of criminal possession of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of three years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's belated challenge for cause to a selected juror (*see* 270.15[2]). Although the juror had not been sworn, jury selection had been completed, and defendant's request was for substitution of an alternate. Furthermore, the specific

arguments defendant made at the time of the challenge did not require excusal of the juror for cause, and defendant did not request that the juror be recalled.

Under the exceptional circumstances of the case, the People established overriding interests that justified the hearing court's exclusion of defendant (but not his attorney), as well as the public from a limited portion of the suppression hearing (*see People v Frost*, 100 NY2d 129 [2003]; *People v Castillo* (80 NY2d 578 [1992], *cert denied* 507 US 1033 [1993]). Based, in part, on our review of sealed materials, we find that permitting defendant to learn any information about source of the community complaints in this case would have permitted defendant to ascertain the complainants' identities, and that their safety would have been jeopardized. We have considered and rejected defendant's remaining arguments on these issues.

The People provided reasonable assurances as to the identity and unchanged condition of the drugs seized from defendant. The absence of testimony from the chemist who initially tested the drugs went only to the weight of the evidence, not its admissibility (*see People v Julian*, 41 NY2d 340 [1977]).

The court providently exercised its discretion in declining

to order production, for in camera review, of the arresting officers' personnel records and Civilian Complaint Review Board files. There was no showing that it was "reasonably likely" that the records would "directly bear" on defendant's guilt or innocence (*People v Gissendanner*, 48 NY2d 543, 550 [1979]).

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

ENTERED: OCTOBER 1, 2019

CLERK

Richter, J.P., Gische, Kapnick, Kern, Moulton, JJ.

9960N Michael Varley, et al., Index 151716/17
Plaintiffs-Appellants,

-against-

Elk 300 E 83, LLC,
Defendant-Respondent.

_____

Sokolski & Zekaria, P.C., New York (Daphna Zekaria of counsel), for appellants.

Desiderio, Kaufman & Metz, P.C., New York (Jeffrey R. Metz of counsel), for respondent.

_____

Order, Supreme Court, New York County (Gerald Lebovits, J.), entered June 29, 2018, which denied plaintiffs' motion to restore this settled action to the calendar, to compel defendant landlord's adherence to the stipulation of settlement, and for an award of continuing damages and legal fees, unanimously affirmed, without costs.

Plaintiffs were long-term tenants of an apartment in a building, owned by defendant, that was severely damaged and rendered unsafe by a fire in February 2017. Plaintiffs commenced this action seeking, inter alia, access to their personal property left in the apartment, and the parties entered into a confidential settlement agreement in July 2017. To the extent the terms of the agreement have been disclosed, the parties

agreed to terminate plaintiffs' lease, and agreed that defendant could not dispose of plaintiffs' personal property until after the building was deemed safe and plaintiffs were allowed access to remove their belongings. In the event of a breach or threatened breach of the agreement, the opposing party could seek an injunction and reasonable attorneys' fees.

Contrary to plaintiffs' contention, defendant's September 2017 letter updating them on upcoming repairs, and seeking their input concerning items that needed to be relocated or discarded in anticipation of the repairs, did not constitute a threatened breach of the settlement agreement. Defendant merely sought a mutual understanding to determine which items in the portion of the unit needing repair were not salvageable due to fire, smoke, water, or mold damage (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]; *Hotel Cameron, Inc. v Purcell*, 35 AD3d 153, 155 [1st Dept 2006]).

Furthermore, plaintiffs rely on facts concerning subsequent disposition of their property that are dehors the record and thus

cannot properly be considered on appeal (*see Kellogg v All Sts. Hous. Dev. Fund Co., Inc.*, 146 AD3d 615, 617 [1st Dept 2017]; *Martin v Manhattan & Bronx Surface Tr. Operating Auth.*, 198 AD2d 160, 160-161 [1st Dept 1993]).

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9961 The People of the State of New York, Ind. 1188/17
Respondent,

-against-

Kevin Crawford,
Defendant-Appellant.

_____

Steven N. Feinman, White Plains, for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered September 5, 2017, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of one and one-half to three 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 [2007]). The jury could have reasonably found that defendant's demands for money directed at a bank teller constituted an implied threat of force (*see People v Woods*, 41 NY2d 279, 282-283 [1977]).

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9962 In re Solomon R. Faison, Jr., Index 101530/18
Petitioner,

-against-

The New York City Taxi and
Limousine Commission,
Respondent.

_____

Solomon R. Faison, Jr., appellant pro se.

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

_____

Determination of respondent New York City Taxi and Limousine Commission (TLC), dated August 24, 2018, which found that petitioner had allowed a vehicle to be operated for hire without a permit in violation of Administrative Code of the City of New York § 19-506(b)(1), and imposed a fine of $1,500, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Joan A. Madden, J.], entered February 20, 2019), dismissed, without costs.

Respondent's determination is supported by substantial evidence, namely an undercover TLC officer's testimony that petitioner agreed to provide him with a ride from the airport to a local college for money *(Matter of Williams v New York City*

Taxi & Limousine Commn., 225 AD2d 502, 503 [1st Dept 1996], *lv denied* 88 NY2d 812 [1996]). Petitioner testified that he agreed to give the TLC officer a ride to the boulevard, where he could catch a cab, and the ride was of no monetary value, but if the passenger wanted to give him a tip, it was fine. The Hearing Officer credited the TLC officer's testimony, a determination "largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record" (*see Berenhaus v Ward*, 70 NY2d 436, 443 [1987]).

The penalty imposed is not so disproportionate to the violation as to shock the conscience, since it was within the statutory penalty for the first-time violation (*see* Administrative Code of the City of New York § 19-506[e][1]).

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9963-
9963A-
9963B-
9963C In re Jonathan R.F.-C.,

A Child Under Eighteen Years
of Age, etc.,

Virgilio D.O.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

_____

Larry S. Bachner, New York, for appellant.

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

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

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Order of disposition, Family Court, Bronx County (Alma M. Gomez, J.), entered on or about August 23, 2018, to the extent it brings up for review orders, same court and Judge, entered on or about December 19, 2017, and on or about November 28, 2017, which granted petitioner agency's motion for summary judgment on the issue of respondent's derivative abuse of the subject child, unanimously affirmed, without costs. Order of protection, same court and Judge, entered on or about August 23, 2018, unanimously affirmed, without costs. Appeals from December 19, 2017 and

November 20, 2017 orders unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Respondent failed to raise an issue of fact in opposition to petitioner's prima facie showing of his derivative abuse of the subject child (*see Matter of Skylean A.P. [Jeremiah S.]*, 136 AD3d 515 [1st Dept 2016], *lv denied* 27 NY3d 907 [2016]). Respondent was criminally convicted of raping the child's then seven-year-old half-sister and filming the sexual assault, and was sentenced to 25 years to life in prison, following a jury trial at which he had a full and fair opportunity to litigate the issue of his criminal conduct (*see Matter of Lea C. [Akil F.]*, 160 AD3d 724, 726 [2d Dept 2018]; *Matter of Harmony M.E. [Andre C.]*, 121 AD3d 677, 680 [2d Dept 2014]). The fact that the child had not yet been born at the time of the rape of his half-sister does not undermine the finding of derivative neglect, as respondent's actions demonstrate parental judgment and impulse control so defective as to create a substantial risk of harm to any child in his care (*see id.* at 679).

The presumption that parental visitation is in the best interests of a child was rebutted by the record demonstration, by a preponderance of the evidence, that visitation with respondent would not be in the child's best interests (*see Matter of Granger*

v Misercola, 21 NY3d 86, 90-92 [2013]; *Matter of Giovanni H.B. [Henry B.-Orissa B.]*, 172 AD3d 489 [1st Dept 2019]). The now five-year-old child has never met respondent, who has been incarcerated for the entirety of the child's life. Respondent continues to deny his guilt following his conviction for sexual assault of a child and use of a child in a sexual performance. He has failed to attend or complete a sex offender program, a condition of visitation, and contends that he does not need sex offender treatment. While respondent has suggested that visitation could be facilitated by the child's paternal grandmother, she is a complete stranger to the child.

The record supports the issuance of an order of protection (*see e.g. Matter of Lea C.*, 160 AD3d at 727).

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9964 N.N. Simpson, et al., Index 160737/17
Plaintiffs-Appellants,

-against-

16-26 East 105, LLC, et al.,
Defendants-Respondents.

_____

Newman Ferrara LLP, New York (Roger A. Sachar of counsel), for appellants.

Greenberg Traurig, LLP, New York (Hal N. Beerman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alan C. Marin, J.), entered February 6, 2019, which denied plaintiffs' motion for class certification, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiffs, who are tenants in a contiguous row of buildings owned and operated by defendants, allege that defendants improperly deregulated their apartments while the buildings received J-51 tax benefits (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). They seek, inter alia, declaratory relief and damages arising from the resulting rent overcharges.

The motion court denied plaintiffs' motion for class certification solely on the ground that the Rent Stabilization Code's so-called "default formula" for calculating rents in

certain instances amounts to a penalty and is therefore unavailable in a class action (*see* CPLR 901[b]; 9 NYCRR 2522.6[b][3]; 2526.1[g]).

For the reasons that follow, we hold that the default formula is not a penalty but a method by which to calculate compensatory damages, and therefore is not a bar to class certification pursuant to CPLR 901(b).

The Rent Stabilization Code requires that a "base date" be established for calculating the legal regulated rent for an apartment (*see* 9 NYCRR 2522.6[b][2]). Generally, the legal regulated rent is the rent registered with the Division of Housing and Community Renewal (DHCR) for the apartment six years before the overcharge proceeding was commenced (CPLR 213-a).[1] The base date is used in the calculation of overcharges, i.e., overcharges result from improper rent increases after the base date (9 NYCRR 2526.1). The default formula for establishing the

[1] The Housing Stability and Tenant Protection Act of 2019 (L 2019, ch 36) extended the statutory "lookback period" for overcharge proceedings from four to six years for all actions pending on or after June 14, 2019 (CPLR 213-a, as amended). The act also permits review of rent history beyond the lookback period in a determination of the legal regulated rent (Rent Stabilization Law of 1969 [Administrative Code of City of NY] § 26-516(h), as amended by L 2019, ch 36] [DHCR or court "shall consider all available rent history which is reasonably necessary to make such determinations"]).

base date rent is applied where 1) the base date rent cannot be determined, 2) a full rent history is not provided, or 3) the owner has engaged in fraudulent practices (*see* 9 NYCRR 2522.6[b][3]; 2526.1[g]).

The default formula provides for the base date to be established at the lowest of 1) the lowest registered rent for a comparable apartment in the building at the time the complaining tenant moved in, 2) the complaining tenant's initial rent reduced by a certain percentage, 3) the last registered rent paid by the prior tenant within the lookback period, or 4) if none of those is appropriate, an amount set by DHCR based on its relevant data (9 NYCRR 2522.6[b][3] and 2526.1[g]).

Thus, the default formula is applied to calculate compensatory overcharge damages where no other method is available. Moreover, it is applied equally in cases in which the owner has engaged in fraud and in cases in which the base date rent simply cannot be determined or the rent history is unavailable. Considered in this light, we conclude that the default formula is not "punishing conduct." Nor can a case in which it is applied be reasonably deemed "an action to recover a penalty" under CPLR 901(b).

In view of the foregoing, we do not reach the question whether defendants' failure to raise their argument that the default formula is a penalty within the meaning of CPLR 901(b) in a pleading precluded the motion court's consideration of the argument (*see People v Carvajal*, 6 NY3d 305, 316 [2005] ["We are bound ... not to decide questions unnecessary to the disposition of the appeal"]).

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9966- Ind. 162/12
9966A The People of the State of New York,
Respondent,

-against-

Serafin E. Colon,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered July 18, 2012, convicting defendant, after a jury trial, of attempted assault in the first degree and criminal possession of a weapon in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 15 years; and order, same court (Patricia M. Nuñez, J.), entered on or about November 30, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The trial court providently exercised its discretion in admitting a recording of a voicemail defendant left for the victim, even though only parts of it were audible and intelligible (*see People v Rivera*, 257 AD2d 172, 176 [1st Dept 1999], *affd* 94 NY2d 908 [2000]; *see also People v Patterson*, 93

NY2d 80, 84 [1999]). The victim testified to the authenticity of the recording, and a technician testified regarding how he enhanced the recording in order to clarify defendant's voice in the foreground. As defense counsel acknowledged, a few parts were audible, including when defendant said, "Don't let me catch you," which, viewed along with the other evidence at trial, was probative of defendant's intent to cause the victim serious physical injury.

The court also properly admitted approximately 20 text messages the victim had saved in which defendant insulted and threatened her, because they were relevant to the then-pending harassment and stalking charges (which ultimately were not submitted to the jury), and they were probative as background of the stabbing incident, as well as defendant's intent to cause the victim serious physical injury. To the extent defendant argues that they unfairly presented a "one-sided" view of his text exchanges with the victim, his argument is unavailing. The evidence established that both parties exchanged hundreds of texts and phone calls, and the victim acknowledged that she also replied to defendant's texts and calls. Defendant also had an opportunity to cross-examine the victim regarding those communications.

Moreover, to the extent any messages were more prejudicial than probative, any error in their admission was harmless in light of overwhelming evidence of defendant's guilt, and there was no significant probability that the jury would have acquitted defendant but for their admission into evidence (*see People v Crimmins*, 36 NY2d 230 [1975]). The evidence included eyewitness testimony that defendant stabbed the victim in her left side, barely missing her kidney, with a knife with an eight-inch blade, which was found on defendant just after the assault. In addition, surveillance videos recorded the incident, and defendant admitted to a friend that he had committed the stabbing.

The motion court providently exercised its discretion when it denied, without a hearing, defendant's motion to vacate the judgment, made on the ground that the prosecution knew that the victim gave perjured testimony, which the prosecution failed to correct during trial (*see People v Samandorov*, 13 NY3d 433, 436 [2009]). As the motion court found, the prosecutor had no actual evidence during trial that the victim had falsely testified when she denied having any romantic relationship with defendant, or when she claimed she had been drug-free for four years at the time of trial. The prosecutor subpoenaed the relevant medical records the day after defense counsel had cross-examined the

victim using a previously undisclosed and unauthenticated sonogram dated September 2010. The hospital's medical records were received two days after the verdict, and they confirmed that the victim had been pregnant in September 2010. However, these records did not reveal the father's identity. The records also revealed, contrary to the victim's trial testimony, that she had been using drugs at that time. Defendant's brother had testified that the sonogram was in defendant's possession, but he did not elaborate on this or testify, as the defense counsel argued during her cross-examination, that the victim had given it to defendant and claimed he was the father.

At the time of trial, the evidence showed that defendant and the victim met in November 2010, and thus the prosecution had no reason during or before trial to investigate medical records that predated their relationship. The prosecutor acknowledged, due to the extent of text exchanges between defendant and the victim, of which defendant was aware, that she suspected that the victim had not been candid about her relationship with defendant. However, at the time of trial, the prosecutor had no "undisclosed evidence [that] demonstrate[d] that the prosecution's case include[d] perjured testimony and that the prosecution knew, or should have known, of the perjury" (*United States v Agurs*, 427 US 97, 103 [1976]).

Furthermore, in light of the evidence of his guilt, there was no reasonable possibility that the error contributed to the conviction. The jury was entitled to credit and reject portions of the victim's testimony, and evidence other than her testimony, as noted above, sufficed to prove defendant's guilt. Defendant unpersuasively argues that the truth about their romantic involvement would have been probative of his intent, and could have led to an acquittal because the People had argued that defendant falsely claimed to have a relationship with the victim, and that his feelings of rejection provoked his intent to kill or cause serious physical injury. However, evidence that the victim lied about their relationship and/or ended a more serious romantic relationship would not negate his intent.

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

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9967- Ind. 1479/2014
9967A- 2373/2014
9967B The People of the State of New York, 3275/2014
Respondent,

-against-

Willie Bellinger,
Defendant-Appellant.

_____

Larry Sheehan, Bronx, for appellant.

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

_____

Judgments, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered July 31, 2015, convicting defendant, upon his pleas of guilty, of gang assault in the first degree, conspiracy in the second degree and criminal possession of a controlled substance in the third degree, and sentencing him, as a second violent felony offender, to an aggregate term of 17 years, unanimously affirmed.

The court providently exercised its discretion in denying defendant's motion to withdraw his plea of guilty (*see People v Frederick*, 45 NY2d 520 [1978]), which was made with the assistance of new counsel. The record establishes the voluntariness of the plea. Defendant's claim of coercive conduct

by the attorney who represented him at the plea colloquy was unfounded. The fact that defendant gave monosyllabic responses to the court's questions did not render the plea invalid. "The court was not required to have defendant personally recite the facts underlying the crime during the plea colloquy where, as here, the record establishes that defendant confirmed the accuracy of the court's recitation of the facts" (*People v Pryce*, 148 AD3d 1629, 1630 [4th Dept 2017], *lv denied* 29 NY3d 1085 [2017]).

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

ENTERED: OCTOBER 1, 2019

CLERK

CORRECTED ORDER - NOVEMBER 6, 2019

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

9969 Juan Roberto Cruz Martinez, as Executor of the Estate of Ana Cruz, deceased,
Plaintiff,

-against-

Benevento Realty Corp., et al.,
Defendants.

- - - - -

Benevento Realty Corp.,
Third-Party Plaintiff-Respondent,

-against-

Jose Luis Arosquipa,
Third-Party Defendant-Appellant.

Index **308511/11**
839340/16

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about May 18, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated September 5, 2019,

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9970- Index 600920/08
9971 Millennium Holdings LLC, et al.,
Plaintiffs,

Certain Underwriters at Lloyd's,
London, et al.,
Plaintiffs-Intervenors-Respondents,

-against-

The Glidden Company now known as
Akzo Nobel Paints LLC, et al.,
Defendants-Appellants.

- - - - -

Millennium Holdings LLC, et al.,
Plaintiffs,

Certain Underwriters at Lloyd's,
London, et al.,
Plaintiffs-Intervenors-Appellants,

-against-

The Glidden Company now known as Akzo
Nobel Paints LLC,
Defendant-Respondent.

_____

Debevoise & Plimpton LLP, New York (James B. Amler of counsel), for The Glidden Company, appellants/respondents.

Zuckerman Spaeder LLC, New York (Carl S. Kravitz of counsel), for respondents/appellants.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered May 7, 2018, which denied plaintiffs-

intervenors (insurers) motion for summary judgment on liability, unanimously affirmed, without costs. Order, same court and Justice, entered May 7, 2018, which denied defendant's motion for summary judgment dismissing the insurers claims against it, unanimously modified, on the law and the facts, to the extent of dismissing the insurers' subrogation claims to the extent they seek indemnification for any payments made on behalf of plaintiff prior to March 25, 2002, and otherwise affirmed, without costs.

The issue on these appeals is whether the insurers are contractually subrogated to plaintiff's contractual indemnification rights against defendant. We previously held that the amended purchase agreement setting forth defendant's indemnification obligation is ambiguous as to whether plaintiff and defendant intended that plaintiff would maximize its insurance recoveries before seeking indemnification from defendant and remanded to Supreme Court for consideration of extrinsic evidence on the matter (146 AD3d 539, 546 [1st Dept 2017]). In subsequently moving for summary judgment, each side failed to meet its respective burden on this point.

However, the insurers' claim for subrogation is time-barred to the extent they seek indemnification for any payments made on behalf of plaintiffs under the policies at issue prior to March

25, 2002. We also note the 2011 settlement agreement between plaintiff and defendant terminated plaintiff's indemnification rights. While the agreement preserved the insurers' existing subrogation claims, because a subrogee stands in the shoes of the subrogor with no greater rights (*Hartford Acc. & Indem. Co. v CNA Ins. Cos.*, 99 AD2d 310, 312 [1st Dept 1984]), the agreement also terminated the insurers' subrogation right for indemnification claims that no longer existed as of the agreement's effective date. To the extent that defendant released its rights to recover from plaintiff, it is not entitled to a setoff of such released amounts against any sums for which it may be liable to the insurers-subrogees (*see Allstate Ins. Co. v Stein*, 1 NY3d 416, 420-421 [2004] [defendant in subrogation action may assert same defenses that it could assert against the subrogor]).

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9972 The People of the State of New York, SCI 447/16
Respondent,

-against-

Vicente Rivera,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Joseph Marciano of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Shari Michels, J.), rendered April 4, 2016,

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

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

9973-
9973A In re Chance Y., and Another,

Dependent Children Under the Age
of Eighteen Years, etc.,

Danielle Y.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner-Respondent.

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Larry S. Bachner, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

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

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Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about January 5, 2018, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about August 23, 2017, which found that respondent neglected the subject children, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

Respondent failed to preserve her argument that Family Court Act § 1046(b)(i) violates the Constitution insofar as it permits

a child to be removed from a parent's care and placed into foster care upon evidence that is less than clear and convincing. In any event, the argument is unavailing. "In a fact-finding hearing to determine whether a child is abused or neglected, the provision of Family Court Act § 1046(b) that a finding of neglect 'must be based on a preponderance of the evidence' affords due process under the Federal Constitution" (*Matter of Tammie Z.*, 66 NY2d 1, 3 [1985]).

The finding of neglect is supported by a preponderance of the evidence, which showed that respondent was paranoid and delusional, which affected her ability to care for the children (*see Matter of Ruth Joanna O.O. [Melissa O.]*, 149 AD3d 32 [1st Dept 2017], *affd* 30 NY3d 985 [2017]). When the petition was filed, the children, who were then three years old and one year old, were dependent on respondent's care. Medical records demonstrate that respondent showed signs of delusional disorder, paranoid schizophrenia, brief psychotic disorder, and depression with psychosis. Other evidence demonstrates that respondent made repeated unfounded allegations of physical and sexual abuse against her mother's longtime male companion, including the allegation that the children, who were nonverbal, articulated sentences describing sexual abuse, and that the companion had

burned the children's hands and feet, although a physical examination revealed no marks on them. Respondent also insisted that the children undergo further invasive medical examinations because she was not satisfied that the reports showed no sign of abuse.

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9974 Jose Rivera-Astudillo, Index 301326/15
Plaintiff-Appellant-Respondent,

-against-

The Garden of Prayer Church of
God in Christ, Inc.,
Defendant-Respondent-Appellant,

Belfor Property Restoration,
Defendant-Respondent.
- - - - -
[And a Third-Party Action]

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

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for respondent-appellant.

Pillinger Miller Tarallo, LLP, Garden City (Neil Sambursky of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered on or about January 3, 2019, which, to the extent appealed from, as limited by the briefs, denied plaintiff's motion seeking partial summary judgment on his cause of action pursuant to Labor Law § 240(1), and denied the motions of defendant The Garden of Prayer Church of God in Christ, Inc. (Church of God) for summary judgment dismissing plaintiff's Labor Law § 240(1) claim and for summary judgment on its common law

indemnity claim against Belfor Property Restoration (Belfor), unanimously modified, on the law, to grant plaintiff partial summary judgment on his Labor Law § 240(1) claim, and grant Church of God summary judgment on its common law indemnity claim, and otherwise affirmed, without costs.

Plaintiff's testimony that the ladder wobbled, flipped, and flopped, causing him to fall, sets forth a prima facie violation of Labor Law § 240(1) (*see Cutaia v Board of Mgrs. of the Varick St. Condominium*, 172 AD3d 424 [1st Dept 2019]; *Plywacz v 85 Broad St. LLC*, 159 AD3d 543 [1st Dept 2018]; *Kebe v Greenpoint-Goldman Corp.*, 150 AD3d 453, 454 [1st Dept 2017]; *Goreczny v 16 Ct. St. Owner LLC*, 110 AD3d 465 [1st Dept 2013]). Defendants failed to adduce any evidence rebutting plaintiff's showing, making summary judgment appropriate.

Plaintiff testified that he was using a Belfor ladder at the time of his fall. Belfor's deponent, who had no knowledge of the accident, conceded that Belfor had ladders on site, and could not say whether plaintiff's employer, the subcontractor who furnished labor for the cleaning and debris removal portion of the project, also brought ladders. There were no other subcontractors on site. Belfor's deponent also testified that Belfor had a site supervisor, the only Belfor employee on site that day, and that

he would have been "in the thick of it," and not performing paperwork or similar administrative tasks. Plaintiff, who wore a Belfor uniform at Belfor's behest, testified that Belfor employees were "the bosses," ordering him around. This evidence, taken together, is sufficient to establish that Church of God made a prima facie showing of entitlement to common law indemnity (*see generally McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 378 [2011]). In opposition, Belfor did not adduce any evidence to rebut that showing. Notably, the daily paperwork generated by Belfor is not in the record, nor is there any testimony or affidavit from the Belfor site supervisor who was present that day. Thus, summary judgment in favor of Church of God on its claim against Belfor is warranted.

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9975 The People of the State of New York, SCID 30156/17
Respondent,

-against-

Donovan Cushnie,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Robert M. Stolz, J.), entered on or about November 29, 2017, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court's discretionary upward departure was based on clear and convincing evidence that there were aggravating factors not sufficiently taken into account by the risk assessment instrument (*see People v Gillotti*, 23 NY3d 841, 861 [2014]), including defendant's repeated failure to register as a sex offender as required by the state where he committed the underlying sex offense, and his violation of his parole by absconding. The assessment of points under the risk factor for

conduct while under supervision did not reflect the egregiousness of defendant's behavior, which demonstrates his inability to comply with legal requirements. The mitigating factors defendant raises are outweighed by the aggravating factors noted by the court (*see e.g. People v Corn*, 128 AD3d 436, 437 [1st Dept 2015]). We have considered and rejected defendant's remaining arguments.

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9976 The People of the State of New York, Ind. 636/16
Respondent,

-against-

Andrew Barrios,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Christopher Michael Pederson of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (John S. Moore, J.), rendered October 31, 2017,

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

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

9977 The People of the State of New York, Ind. 1571/16N
Respondent,

-against-

Alexander Gesin,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Robert Stolz, J. at plea; Patrick McGrath, J. at sentencing), rendered February 15, 2018,

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

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

9979 The People of the State of New York, Ind. 3489/15
Respondent,

-against-

Reality Lucas,
Defendant-Appellant.

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

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Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered April 5, 2016, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9980 The People of the State of New York, Ind. 1648/15
Respondent,

-against-

Terry Luke also known as Terry Jackson,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Roger S. Hayes, J. at suppression hearing; Maxwell Wiley, J. at jury trial and sentencing), rendered September 7, 2016, convicting defendant of burglary in the second degree (two counts), burglary in the third degree (two counts), criminal possession of stolen property in the fourth degree (two counts) and criminal possession of stolen property in the fifth degree, and sentencing him, as a second violent felony offender, to an aggregate term of 17 to 19 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of directing that all sentences run concurrently, resulting in a new aggregate term of 15 years, and otherwise affirmed.

The court properly denied defendant's suppression motion. The record supports the hearing court's finding that the information possessed by the police, coupled with defendant's evasiveness, flight and resistance, provided probable cause to believe that defendant had attempted, or was attempting, to buy merchandise by way of a stolen or fraudulent credit card. A store employee provided detailed information about a pattern of behavior by defendant that was highly suspicious, when viewed in the light of the experience of both the employee and the police officer regarding such matters (*see generally People v Valentine*, 17 NY2d 128, 132 [1966]). Defendant argues that when the officers tackled him to terminate his flight, this constituted a forcible seizure tantamount to an arrest that required probable cause. However, in his omnibus motion and at the suppression hearing, defendant never alerted the court to this particular issue, and the court did not expressly decide it (*see* CPL 470.05 [2]; *People v Parker*, 32 NY3d 49, 57 [2018]). Accordingly, this issue is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that tackling defendant was a reasonable measure to prevent him from frustrating police efforts to lawfully detain him based on, at least, reasonable suspicion, and that this use of force did not

elevate the seizure to an arrest requiring probable cause (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *see also People v Hill*, 151 AD3d 479 [1st Dept 2017], *lv denied* 29 NY3d 1128 [2017][use of police dog to terminate suspect's flight]). In any event, regardless of whether defendant was arrested at the moment he was tackled, that arrest was lawful.

The trial court providently exercised its discretion in permitting the People to introduce evidence of defendant's prior attempts to make unlawful entries at one of the locations he was charged with burglarizing. The evidence was relevant, among other things, to a witness's ability to identify defendant, and it was not unduly prejudicial (*see e.g. People v Matthews*, 276 AD2d 385 [2000], *lv denied* 96 NY2d 736 [2001]). Defendant did not preserve his related claims regarding the People's summation and the court's charge, and we decline to review them in the

interest of justice. As an alternative holding, we find no basis for reversal.

We find the sentence excessive to the extent indicated.

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

ENTERED: OCTOBER 1, 2019

CLERK

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

9982N Lester J. Tanner, Index 153234/18
Plaintiff-Appellant,

-against-

Shari Stack, et al.,
Defendants-Respondents.

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Lester J. Tanner, New York, appellant pro se.

Sherman Wells Sylvester & Stamelman LLP, New York (Joshua S. Bratspies of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about December 19, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for leave to file a proposed amended complaint, unanimously affirmed, without costs.

By the time plaintiff moved for leave to amend, the original complaint had already been dismissed; hence, "there was no complaint left before the court to amend" (*Jeffrey L. Rosenberg &*

Assoc. v Kadem Capital Mgt., 306 AD2d 155, 156 [1st Dept 2003]; *see generally Wadsworth Ave. Assoc. v Maynard*, 91 AD3d 452, 453 [1st Dept 2012]).

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

ENTERED: OCTOBER 1, 2019

CLERK