SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 30, 2020

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Manzanet-Daniels, J.P., Gische, Webber, Moulton, JJ.

10119 Randy Polanco Rodriguez, Index 301012/14
Plaintiff-Appellant,

-against-

Antillana & Metro Supermarket Corp., doing business as Antilla Superfood Supermarket, et al.,
Defendants-Respondents.

– – – – –

[And a Third-Party Action]

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

Kaufman Borgeest & Ryan LLP, Valhalla (Rebecca A. Barrett of counsel), for Antillana & Metro Supermarket Corp., respondent.

Black Marjieh & Sanford, LLP, Elmsford (Sheryl A. Sanford of counsel), for Boss Realty Company, LLC, respondent.

Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about May 10, 2018, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his Labor Law § 241(6) claim, granted defendant Boss Realty Company, LLC's (Boss) motion for summary judgment dismissing the complaint and any cross claims as against it, and granted defendant Antillana & Metro Supermarket Corp.

d/b/a Antillana Superfood Supermarket's (Antilla) motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim as against it, unanimously modified, on the law, to deny Antillana's and Boss's motions for summary judgment dismissing plaintiff's Labor Law § 241(6) claim, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured while installing a refrigeration condenser unit at premises owned by Boss and leased by Antillana. We find that the motion court improperly granted defendants' motions for summary judgment dismissing the Labor Law § 241(6) claim. Plaintiff was engaged in an activity within the purview of Labor Law § 241(6). Plaintiff worked at the subject premises during the build-out installing three refrigeration system condensers, which weighed about 3000 pounds and had to be moved with a forklift. Three weeks after the store was opened, plaintiff was asked to install an additional condenser which weighed about 200 pounds. The president of Antillana acknowledged that there had been a renovation project underway at the premises before plaintiff's accident.

We find that there is an issue of fact whether the subsequent installation of the condenser constituted an "alteration" of the premises, which falls within the ambit of "construction" work under Labor Law § 241(6) (*see Fuchs v Austin*

Mall Assoc., LLC, 62 AD3d 746, 747 [2d Dept 2009]; *Becker v AND Design Corp.*, 51 AD3d 834 [2d Dept 2008]).

We also find triable issues of material fact as to whether Antillana violated 12 NYCRR 23-1.25(d), (e)(1), (e)(3), and (f), relied upon by plaintiff to support his Labor Law § 241(6) claim.

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

The Decision and Order of this Court entered herein on October 29, 2019 (176 AD3d 597 [1st Dept 2019]) is hereby recalled and vacated (*see* M-8316 decided simultaneously herewith).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10913- Ind. 607/16
10913A The People of the State of New York, 3302/16
Respondent,

-against-

Infa Salim,
Defendant-Appellant.

_____

Janet E. Sabel, The Legal Aid Society, New York (Ying-Ying Ma of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eric Del Pozo of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Gregory Carro, J.), rendered November 16, 2016,

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

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

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

ENTERED: JANUARY 30, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10914 Ke'Andrea Nelson, Index 160417/13
Plaintiff-Respondent,

-against-

New York City Transit
Authority, et al.,
Defendants-Appellants.

_____

Steve S. Efron, New York, for appellants.

Schwartz Perry & Heller LLP, New York (Brian Heller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn Freed, J.), entered March 22, 2019, which, to the extent appealed from, denied in part defendants' motion for partial summary judgment, unanimously affirmed, without costs.

Defendants New York City Transit Authority (NYCTA) and Metropolitan Transit Authority Bus Company (MTA) failed to establish prima facie entitlement to partial summary judgment dismissing plaintiff's remaining claims of discrimination and retaliation. The record, including the findings of the neutral arbitrator, does not conclusively resolve factual issues regarding MTA's motives in levying various disciplinary charges against plaintiff between 2012 and 2016 (*compare Novak v St. Luke's-Roosevelt Hosp. Ctr., Inc.*, 136 AD3d 435, 436 [1st Dept 2016]; *Collins v New York City Tr. Auth.*, 305 F3d 113, 119 [2d

Cir 2002] [decision of a neutral arbitrator upholding charges of misconduct was "highly probative of the absence of discriminatory intent"]). Unlike *Collins* and *Novak*, plaintiff here challenged a number of disciplinary charges, including two dismissals, and the arbitrator twice found that defendants' penalties were disproportionate to the charged misconduct.

Further, plaintiff independently lodged formal complaints that her superiors at MTA made discriminatory, disparaging comments about her race and gender before any disciplinary actions were taken against her. Viewed in context, the alleged pervasive, racist, and sexist comments and conduct preclude summary dismissal of this case as "insubstantial" (*Hernandez v Kaisman*, 103 AD3d 106, 115 [1st Dept 2012]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10915- Dkt O-38672/16
10915A O-38587/16
10915B In re Judith L.C.,
Petitioner-Respondent,

-against-

Lawrence Y.,
Respondent-Appellant.

_____

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for appellant.

Simpson Thacher & Bartlett LLP, New York (Adam M. Saltzman of counsel), for respondent.

_____

Order, Family Court, New York County (Carol Goldstein, J.), entered on or about May 23, 2018, which found that respondent father committed the family offenses of menacing in the third degree (Penal Law § 120.15), two counts of harassment in the second degree (Penal Law § 240.26[1]), and one count of harassment in the second degree (Penal Law § 240.26[3]), and found aggravating circumstances based upon the father's behavior and occurrences that constitute an immediate and ongoing danger to petitioner mother, unanimously affirmed, without costs. Order, same court and Justice, entered on or about May 23, 2018, which granted a five-year order of protection in favor of the mother and the two subject children and against the father, unanimously affirmed, without costs. Order, same court and

Justice, entered on or about May 23, 2018, which dismissed the father's family offense petition against the mother, unanimously affirmed, without costs.

A preponderance of the evidence presented at the hearing established that the father engaged in acts which would constitute the family offenses of menacing in the third degree (Penal Law § 120.15), two counts of harassment in the second degree (Penal Law § 240.26[1]), and harassment in the second degree (Penal Law § 240.26[3]). The Family Court credited the mother's testimony and found the father not to be credible, and these findings are entitled to great deference (*see Matter of Everett C. v Oneida P.*, 61 AD3d 489, 489 [1st Dept 2009]).

The mother testified that, in August 2016, during an argument, the father grabbed her jaw and face so forcefully that the mother believed the father might kill her, and she was sore for hours afterward. On a separate occasion, in August 2016, the father was annoyed because the mother would not have sex with him and poked her hard with his finger all over her body all night long to prevent her from sleeping, and would shake her awake when she fell asleep. She testified that, in December 2015, during an argument, she was standing in the apartment's doorway when the father physically lifted her up under her chest and swung her into the apartment while she was holding the then 4-year-old

child, almost causing physical injury to her. The older child witnessed this incident, and both children were present on multiple occasions when their father cursed at the mother. In October 2015, the father grabbed her arm, pulled her arm, "mooshed" her face, slammed her into the sofa, and pinned her down by the wrists.

The record supports the finding of aggravating circumstances, as the father engaged in a repeated pattern of causing the mother physical injury, sometimes in the presence of the children, thus exposing them to injury (*see Matter of Pei-Fong K. v Myles M.*, 94 AD3d 675, 676 [1st Dept 2012]). The Family Court providently exercised its discretion in granting the 5-year order of protection in favor of the mother and the two children, as the father committed acts of domestic violence against the mother in close proximity to the children (*see Matter of Coumba F. v Mamdou D.*, 102 AD3d 634, 635 [1st Dept 2013]).

Courts are not statutorily required to appoint children counsel in family offense proceedings, but may do so within their discretion (*see Matter of Pamela N. v Neil N.*, 93 AD3d 1107, 1110 [3d Dept 2012]; *Matter of Quinones v Quinones*, 139 AD3d 1072, 1074 [2d Dept 2016]). The Family Court providently exercised its discretion in appointing an attorney for the children in the related proceedings, and, when the attorney for the children

appeared at the family offense proceeding, he stated that he would not be participating. The father contends for the first time on appeal that the Family Court should have held a *Lincoln* hearing with the children. However, there is no evidence that he made this request to the Family Court. Moreover, in a hearing seeking an order of protection, it would have compromised the parties' due process rights if the court had considered statements made in a *Lincoln* hearing where the court interviews the children in camera without the parties and their counsel present (*see Matter of Joyesha J. v Oscar S.*, 135 AD3d 557, 558 [1st Dept 2016]).

With respect to the father's ineffective assistance of counsel claim, the father already made this argument in a motion to the Family Court, but he did not appeal from the order denying his motion. As such, any challenge to that order is not properly before this Court (*see Matter of Sharyn PP. v Richard QQ.*, 83 AD3d 1140, 1143 [3d Dept 2011]). However, even if this Court considered his ineffective assistance of counsel argument on this appeal, it would find that it is unavailing. To prevail on this claim, respondent must demonstrate that he was deprived of meaningful representation by reason of counsel's deficiency and that respondent suffered actual prejudice as a result (*see Matter of Aaron Tyrell W. v Ruth B.*, 58 AD3d 419, 420 [1st Dept 2009]).

Here, the father's counsel actively participated in proceedings by cross-examining the mother, directly examining the father, making arguments, and objecting appropriately (*see Matter of Devin M.[Margaret W.]*, 119 AD3d 435, 437 [1st Dept 2014]). In addition, even though his initial counsel did not lay a proper foundation for the admission of photographic evidence, the father was not prejudiced because the court permitted his subsequent counsel to enter the photographs into evidence prior to the end of the hearing.

Family Court properly dismissed the father's family offense petition against the mother, as it credited the mother's testimony that she did not cause the father's alleged bruises (*see Everett C.*, 61 AD3d at 489).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10916 Deborah J. Bentley, Index 155323/14
Plaintiff-Respondent,

-against-

All-Star, Inc.,
Defendant,

Madison Avenue Realties, LLC, et al.,
Defendants-Respondents-Appellants,

314 5th Enterprises, Inc., doing
business as Turntable Chicken Jazz, et al.,
Defendants-Appellants-Respondents.

_____

Law Offices of Michael E. Pressman, New York (Stuart B. Cholewa of counsel), for appellants-respondents.

Molod Spitz & DeSantis, P.C., New York (Marcy Sonneborn of counsel), for Madison Ave Realties, LLC and 314 Fifth Avenue, Inc., respondents-appellants.

Law Office of James J. Toomey, New York (Evy L. Kazansky of counsel), for Treatsa Pizza Corp., respondent-appellant.

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

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered January 17, 2019, which denied defendants' respective motions for summary judgment dismissing the complaint and cross claims, unanimously affirmed, without costs.

Plaintiff alleges she sustained injuries when the ceiling in defendant Treatsa Pizza's pizzeria collapsed on her. Defendants Madison Avenue Realties, LLC and 314 Fifth Avenue, Inc. are

owners of the building, and defendant 314 5th Enterprises (Turntable) operated a restaurant on the second floor, above the pizzeria.

The court properly determined that issues of fact exist as to the liability of each of the defendants. The building owners and Treatsa contend that they had no notice of the defective condition of the plaster ceiling above the dropped ceiling in the pizzeria, because it was a latent condition that would not have been discovered even if inspected (*see Figueroa v Goetz*, 5 AD3d 164, 165 [1st Dept 2004]). "Where, as here, an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect . . . . If no such program of inspection is in place, constructive notice of the defect is imputed" *(Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007] [internal quotation marks and citations omitted]). However, where evidence shows that such an inspection would not have disclosed the defect, "even if there was a breach of the duty to inspect, it was not causally related to the accident" (*id.*).

While all three experts agree that the primary cause of the accident was a deterioration of the plaster due to age and exposure to changing moisture and humidity levels, issues of fact

exist as to whether a reasonable inspection by defendant building owners and/or Treatsa would have revealed a defect in the plaster ceiling (*see Stubbs v 350 E. Fordham Rd., LLC*, 117 AD3d 642, 644 [1st Dept 2014]; *Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462, 463 [1st Dept 2010]). Even though Treatsa further asserts that it was not obligated to inspect, it failed to offer any factual or legal support for its contention that it had no responsibility for the plaster ceiling under the terms of its tenancy.

As to Turntable, issues of fact exist as to whether recurring leaks emanating from various locations in its premises caused or contributed to the plaster falling, given that its own expert acknowledged that the exposed wooden lath from which the plaster fell displayed water damage, as well as the evidence of a history of leaks from the premises and that some witnesses observed water in the area of the collapsed ceiling.

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10917 Marder's Antique Jewelry, Inc., Index 152926/12
Plaintiff-Appellant,

-against-

David I. Bolton, et al.,
Defendants-Respondents.

_____

Andrew Lavoott Bluestone, New York, for appellant.

Voutè, Lohrfink, Magro & McAndrew, LLP, White Plains (Howard S. Jacobowitz of counsel), for respondents.

_____

Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered August 22, 2018, which, in this action alleging legal malpractice, granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff is in the business of buying and selling jewelry and retained defendants to represent plaintiff in an effort to recover pieces of antique jewelry that it had loaned to plaintiff's principal's (Arthur Marder) cousin, who then used them as security for personal loans. Defendants demonstrated prima facie that, assuming they were negligent in delaying prosecution of the underlying case against the cousin and the lender, plaintiff is unable to demonstrate that the delay proximately caused any damages, or that but for the alleged malpractice delay it would have obtained a more favorable result

(*see generally Brooks v Lewin*, 21 AD3d 731 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). Marder acknowledged in deposition testimony that he could provide an appraisal of the pledged jewelry, even after it was sold. Plaintiff cannot demonstrate that defendants' conduct was the proximate cause of its incurring litigation costs.

In opposition, plaintiff failed to offer evidence of any nonspeculative damages that would raise a triable issue on the proximate cause element.

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: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10918 The People of the State of New York, Ind. 1229/16
Respondent,

-against-

Tyrone Smith,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Jennifer Westphal 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 (Patricia Nunez, J.), rendered September 21, 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: JANUARY 30, 2020

CLERK

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

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10919 Isidro Abascal-Montalvo, Index 100112/16
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

_____

Isidro Abascal-Montalvo, appellant pro se.

Georgia M. Pestana, Acting Corporation Counsel, New York (Barbara Graves-Poller of counsel), for respondent.

_____

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered December 3, 2018, which, as limited by the briefs, granted defendant's cross motion to dismiss the complaint, unanimously affirmed, without costs.

The complaint fails to state a cause of action for false arrest or imprisonment because plaintiff's own allegations establish that his arrest and detention for a mental health evaluation were privileged (Mental Hygiene Law § 9.41; *see Kwasnik v City of New York*, 298 AD2d 502, 503 [2d Dept 2002]). The remaining allegations in the complaint fail to state any

other cause of action (*see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10921 Eric Cortes, Index 157421/13
Plaintiff-Appellant-Respondent,

-against-

The Madison Square Garden Company also known as Madison Square Garden, Inc., et al.,
Defendants-Respondents-Appellants.

_____

Nguyen Leftt, P.C., New York (Stephen D. Chakwin, Jr. of counsel), for appellant.

Cullen & Dykman LLP, New York (Christopher Ruggiero of counsel), for respondents.

_____

Order, Supreme Court, New York County (David B. Cohen, J.), entered July 2, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, unanimously affirmed, without costs.

Plaintiff established prima facie entitlement to partial summary judgment on his Labor Law § 240(1) claim, through his testimony that he fell when a loose piece of masonite on which the ladder was placed "kicked out" from under him (*see Klein v City of New York*, 89 NY2d 833 [1996]).

In opposition, defendants raised an issue of fact as to whether plaintiff's negligence was the sole proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of N.Y. City*,

1 NY3d 280, 290 [2003]).

We have considered the remaining arguments and find them to be unavailing.

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10922-
10922A Fiore Financial Corporation,
Plaintiff-Respondent,

-against-

Gaea North America, LLC,
Defendant-Appellant.

Index 650742/18

_____

Rotbert Business Law, P.C., New York (Mitchell J. Rotbert of counsel), for appellant.

Greenberg Traurig, LLP, New York (William Wargo of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered March 12 2019, granting plaintiff's motion for summary judgment in lieu of complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered on or about January 3, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff properly showed that the promissory note at issue contained an unconditional promise to pay, that defendant executed the note, and that defendant failed to pay in accordance with the note's terms. The motion court properly rejected defendant's claim that the note falls outside the scope of CPLR 3213 because it refers to a "contemplated management agreement" which the parties never ultimately entered.

"A document does not qualify for CPLR 3213 treatment if the court must consult other materials besides the bare document and proof of nonpayment, or if it must make a more than de minimis deviation from the face of the document" (*PDL Pharmaceuticals, Inc., v Wohlstadter*, 147 AD3d 494, 495 [1st Dept 2017; *see Weissman v Sinorm Deli*, 88 NY2d 437, 444 [1996]). Here, where the parties agreed that they had not entered into the "contemplated management agreement" by October 31, 2016, that is the type of "de minimis" information which does not preclude relief under CPLR 3213.

The motion court properly rejected defendant's argument that plaintiff had an obligation to enter into or negotiate a management agreement (*see Vanlex Stores, Inc. v BFP 300 Madison II, LLC*, 66 AD3d 580, 581 [1st Dept 2009] ["the implied covenant of good faith and fair dealing inherent in every contract cannot be used to create terms that do not exist in the writing"];

National Union Fire Ins. Co. v Xerox Corp., 25 AD3d 309, 310 [1st Dept 2006] [claim of breach of implied covenant only viable where identifiable contractual right denied].

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10923 In re Janiya P. and Another, Petitioners-Appellants, Dkt 26042-43/17

Children Under Eighteen Years of Age, etc.,

Scott G., et al., Respondents-Respondents,

_____

Dawne A. Mitchell, The Legal Aid Society, New York (Israel T. Appel of counsel), for appellants.

Michele Cortese, Center for Family Representation, Inc., New York (Emily S. Wall of counsel), for Scott G., respondent.

James E. Johnson, Corporation Counsel, New York (Jonathan A. Popolow of counsel), for Administration for Children's Services, respondent.

_____

Order, Family Court, New York County (Jonathan H. Shim, J.), entered on or about November 30, 2018, which dismissed, after a hearing, the neglect petitions against respondent, unanimously reversed, on the law and the facts, without costs, the petitions reinstated, findings of neglect entered against respondent, and the matter remanded for a dispositional hearing.

Respondent is the father of the youngest subject child and a person legally responsible for the mother's eldest child within the meaning of Family Court Act § 1012(g).

A preponderance of the evidence supports a finding that respondent neglected the children by committing an act of

domestic violence against the children's mother. The evidence shows that while in the proximity of the children, respondent grabbed the mother by the hair and dragged her into the apartment after she returned, together with the children, from the hospital, and all three were standing together outside the apartment while the mother tried to persuade respondent to allow them inside (*see* Family Ct Act §§ 1012[f][i][B], 1046[b][i]; *Matter of Andru G. [Jasmine C.]*, 156 AD3d 456, 457 [1st Dept 2017]; *Matter of Isabella S. [Robert T.]*, 154 AD3d 606 [1st Dept 2017]).

The court also erred in failing to draw a negative inference against respondent for failing to testify or present evidence at the hearing (*see Matter of Nah-Ki B. [Nakia B.]*, 143 AD3d 703, 706 [2d Dept 2016]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10924 The People of the State of New York, Ind. 4752/15
Respondent,

-against-

Khalil Koonce,
Defendant-Appellant.

_____

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

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 18, 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.

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10925 In re State of New York, Index 30140/16
Petitioner-Appellant,

-against-

Gary K. (Anonymous),
Respondent-Respondent.

_____

Letitia James, Attorney General, New York (Amit R. Vora of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee of counsel), for respondent.

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Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered August 16, 2018, which, after a nonjury trial, determined that respondent does not suffer from a mental abnormality under Mental Hygiene Law article 10, and bringing up for review a ruling, same court and Justice, dated February 20, 2018, that the diagnosis of unspecified paraphilic disorder is not generally accepted in the relevant community, unanimously reversed, on the law, without costs, the order vacated, and the matter remanded for further proceedings in accordance herewith.

The motion court was constrained to follow the decision of the Second Department in *Matter of State of New York v Hilton C.* (158 AD3d 707 [2d Dept 2018) since, at that time, we had not yet addressed the issue before it (*see D'Alessandro v Carro*, 123 AD3d1, 6 [1st Dept 2014]). However, in *Matter of State of New*

York v Jerome A. (172 AD3d 446 [1st Dept 2019]), we rejected the position taken by the Second Department and held that the type of evidence presented at the *Frye* hearing (*see Frye v United States*, 293 F 1013 [DC Cir 1923]) in that case, such as the evidence that unspecified paraphilic disorder (USPD) was included as a diagnosis in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), which signals its general acceptance by the psychiatric community, is sufficient to satisfy the State's burden of showing that the USPD diagnosis meets the *Frye* standard (172 AD3d at 447) (*see also Matter of Luis S. v State of New York*, 166 AD3d 1550, 1552-1553 [4th Dept 2018]). The *Frye* evidence presented in *Jerome A.* is identical to the *Frye* evidence in this case.

Consistent with our decision in *Jerome A.*, we decline to rule that the instant record establishes conclusively that the USPD diagnosis would have been found unreliable or that its admission at trial would have made no difference to the outcome of the case.

Accordingly, the verdict that respondent does not suffer from a mental abnormality, rendered after an article 10 trial from which USPD evidence was excluded, must be vacated and the matter remanded for further proceedings, including a

determination whether the evidence meets the threshold standard of reliability and admissibility (*see Jerome A.*, 172 AD3d at 447).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10926 Vincent Scotto, Index 154444/12
Plaintiff, 590271/13
595876/15

-against-

315 Park Ave S, LLC, et al.,
Defendants.
- - - - -
[And a Third-Party Action]
- - - - -
Credit Suisse Securities (USA) LLC,
Second Third-Party Plaintiff,

-against-

Responsys, Inc.,
Second Third-Party Defendant-Respondent.
- - - - -
[And Other Third Party Actions]
- - - - -
Plaza Construction Corp.,
Fifth Third-Party Plaintiff-Respondent,

-against-

Cosmopolitan Decorating Co., Inc.,
Fifth Third-Party Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Paul M. Tarr of counsel), for appellant.

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

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Order, Supreme Court, New York County (Shlomo S. Hagler, J.), entered on or about February 5, 2019, which denied the motion of fifth third-party defendant Cosmopolitan Decorating Co., Inc. (Cosmopolitan) for summary judgment dismissing

defendant/fifth third-party plaintiff Plaza Construction Corp.'s (Plaza) claims against it, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he fell from a ladder as he was performing wiring work on the 9th floor of the subject premises. Plaza was the general contractor for the renovation work, and it subcontracted various entities, including Cosmopolitan, which was responsible for painting. Plaintiff testified that after he fell, he noticed that plastic that was covering the carpet caused the ladder to shift, and stated that on the day prior to his accident, painters had placed plastic on the floor.

The court properly denied Cosmopolitan's summary judgment motion, as Cosmopolitan relied upon selective excerpts of testimony, including from its owner, that its policy is to not use plastic tarping at work sites, to argue that it did not place the plastic tarping that caused plaintiff's fall. This speculation is insufficient to establish a prima facie entitlement to judgment as a matter of law (*see Esteva v City of New York*, 30 AD3d 212, 213 [1st Dept 2006]; *Valerio v City of New York*, 23 AD3d 308 [1st Dept 2005]). Furthermore, Plaza submitted

evidence, including its daily construction reports, that would support an inference that Cosmopolitan's workers placed the plastic on the floor.

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10927 Endurance American Specialty Insurance Company, et al., Plaintiffs-Respondents, Index 654568/17

-against-

Harleysville Worcester Insurance Company, Defendant-Appellant,

Women Work Construction Corp. doing business as WWC Corporation, Defendant.

_____

Riker Danzig Scherer Hyland & Perretti LLP, New York (Jeffrey A. Beer, Jr. of counsel), for appellant.

Fleischner Potash LLP, New York (Alexandra E. Rigney of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert R. Reed, J.), entered January 29, 2019, which granted the motion of plaintiffs Endurance American Specialty Insurance Company (Endurance), NYCHA Public Housing Preservation I, LLC and New York City Housing Authority (collectively NYCHA) for summary judgment, denied the motion of defendant Harleysville Worcester Insurance Company (Harleysville) for summary judgment and for leave to amend to assert a counterclaim, and declared that Harleysville and Endurance each owe a pro rata share of the defense and indemnity of plaintiffs in the underlying personal injury action and that Harleysville must contribute to the defense of the underlying

action and reimburse all fees and costs of defense incurred by Endurance to date, unanimously reversed, on the law, without costs, the declaration vacated, plaintiffs' motion denied, and Harleysville's motion granted.

Endurance's policy provides primary coverage, by its plain terms, under its "Primary Non-Contributory Endorsement" to defendant Women Work Construction Corp.'s (WWC) additional insured, NYCHA. It further specifically provides that it will not seek contribution from any other insurance available to NYCHA. As such, Endurance has waived any contribution from Harleysville (*see Arch Ins. Co. v Harleysville Worcester Ins. Co.*, 2014 WL 3377124, 2014 US Dist LEXIS 91928 [SD NY, July 7, 2014, No. 13-Civ-7350 (DLC)]).

Furthermore, the Harleysville policy, by its terms, provides excess coverage to NYCHA, and the underlying contract between WWC and Harleysville did not "specifically" require the Harleysville policy to be primary (*Kel-Mar Designs, Inc. v Harleysville Ins. Co. of N.Y.*, 127 AD3d 662, 663 [1st Dept 2015]). The parties are therefore not co-primary insurers (*cf. Sport Rock Intl., Inc. v American Cas. of Reading, Pa.*, 65 AD3d 12 [1st Dept 2009]), and Harleysville has no obligation to provide primary coverage.

Leave to amend is to be freely given (CPLR 3025[b]). Harleysville should thus be provided the opportunity to amend its

answer to assert a counterclaim for contribution by Endurance for costs incurred in defense of the second third-party complaint in the underlying personal injury action.

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10928 In re Kenneth Hockaday, Index 101071/17
Petitioner,

-against-

Sholda Olatoye, etc., et al.,
Respondents.

_____

Brooklyn Legal Services, Brooklyn (Udoka Odoemene of counsel), for petitioner.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for respondents.

_____

Determination of respondent New York City Housing Authority, dated April 5, 2017, which, after a hearing, denied petitioner's remaining family member grievance, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Nancy M. Bannon, J.], entered June 25, 2018), dismissed, without costs.

The determination denying petitioner's grievance is supported by substantial evidence (*see Matter of Taylor v Olatoye*, 154 AD3d 634 [1st Dept 2017]). Petitioner's grandmother, the tenant of record and the only person authorized to reside in the apartment, sought to add petitioner to her household in 2011. That application was properly denied, as petitioner was then ineligible to be admitted to the tenant's

household. Respondent rationally determined that the tenant did not subsequently attempt to add petitioner as a permanent resident after the period of ineligibility was completed, did not obtain permission for petitioner to join the household, and did not include petitioner on the tenant's affidavits of income (*see Matter of Blas v Olatoye*, 161 AD3d 562 [1st Dept 2018]).

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: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10930 Bryant Pewritt, Index 152558/14
Plaintiff-Respondent-Appellant,

-against-

Compass Group, USA, Inc.,
Defendant,

Columbia University,
Defendant-Appellant-Respondent.

_____

French & Casey, LLP, New York (Joseph A. French of counsel), for appellant-respondent.

Argyropoulos & Associates, LLC, Astoria (Susan E. Paulovich of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Kelly O'Neill Levy, J.), entered June 18, 2019, which denied the motion of defendant Columbia University (Columbia) for summary judgment dismissing the complaint, and denied plaintiff's cross motion for partial summary judgment on the issue of liability, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he slipped and fell on a recently mopped floor while working as a temporary employee in Columbia's kitchen. The record presents a triable issue of fact as to whether Columbia assumed comprehensive and exclusive daily control of plaintiff's work duties, so that he became its special employee. There is evidence that the decision

as to where plaintiff was to work from day to day was not made by Columbia, but by his general employer (*Bellamy v Columbia Univ.*, 50 AD3d 160, 162-163 [1st Dept 2008]; *see Cartagena v Access Staffing, LLC*, 151 AD3d 580, 581 [1st Dept 2017]; *compare Berhe v Trustees of Columbia Univ. in the City of N.Y.*, 146 AD3d 697 [1st Dept 2017]).

Plaintiff's cross motion for partial summary judgment was also properly denied because his ability to maintain this personal injury action hinges on whether he was a special employee of Columbia when the accident occurred (*see* Worker's Compensation Law §§ 11, 29[6]; *Vasquez v Cohen Bros. Realty Corp.*, 105 AD3d 595, 597 [1st Dept 2013]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10932 Board of Managers of 141 Fifth Avenue Condominium, Plaintiff-Respondent-Appellant, Index 651426/13

-against-

141 Acquisition Associates, LLC, et al., Defendants,

Cetra/Ruddy Incorporated, et al., Defendants-Respondents,

J Construction Company, LLC, Defendant-Appellant.

_____

O'Toole Scrivo, LLC, New York (Steven A. Weiner of counsel), for appellant.

Arent Fox LLP, New York (Mark A. Bloom of counsel), for respondent-appellant.

Zetlin & De Chiara LLP, New York (James H. Rowland of counsel), for respondents.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 16, 2015, which, to the extent appealed from as limited by the briefs, granted defendants Cetra/Ruddy Incorporated and John A. Cetra Architecture, PC's (the Cetra defendants) motion to dismiss the complaint as against them, and denied defendant J Construction Company, LLC's motion to dismiss the breach of contract cause of action against it, unanimously affirmed, without costs.

The motion court correctly determined that discovery was

necessary to determine the extent of plaintiff board of manager's rights under defendant J Construction's contract with defendant sponsor (*see Diamond Castle Partners IV PRC, L.P. v IAC/InterActiveCorp*, 82 AD3d 421, 422 [1st Dept 2011]). While paragraph 22.12 of the agreement provides that "the [sponsor] and [J Construction] do not intend to create any interest in favor of any third party by this Agreement," paragraph 22.5 of the agreement provides that "[t]his Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of Owner," and the complaint alleges that the sponsor agreed in the offering plan to assign all warranties to the board of managers. Thus, it may be that plaintiff is a successor or an assignee under paragraph 22.5.

However, no such provision appears in the Cetra defendants' contract with the sponsor, and plaintiff failed to allege any other facts that would support its assertion that it was an intended beneficiary under that agreement (*see Alicea v City of New York*, 145 AD2d 315, 316 [1st Dept 1988] ["in claiming third-party beneficiary status, plaintiffs did no cite any specific clause of the contract"]). For the same reasons, plaintiff failed to establish privity of contract, and therefore failed to state a cause of action for damages for economic loss arising from negligence in a contractual relationship (*see Residential*

Bd. of Mgrs. of Zeckendorf Towers v Union Sq.-14th St. Assoc., 190 AD2d 636 [1st Dept 1993]). Plaintiff also failed to allege facts that would establish the functional equivalent of privity (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 424-425 [1989]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10933N Asimida Besler, et al., Ind. 152864/18
Plaintiffs-Respondents,

-against-

Kreshnik Uzieri also known as Kreshnik Uzeiri,
Defendant-Appellant.

_____

Frank M. Graziadei, P.C., New York (Frank M. Graziadei of counsel), for appellant.

Boris Kogan & Associates, New York (Boris Kogan of counsel), for respondents.

_____

Order, Supreme Court, New York County (Robert D. Kalish, J.), entered on or about March 28, 2019, which, inter alia, denied defendant's motion to vacate a default judgment entered against him, unanimously affirmed, without costs.

Defendant failed to demonstrate a reasonable excuse for his default. Defendant's claim that he was unfamiliar with the legal system and did not understand that he needed an attorney to represent him, does not constitute a reasonable excuse for his failure to timely appear and oppose plaintiffs' motion for summary judgment in lieu of complaint (*see US Bank N.A. v Brown*, 147 AD3d 428, 429 [1st Dept 2017]). His assertion that he did not realize that he should retain counsel is unavailing since he was previously represented by an attorney in connection with settlement negotiations with plaintiffs, arising out of his

failure to pay the same promissory note (*see Dorrer v Berry*, 37 AD3d 519, 520 [2d Dept 2007]).

Defendant's failure to establish a reasonable excuse for his default renders it unnecessary to consider whether he demonstrated the existence of a potentially meritorious defense to the action (*see Hertz Vehs. LLC v Westchester Radiology & Imaging, PC*, 161 AD3d 550 [1st Dept 2018]).

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

ENTERED: JANUARY 30, 2020

CLERK

Richter, J.P., Gische, Mazzarelli, Gesmer, JJ.

10934N Alliance For Progress, Inc., Index 21403/16E
Plaintiff-Appellant,

-against-

Blondell Realty Corp.,
Defendant-Respondent.

_____

Davidoff Hutcher & Citron LLP, New York (Brian C. Kochisarli of counsel), for appellant.

Law Offices of Reginald A. Jacobs, PLLC, Mount Vernon (Reginald A. Jacobs of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (George J. Silver, J.), entered February 14, 2019, which, inter alia, granted defendant's motion to vacate an order entered on default granting plaintiff's motion to strike the answer, unanimously affirmed, without costs.

Defendant demonstrated a reasonable excuse for its default and a meritorious defense to the action (*see Matter of Bendeck v Zablah*, 105 AD3d 457 [1st Dept 2013]). It contends that it did not receive adequate notice of the May 16, 2018 oral argument date, and this contention is supported by an affidavit by its IT expert, albeit submitted in reply. Even if plaintiff is correct that defendant's counsel simply failed to monitor the calendar for this case, we agree with the motion court that defendant established the reasonable excuse of law office failure for its default, especially given the absence of any evidence of wilful

or contumacious conduct on its part (*see Matter of Rivera v New York City Dept. of Sanitation*, 142 AD3d 463, 464 [1st Dept 2016]) and the absence of any prejudice to plaintiff from the vacatur of the default (*see Mutual Mar. Off., Inc. v Joy Constr. Corp.*, 39 AD3d 417, 419 [1st Dept 2007]). Indeed, defendant moved to vacate only three days after plaintiff's motion to strike the answer was granted. Plaintiff contends before this Court, for the first time in reply, that it is prejudiced by defendant's discovery defaults. However, the note of issue has been vacated, and further discovery will ensue.

With respect to a defense, defendant's affidavit by an individual with knowledge of the facts was submitted, as plaintiff points out, only in reply (*see Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). However, defendant's answer, which is verified by its principal, demonstrates a meritorious defense (*see 60 E. 9th St. Owners Corp. v Zihenni*, 111 AD3d 511, 513 [1st Dept 2013]).

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

ENTERED: JANUARY 30, 2020

CLERK